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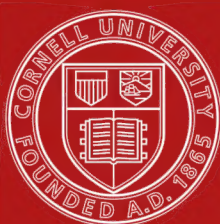
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THE
AMERICAN LAW
OF
REAL PROPERTY.


BY
FRANCIS HILLIARD,
COUNSELLOR-AT-LAW.



Third Edition.
GREATLY ENLARGED AND IMPROVED.



IN TWO VOLUMES.
VOL I.



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1855

ENTERED according to Act of Congress, in the year One Thousand Eight Hundred and Fifty-five, by FRANCIS HILLIARD, in the Clerk's Office of the District Court of Massachusetts.

PREFACE TO THE FIRST EDITION.

THE following work is designed to be for the American lawyer, what Cruise's Digest hitherto has been for him, and still continues to be for the English lawyer. Cruise, although undoubtedly one of the best elementary law books that England has produced, and although *heretofore* an indispensable part of the library of an American practitioner, has been extensively used in this country, not because it is the book *which is wanted*, but because it is the only one, in any degree answering the purpose, *which could be had*. It is believed that the present work is the first attempt to compile a book, upon the important subject of Real Property, corresponding in extent and general plan with the English text-book, and, at the same time, thoroughly American in the materials of which it is composed. It may be stated in few words, what are the chief characteristics which distinguish this work as strictly American, from the popular Abridgment above referred to.

1. Cruise's Digest contains a large amount of matter which is of no practical use whatsoever, to the American lawyer. It treats at great length of subjects, which either never existed, or have become entirely obsolete, in this country. That an occasional illustration or analogy of some value, may be derived from principles which have no longer any direct practical applicability, is not denied. But it is obvious, that portions of the law, which are useful only in this incidental way, ought to be treated with proportional brevity, and not with the minuteness of detail which is demanded in relation to topics in their nature of immediate practical use. Now, as an example of the character of Cruise's Digest, in this particular, it may be mentioned, that, in this work, the three titles of *Ad-vowson, Tithes and Dignities*, occupy 150 closely printed pages; *Fine, Recovery and Alienation by Custom*, about 400 pages; *Copyhold*, 60 pages, &c., &c. It is not too much to say, that no such titles as these are known to *American law*. Upon a strictly scientific American plan, they would find no place in a work upon the *American Law of Real Estate*. But, supposing them, though now obsolete, or never adopted in this country to be so closely connected with other titles which are in force, that they

cannot with propriety be wholly passed over; still, there is no propriety in filling up a large space with the intricate decisions, formal classifications, and nice distinctions, which appertain to them, as subsisting branches of the English law. It is certainly within bounds to say, that, in purchasing Cruise for the sake of the matter *which he does want*, the American lawyer must pay one-third of his money for matter *which he does not want*.

2. While Cruise's Digest is thus ill adapted to the American lawyer, by reason of *surplusage* or *excess*, its *defectiveness* is equally striking and apparent. It is obvious, that in the course of forty years, an immense mass of decisions must have been accumulating in the United States, upon subjects pertaining to Real Estate. Even where these substantially corroborate the principles of the English law, they are of paramount importance to the American lawyer. And, for the innumerable modifications, with which, in the various States, they qualify those principles, they are still more indispensable. The present work proceeds upon the plan of *collecting the American cases*, not in the way of merely stating the points decided, or copying the marginal notes, but by summarily giving the facts, and often an abstract of the opinion of the court, either in its own language, or otherwise. It is believed—without any accurate enumeration, however,—that two-thirds of the cases cited in this work, are American cases; while, at the same time, few or none of the English decisions are omitted.

3. The remaining, and most important characteristic of the present work, as an American work, is, that it gives a view of the *changes made in this country in the English law of Real Estate*. Every lawyer is aware that these changes are vastly numerous and important; but perhaps few would suppose the number or importance of them to be such, as a careful inquiry shows it to be. Take, for an example, such titles as *Descent, Estate Tail, Dower, Mortgage*; it is not too much to say, that upon these subjects *the English law is not our law*, but that the American statutes have built up a *new system* for the American States. It is believed, that in the preparation of the present work, the statutes of all the States have been faithfully examined; and that all their provisions, bearing upon the subject of Real Property, will be found stated correctly, and with sufficient minuteness to make the work a safe and satisfactory guide. Great care has been used, to avoid giving the present work anything of a *local character*; and to make it alike applicable and useful *in every State of the Union*, where the common law of England is adopted. For an obvious reason, the State of Louisiana has been omitted. Should it be deemed expedient, the Law of Real Property in this State may be hereafter noticed in an Appendix.

In the multitude of statutes of the several States which the author

has examined, it would be folly to pretend that none have escaped his notice, pertaining to the subjects treated of in this book. He may, however, be permitted to claim the merit of a careful and thorough investigation of all, or nearly all the printed laws of each State, so far as the Indexes, Contents and Alphabetical Arrangements have afforded him any aid in making it. It is proposed at the end of the second volume, to form an *Addenda* of such statutory provisions as may chance to have been overlooked, and those passed since the commencement of the work. The author will be greatly indebted to gentlemen in any State, who will suggest by letter any required alterations or additions, which may occur to them in the perusal of these volumes, with respect to the peculiar laws of their own States.

With the consciousness of having assumed a great undertaking, to which he is incompetent to do full justice, but at the same time of unintermitted labor and strict fidelity in accomplishing it according to his ability, the author submits the work to the candid notice of the profession.

BOSTON, JULY 1, 1838.

PREFACE TO THE SECOND EDITION.

IN this edition, the work has been brought down to the present time, by the addition of English and American cases decided, and statutes enacted, since it was first published.

The new matter, incorporated into the text and notes, enlarges the book at least one-fourth from its original size. It is believed, that by this means, and the correction of such errors as have been discovered in the former edition, the work has been rendered more worthy, than before, of the patronage of the profession.

BOSTON, APRIL, 1846.

PREFACE TO THE THIRD EDITION.

IN this edition, the same plan is retained, which was adopted in the former editions, of making the work a summary abstract of the American Law of Real Property, *as it now is*, in the several States of the Union. With the rapid multiplication of remote States, each adopting its own modifications of the law relating to this copious and intricate subject; the difficulty of preparing a *complete* view of that law, without important omissions, on a perfectly *accurate* view, without important errors, is of course greatly increased. The author can only repeat the remark made with reference to the first edition, that he has had access to, and availed himself of, a large proportion of the recent Statutes in the several States relating to real property, and, in as concise a form as possible, stated their respective provisions. The English and American decisions, also, made since the last edition, have been incorporated into the work, with the purpose of making it a *manual* for professional use, which may in part supply the want of the Reports, and always furnish a ready guide and index to their use.

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THE AMERICAN LAW OF REAL PROPERTY.

CHAPTER I.

REAL PROPERTY IN GENERAL.

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| <p>1. 4. Lands, tenements and hereditaments.
 2. <i>Heir-looms</i>.
 6. Water.
 7. <i>Real estate</i>—definition.
 8. <i>Land</i>—what it includes.
 12. Chamber of a house.
 13. Pews.
 14. Building on another's land.
 29. Mines.</p> | <p>30. Trees.
 36. Growing crops.
 41. <i>Emblements</i>.
 71. Sea-weed.
 72. Wreck, &c.
 73. Manure.
 74. Fixtures.
 107. <i>Shares</i> in corporations.
 110. Money to be laid out in land.</p> |
|--|---|

1. REAL PROPERTY, in the technical phraseology of the law, consists of *lands, tenements and hereditaments*. The first of these terms is the least comprehensive, including only *corporeal* or *tangible* property, while the two last embrace also *incorporeal* property. Thus a rent or right of common, though not *land*, is still *real property*, being both a *tenement* and *hereditament*. (a) The term *hereditament*, which is the most comprehensive of the three, besides including the others, applies also even to articles of personal property, provided they are such as *pass to the heir* and not to the executor; as, for instance, an annuity, limited to heirs, or *the condition in a bond*. So the *visitation power*, vested in the visitors of a corporation, has been termed an hereditament. So also a *land-warrant*. So the right of permanently overflowing the land of another by a mill-dam below it, and a corporate right to select and acquire land for a corporate purpose. So a ferry. (1)

(1) Co. Litt. 6 a; 1 Cruise, 37; 2 Black. Yerg. 94; Harris v. Miller, 1 Meigs, 158; 17; Mitchell v. Warner, 5 Conn. 518; Canal, Sacket v. Wheaton, 17 Pick. 103; Bowman &c. v. Railroad, &c., 4 Gill & J. 1; Allen v. v. Wathen, 2 McL. 376; Radburn v. Jervis, M'Keen, 1 Sumn. 301; Dunlap v. Gibbs, 4 3 Beav. 450.

(a) A *public way*, says Mr. Justice Cowen, if not an hereditament in every sense, is certainly a *quasi* hereditament. Willoughby v. Jenks, 20 Wend. 99. A road was laid out over land which had been taken by a turnpike company, improved by them, and afterwards sold to an individual. Held, the old way of the company was not *land*, within the meaning of the Road Acts and the Constitution of New Jersey. In the Matter, &c., 2 N. J., 293.

A water company, which has laid pipes in a land-tax division, under a statutory power, but owns no land within the division, is not assessable there to the land-tax; the right in question being in the nature of an *easement*, and not *land* or *hereditament*. Chelsea, &c. v. Bowley, 7 Eng. Law and Eq., 376.

The grant of a whole mineral stratum, under the soil of the grantor, is a grant of a *real hereditament*. Stoughton v. Leigh, 1 Taun. 402.

2. In England, the most frequent example of a personal hereditament is an *heir-loom*. Heir-looms are certain chattels that accompany the inheritance; such as deer in a park, doves in a dove-house, or the ancient jewels of the crown. So, an ancient horn, which had gone immemorially with the estate, and been delivered to the plaintiff's ancestors to hold their land by.(1) It has been suggested, that nothing is strictly an *heir-loom*, which passes by the general law, and not by special custom. The instances mentioned are said to be merely *in the nature* of heir-looms.(2)

3. In the United States, heir-looms, as such, are for the most part unknown. They are, however, recognised by the statute law of Maryland,(3) and excepted from the general disposition of personal property upon the death of the owner. And *the principle* applies to *title-deeds*,(a) which Lord Coke calls "the sinews of the inheritance;" the chests and boxes containing them; and to the keys of a house—all of which undoubtedly pass with the land to which they pertain. So also, in England, to family pictures.(4) In those States where slavery is known, it would seem that the transmission of *slaves* is founded upon a somewhat similar principle. In Virginia, Missouri and Maryland, slaves are either declared by statute to be personal estate, or treated as such, in reference to devises.(5) So, to a great extent, in Mississippi and Kentucky.(6) But whether personal or real, technically speaking, it is the almost universal practice to treat them, in many important particulars, such as dower, or the formalities of transfer by deed or execution, like real property; or at least to place them on an intermediate ground between lands and chattels.

4. "Lands, tenements(b) and hereditaments," is the phrase commonly used in the American statute law, to denote real estate. But in Delaware, Massachusetts, Maine and New Hampshire, it is provided, that the words "land" or "lands" and "real estate," when used in a statute, shall include "lands, tenements and hereditaments, and all rights thereto and interests therein," unless the Legislature manifestly intend otherwise. So in New York, with the terms "real property." And in Missouri, *real estate*, when spoken of in the statute concerning executions, is declared to mean lands, tenements, &c., and in the statute relating to conveyances, to include chattels real. So in Arkansas, in the statute relating to estates, &c.(7)

(1) 1 Cruise, 38; Co. Lit. 9 a, n. 1; Pusey v. Pusey, 1 Vern. 273; Ibbetson v. Ibbetson, 5 My. & C. 26; Conduitt v. Soane, 1 Coll. 285; N. H. Rev. St. 45; Maine Ib. 45; Verm. Ib. 240, 294.

(2) Amos on Fix. 161, *et seq.*

(3) Anthon's Shep. 423.

(4) Liford's case, 11 Co. 50—an interesting and valuable case.

(5) Anth. Shep. 423, 494; Misso. St. 588.

(6) Smiley v. Smiley, 1 Dana, 94; 1 Ky. Rev. L. 566; Miss. L. 1839, 72; Briscoe v. Wickliffe, 6 Dana, 164.

(7) Mass. Rev. St. 60; Ib. 413; Misso. St. 124, 262; Ark. Rev. St. 189, 331; N. H. Rev. St. 45; Me. St. 45; Vern. St. 240, 294; N. Y. Code, 1851, 144; Dela. Rev. Sta. 7.

(a) It will be seen hereafter, (see ch. 4, ss. 3, 13,) that important questions may arise between parties holding distinct interests in the same land—as, for instance, tenant for life and the owner in fee, or feeoffee and *cestui que use*—in regard to possession of the title-deeds.

(b) The word *tenement* is frequently used in a restricted sense, as signifying a house or building; but it is also used in a much more enlarged sense, as signifying land, or any corporeal inheritance, or any thing of a permanent nature, which may be holden. And where it was used in a statute, providing a summary remedy for landlords to recover possession; held, that as the act was a *remedial* one, the latter sense of the word should be adopted. Sacket v. Wheaton, 17 Pick. 105.

5. *Lands, tenements and hereditaments*, have been held to include a reversion expectant upon a life estate, and also equitable estates. So an insolvent debtor's assignment of "all his lands, tenements and hereditaments," will pass all his real estate.(1)

6. *Water* is neither *land* nor a *tenement*; and is not demandable in a suit, except as *so many acres of land covered with water*. It is a movable, wandering thing, and must, of necessity, continue common by the law of nature. The air which hovers over one's land, and the light which shines upon it, are as much land as water is.(2)

7. It will be seen hereafter, that a subject of ownership, though in its nature *real*, may be owned in such a way as to constitute a *chattel interest* or *personal estate*. Thus, *an estate for years* in land is personal property; (see ch. 14, s. 23.) So is every other estate less than *freehold*. The terms real estate and personal estate, therefore, denote sometimes the *nature of the property*, and sometimes the *particular interest in that property*. The former is the popular, and the latter the technical use of those expressions. In conformity with the latter, *things real* are said to be "permanent as to place, and perpetual as to duration."(3) The *real estate* required to gain a settlement has been held to mean a freehold interest, either rightful or wrongful.(4)

8. *Land* includes not only the ground or soil, but everything attached to it above or below, whether by the course of nature, as trees, herbage, stones, mines and water, or by the hand of man, as houses.(a) The legal maxim is, "*cujus est solum, ejus est usque ad cælum*." Hence, if a man devises a lot of land having a building upon it, the building will pass with the land without being named, even though other buildings are named, in the devise. But it is usual to insert the clause, "with all the buildings thereon."(5)

9. A man conveys to A, his daughter, for the consideration of love and affection, a lot of land with *one-half of the buildings thereon*. The same day he conveys to B, for the consideration of £300, *one-half of the buildings standing on the land this day conveyed to A*. There was nothing but the last clause, to show which was the prior deed. Held, inasmuch as the time, person, consideration, subject and purpose of the two deeds were different, and, as they were not given in pursuance of any joint contract, one could not qualify the effect of the other, but A took the whole land and buildings, and B took nothing. It might have been otherwise, had both deeds been delivered simultaneously.(6)(b)

10. Land, upon which were a well and pump, was conveyed by

(1) Cook v. Hammond, 4 Mas. 488; Dunlap v. Gibbs, 4 Yerg. 94. See Moore v. Denn, 7 Bro. P. C. 607, 2 B. & P. 247; Doe v. Allen, 8 T. R. 503; Pingree v. Comstock, 18 Pick. 46.

(2) Mitchell v. Warner, 5 Conn. 497; Co. Litt. 4 a.

(3) 1 Swift, 73.

(4) Charleston v. Ackworth, 1 N. H. 62. See City, &c. v. Dedham, 4 Met. 179-80.

(5) 14 H. 8, fol. 12; Com. Dig. Grant E. 3, Co. Litt. 4 a; Adams v. Smith, Bre. 221; Greenleaf v. Francis, 18 Pick. 117; 4 Y. & Coll. 403.

(6) Isham v. Morgan, 9 Conn. 374.

(a) Where the agents of the State are empowered to take certain "lands" for the construction of a canal, they have authority to take the *stones* contained therein. Baker v. Johnson, 2 Hill, 342. The projection of a building over a piece of ground purchased, will justify the purchaser in rescinding the sale. Pope v. Garland, 4 Y. & Coll. 403.

(b) Williams, J., dissented. This case probably carries the principle stated in the text to as great a length as any one to be found in the books. See Moore v. Fletcher, 4 Shepl. 63.

metes and bounds, without mentioning them; and the following words, "with pump and well of water," were afterwards interlined. Held, as the words did not change the legal effect of the deed, the alteration was an immaterial one.(1)

11. The rule above mentioned is well settled as a general principle of law; subject, however, to many qualifications or exceptions, which require to be distinctly considered. We propose, accordingly, to state the various cases in which movable things, connected with or attached to land, are subject to a peculiar ownership; and the respective rules of law applicable to those cases.

12. It was anciently held, that there could be no freehold estate in *the chamber of a house*, because it must fail with the foundation; and, therefore, that it would pass without livery. But it seems to be now settled otherwise. Ejectment will lie for a house, without any land.(a) And where the chamber belongs to one person, and the rest of the house with the land to another, the two estates are regarded in law as separate but adjoining dwelling-houses.(2) So if a house contain several rooms, with an outer door to each, and not communicating with each other; they are held to be distinct houses. But if the owner lives in the house, the unoccupied rooms are a part of it.(3) But a lease even of the cellar and lower room of a building of several stories, passes no interest in the land. Upon the destruction of the building, the whole right of the lessee is gone. It would be so with the lease of a *cave*.(4)

13. A *pew* in a meeting-house is in general deemed real estate.(b) In England,(c) the right to a pew is a *franchise*, depending either on a grant from the ordinary, or on prescription.(5) In Maine, Michigan, and Connecticut,(6) pews are declared by statute to be real estate. So in Massachusetts,(7) except in Boston, where they are treated as personal property. In New Hampshire,(8) they are personal estate. In New York,(9) the precise nature of this kind of property has been a subject of frequent discussion. It is held to be such *an interest in real*

(1) *Brown v. Pinkham*, 18 Pick. 172.

(2) *Bro. Abr. Demand*, 20; *Co. Litt.* 48 b; *Otis v. Smith*, 9 Pick. 297; *Loring v. Bacon*, 4 Mass. 575; *Aldrich v. Parsons*, 6 N. H. 555; *Doe v. Burt*, 1 T. R. 701. See *Prop'rs. &c. v. City, &c.*, 1 Met. 538; See *Gilliam v. Bird*, 2 Ired. 280; *Browning v. Dalesme*, 3 Sandf. 13; *Gillis v. Bailey*, 1 Post (N. H.) 149.

(3) *Tracey v. Talbot*, 6 Mod. 214.

(4) *Winton v. Cornish*, 5 Ohio, 478; *Kerr v. Merchants', &c.*, 3 Edw. 315.

(5) 2 Black. 428; 3 Kent, 402, n.

(6) 1 Smith's Stat. 145; Conn. L. 432;

Price v. Lyon, 14 Conn. 279; Mich. Rev. St. 266.

(7) *Bates v. Sparrel*, 10 Mass. 323; Mass. Rev. Stat. 413.

(8) N. H. L. 186, Rev. Stat. 369.

(9) *Elder v. Rouse*, 15 Wend. 218; *Trustees, &c. v. Bigelow*, 16 Ib. 28. See *Brick, &c.*, 3 Edw. 155; *Baptist, &c. v. Witherell*, 3 Paige, 302; *Shaw v. Beveridge*, 3 Hill, 26; *Heeney v. St. Peter's, &c.*, 2 Edw. 608; *Voorhees v. The Presbyterian, &c.*, 8 Barb. 135.

(a) So, where land has a house on it, occupied by several tenants, who rent different apartments, they are joint occupants of the land, and may be proceeded against jointly in an action of ejectment. *Pearce v. Colden*, 8 Barb. Sup. Ct. 522.

(b) A suit against a pew-holder for rent, the pew having been granted to him and his heirs by a church corporation, is an action in which the title to real estate comes in question, it being necessary for the plaintiffs to show title in the defendants, in order to recover the rent; therefore the plaintiffs, in such a suit in the circuit, are entitled to full costs if they prevail, though the verdict is for less than \$100. *Presbyterian Church v. Andruss*, 1 New Jersey, 325.

(c) The parson has the freehold of his church, and the right in a pew is a mere easement annexed to a particular message. Pews are subject to the control of the church-wardens, under the ordinary. See *Reynolds v. Monkton*, 2 Carr. & K. 385.

estate as comes within the Statute of Frauds, though the contract relate to a meeting-house not yet erected. But a statute, requiring authority from the chancellor to empower a religious corporation to sell its *real estate*, was held not applicable to a sale of the pews. In the same State, it has been held, that a pew-holder has no interest in the soil. The freehold is in the trustees, who may sell the property, notwithstanding the rights of pew owners.(1)(a) The property in a pew, whether the owner be a member of the society or not, is not absolute, but qualified and usufructuary; an exclusive right to occupy a certain part of the meeting-house for the purpose of attending public worship, and no other; and is necessarily subject to the right in the parish or town to remove, take down, repair, &c., unless these acts be done wantonly. If the house is burnt, or destroyed by time, the right ceases. In Massachusetts and Vermont, it has been held, that if the taking down of a meeting-house is *necessary*, the parish is not bound to indemnify the pew-holders; otherwise, if merely *expedient*.(b) A subsequent case in Massachusetts decides, that if the parish abandon the meeting-house as a place of worship, though still fit for that purpose, but without proof of its acting wantonly, or with intent to injure a pew-owner, and erect a new one elsewhere; it does not, thereby, incur any liability to such pew-owner. The Revised Statutes provide for compensation to pew-holders, in such cases, according to an appraisement, except where the house has become unfit for public worship.(c) It has been held, that where a parish proceeds legally in destroying a pew, a tender of the value to the owner is a good plea to an action for damages.(2)

14. If one man *erect buildings upon the land of another*, voluntarily and without any contract, they become a part of the land, and the former has no right to remove them. Such buildings are, *prima facie*, part of the realty.

15. A husband erected a dwelling-house and joiner's shop upon land belonging to his wife, and died. Held, as no binding contract, in regard to such erection could have been made with the wife during co-

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| <p>(1) <i>Freligh v. Platt</i>, 5 Cow. 494; <i>Fassett v. First Parish</i>, &c., 19 Wend. 361.</p> <p>(2) <i>Gay v. Baker</i>, 17 Mass. 438; <i>Howard v. First Parish</i>, &c., 7 Pick. 138; <i>Mass. Rev. Stat.</i> 205; <i>Fisher v. Glover</i>, 4 N. H. 180; 5 Cow. 494; <i>Price v. Methodist</i>, &c., 4 Ohio,</p> | <p>515; <i>Kimball v. Second</i>, &c., 24 Pick. 347; <i>Pettman v. Bridger</i>, 1 Phill. 316. See <i>First</i>, &c. <i>v. Spear</i>, 15 Pick. 144; <i>Second</i>, &c. <i>v. Waring</i>, 24 Ib. 304; <i>Stat.</i> 1841, 206; <i>Kellogg v. Dickinson</i>, <i>Law Rep.</i>, May, 1846, p. 32; 18 Verm. 266.</p> |
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(a) Where a meeting-house was conveyed to trustees to be used for *public worship only*, and the deeds of pews referred to this conveyance; held, a pew-owner had the exclusive right to his pew *at all times*, and might use any means to shut out others, which would not annoy other pew-owners. *Jackson v. Rounseville*, 5 Met. 127. Tenant in common of a meeting-house may maintain trespass for an injury to a pew against one having no title either in the pew or house. *Murray v. Cargill*, 32 Maine, 517; *Kellogg v. Dickinson*, 18 Vt. 66. A pew-owner may sustain an action of trespass on the case against one who unlawfully disturbs him in the possession of his pew. *Ib.*

(b) So in New York, whenever it is necessary or proper, the trustees may take down the old edifice, and rebuild on the same spot or elsewhere, and may alter the form and shape of the building, for the purpose of making it more convenient and spacious. *Voorhees v. The Presbyterian*, &c., 8 Barb. 135.

In doing this, they may take down and remove the pews, when necessary. And the pew-holders cannot maintain either trespass or ejectment. *Ib.*

But if a pew is destroyed for convenience only, or if the trustees have been guilty of a wanton and malicious abuse of their power in destroying it, the owner may recover damages. *Ib.*

(c) By Statute of 1853, 959, a parish may sell the house, without taking down pews, for the purpose of building a new one.

verture, the buildings belonged to her, and could not be applied to payment of his debts.(1)

15 *a*. A built a rail fence on B's land. B moved and kept the rails without breach of the peace. Held, *trover* did not lie against him.(2)

16. So if one man take another's timber wrongfully, and use it in erecting or repairing buildings upon his own land, it becomes his property.(3)(*a*) And the same rule applies, where the timber consists of the materials of a building taken down by one man and belonging to another.(4)

17. After a mortgage of land, with a dwelling-house thereon, to A, the mortgagor removed the building, used a part of the materials, with others, in erecting a house upon other land, and afterwards conveyed the land and building last named, for valuable consideration, to B. A brings *trover* against B for the new house and the materials used upon it. Held, such materials became a part of the freehold, and B became the owner of them by the conveyance to him; and that the action would not lie.(5)

18. On the other hand, there are many cases where one man may own, as *personal property*, a building erected upon the land of another.(6)

(1) Washburn *v.* Sproat, 16 Mass. 449; Smith *v.* Benson, 1 Hill, 176; Brown *v.* King, 5 Met. 173; Baltimore *v.* McKim, 3 Bland, 455.

(2) Wentz *v.* Fincher, 12 Ired. 297.

(3) Amos on Fict. 9, n. a.

(4) Peirce *v.* Goddard, 22 Pick. 559.

(5) *Ib.*

(6) Russell *v.* Richards, 2 Fairf. 371; Hilborne *v.* Browne, 3, 162; Jewett *v.* Partridge, *Ib.* 243.

(*a*) But if A cut down B's trees, and make them into shingles and short logs, these articles belong to B. So with coals made from another's wood. Betts *v.* Lee, 5 John. 348; Chandler *v.* Edson, 9, 362; Curtis *v.* Groat, 6, 168. A agreed with B, to convey land to B, when B should erect a house thereon, and B agreed to erect such house and mortgage the premises to A. Held, the house did not belong to B till he received a deed of the land, and he could not mortgage the house as personal property. Milton *v.* Celby, 5 Met. 78.

Where a reversioner erects and occupies a building on the land with the assent of the tenant for life, and conveys it to a third person, the grantee cannot hold it against the tenant for life. Cooper *v.* Adams, 6 Cush. 87.

A erects a building upon the land of B, taking a bond from B to convey the land to him on payment of a certain sum within a certain time. Held, a mortgage of the building from A to B need not be recorded, as against A's creditors; nor was the building forfeited in 60 days after breach of condition. Eastman *v.* Foster, 8 Met. 19.

Although buildings are erected on land by license of the owner, if the owner thereafter, in a conveyance of the land to the person erecting them, call them his (the grantor's) new buildings, and convey them as a part of the estate; such person, having accepted such a conveyance, cannot establish a title to them as personal property. Grover *v.* Howard, 31 Maine, 546.

An exception, in a levy on real estate, of "buildings," includes by implication the land underneath, and such other land and easements as may be necessary for their enjoyment, if there be nothing in the description of the premises taken to rebut such an implication. And parol evidence is not admissible, to explain or vary the officer's return. *Ib.*

In trespass *quare clausum fregit*, the plaintiff complained of an injury to the house on the land, as well as to the land itself; the trial was had on the question of title, and a verdict found for the plaintiff. Held, the plaintiff in error could not insist that the house was personal property, and that trespass would lie for its destruction. Houghtaling *v.* Houghtaling, 5 Barb. 379.

It is no defence to a writ of entry, that the tenant owns a building upon the land, erected by her intestate with the owner's consent; for if so, whether the demandant recover or not, she is entitled to a reasonable time to remove it. And such tenant cannot defend such action, on the ground that her intestate's conveyance of the building to the owner, under whom the demandant claims, by a subsequent conveyance, was fraudulent as against creditors, whom she represents as administratrix. She has simply a power to sell. Bullen *v.* Arnold, 31 Maine, 583. Acc. Hutchins *v.* Shaw, 6 Cush. 58.

19. A son, by permission, erected a house upon the land of his father, under the mutual expectation that the land would be devised to the son, but with no agreement that the father should own the house, or be accountable for its value. Held, the house belonged to the son as personal property.(1)

20. A town-house was built on land of the town, under a contract with the builder, that the town should occupy a part of it at a certain rent, and have the right to purchase the house at an appraised value. Held, the house belonged to the builder as personal property.(2)

21. Trespass, for taking and carrying away the plaintiff's "small fish-house or camp," and burning up and destroying his "wooden camp or small house," upon an island in another State. The evidence showed that the injury was done to a building without a cellar, about nineteen feet square, used by the plaintiff and his men as a dwelling, in the spring, while catching salmon. Held, neither the declaration nor evidence showed the property to be real estate.(3)

21 a. In an action of trespass for an injury to a building, owned by and in the possession of the plaintiff, the defendants justified the acts complained of, on the ground that they did them by the direction of A, who owned the land on which the building stood, subject to a right of way in the public, the building constituting an incumbrance on the land of A; also that, the building being an obstruction in the highway, the defendants removed it for the plaintiff, after he had been requested and had neglected to remove it; also, that such highway needed to be graded and made, and the defendants removed the building on the plaintiff's account, in order to grade and make the road. The plaintiff, to show that he was the owner and in possession of the building, offered in evidence a deed of it to the plaintiff, executed by certain individuals, as a committee of a fire engine company; a vote of such company, signed by all its members, authorizing the sale and transfer of the building by said committee; proof that the company erected the building with their own funds; that, up to the time of the sale, they had used it exclusively for an engine-house, and for their library; that all the members of the company, at the time of the sale, delivered, each one, his key of the building to the plaintiff; that all prior members had, on leaving the company, left the building to their successors, making no claim to it thereafter; that the avails of the sale to the plaintiff were appropriated by the company to procure for them another engine-house; and that no other person had objected to the sale, or made any claims to the avails thereof. Held, such evidence was admissible for the purpose for which it was offered; and, thereupon, it was further held: 1. That the members of the company had property in the building; 2. That, though not incorporated, they, as individuals, could hold the property; 3. That the vote of the company, with the assent of each individual member in writing, was binding, and imparted authority to their committee; 4. That the building, under the circumstances of the case, was personal estate, and might be transferred without sale.(4)

22. A bathing-house was erected by an individual, on piles driven into the bed of a navigable river, below low water mark, and after-

(1) Wells v. Bannister, 4 Mass. 514.

(2) Ashmun v. Williams, 8 Pick. 402.

(3) Rogers v. Woodbury, 15 Pick. 156.

(4) Curtiss v. Hoyt, 19 Conn. 154.

wards mortgaged by him. Held, as he had no interest in the soil, the building was a chattel, and no equity of redemption remained in him, liable to be taken on execution.(1)

23. But a building so erected, may be sold on execution as personal property, and the purchaser may legally enter on the land to remove it. The occupant has the right of passing over the close of the owner of the land, to and from the highway.(2)

24. Such building will pass by bill of sale, and not with a deed of the land; nor can it be extended upon, or recovered in a real action. Trover will lie for it as for other chattels. But it may be validly attached, like real estate, without taking actual possession.(a)(3)

25. The owner of the land will not gain a title to the building, merely by a neglect, on the part of the owner of the latter, to occupy or claim it.

26. A erected a saw-mill on the land of B, with his permission. The building was sold to C, upon an execution against A, and B afterwards sold the land to D. The building remained vacant three years, and D made no objection to its being on the land. Held, the purchaser of the building had not waived his right to it.(4)

27. Where one in possession of land, *bona fide*, as his own, has erected buildings upon it; he or his grantee may remove them, without incurring any liability to the true owner of the land.(5)

28. There are other things connected with or attached to land, and therefore *prima facie* subject to the same ownership with it, which, by special acts or agreements, may be, in point of title, separated from the land.

29. In England, *mines* of gold and silver, by the royal prerogative, belong to the crown; which may, in a grant of land, reserve all mines. But this gives no right to the crown to enter in search of them, but only, after they are opened, to restrain the tenant from working them, work them itself, or license others to do it.(6)(b) The United States, in the sale of the public lands, reserve all salt springs and lead

(1) *Marcy v. Darling*, 8 Pick. 283.

(2) *Doty v. Gorham*, 5 Pick. 487.

(3) *Aldrich v. Parsons*, 6 N. H. 555; 2 Fairf. 371; 8 Pick. 402; *Steward v. Lombe*, 1 Brod. & B. 506; *Tapley v. Smith*, 5 Shepl. 12.

(4) 2 Fairf. 371; *Harris v. Gillingham*, 6 N. H. 9; 5 Shepl. 12.

(5) *Wickliffe v. Clay*, 1 Dana, 591.

(6) *Lyddel v. Weston*, 2 Atk. 19; 2 Inst. 577-8. *Plow.* 310, 336.

(a) One claiming under a party, who has previously mortgaged such building as a chattel, cannot assert a title to it against the mortgagee as real estate, nor dispute the mortgagor's title. *Smith v. Benson*, 1 Hill, 176.

(b) The prerogative rests upon the ground, that the king is bound to defend the realm, and to coin and furnish the currency necessary therefor, and for the uses of trade and commerce. It embraces no other classes of mines than those of gold and silver. Stones cut from quarries are *minerals* within the meaning of the terms "coals or minerals" in an Act of Parliament. *Micklethwait v. Winter*, 5 Eng. L. & Eq. R. 526. See *Gibson v. Tyson*, 5 Watts, 34; *Rosse v. Wainman*, 14 Mees & W. 859. In the *case of mines* (Plowd. 310, 336,) it was held by a majority of judges, Plowden and others dissenting, that where gold or silver is mixed with other metals, the whole mine belongs to the crown. Otherwise, by statutes, 1 Wm. & M. ch. 30, 5 ib. ch. 6; which, however, allow the crown to take the proceeds of such mine, upon paying the owner therefor.

Where mines are reserved from a conveyance, the owner of them is still bound to leave a reasonable support for the surface of the soil. *Harris v. Riding*, 5 Mees & W. 60.

So, when the surface of land belongs to one man, and the minerals to another, no evidence of title appearing to regulate or qualify their rights, the latter cannot remove the minerals without leaving support sufficient to maintain the surface in its natural state. The owner

mines. The state of New York reserves to itself all gold and silver mines; also, all mines of other metals on lands of those who are not

of the surface close, while unincumbered by buildings, and in its natural state, is entitled to have it supported by the subjacent mineral strata; and if the surface subsides, and is injured by the removal of these strata, although the operation of removal may not have been conducted negligently nor contrary to the custom of the country, he may maintain an action against the owner of the minerals for the damage sustained by the subsidence. *Humphries v. Brogden*, 1 Eng. Law and Eq. Rep. 241. In Virginia, a statute (Code, 525) provides, that coal mines shall not be opened within twenty-five feet of adjoining land, without consent.

A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided, that nothing thereby granted shall injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but this would render it impossible to reach the alum. Held, the coal pillars could not be removed. *Earl, &c. v. Hurlet*, 8 Eng. L. & Eq. 13.

In a contract relating to mines, there is an implied reservation by the owner of a right to enter and inspect them. *Blakesley v. Whieldon*, 1 Hare, 176. See *Micklethwait v. Winter*, 5 Eng. Law & Eq. 526.

Where a mine reserved or granted, is encroached upon, the proprietor's remedy is *trespass not case*. *Harker v. Birkbeck*, 3 Burr. 1556.

Where the owner of land brings an action for copper ore raised from under it, the presumption of his title to the ore may be rebutted by proof of non-user on his part, and a use by others. *Rowe v. Grenfel*, Ry. & M. 396.

A mining concern, erected by a lease to several persons, who work it jointly, is *quasi*, a partnership in trade, involving the usual partnership liability to creditors. *Fereday v. Wightwick*, 1 Tam. 250.

If a license to dig minerals does not clearly give an exclusive right, the grantor or his assigns may exercise the right in common with the grantee. *Chetham v. Williamson*, Eng. L. & Eq. 469; *Huntington v. Mountjoy*, 4 Leon. 147.

It has been held in Georgia, in the case of the State *v. Canatoo*, (3 Kent, 378, n.,) that a grant of lands by the government passes a perfect title to mines, unless expressly excepted. As to the reservations of *rents*, in consideration of mines contained in lands granted by royal charters to the several States; see 1 Green, Cruise 38, n. 3 How. 120.

Congress may authorize the president to lease lead mines in the State of Illinois. *U. S. v. Gratiot*, 1 M'Lean, 454.

In trespasses by the United States, a permit to enter on the lands which contained lead ore, may be admitted in evidence to show the nature and object of the entry. *United States v. Geer*, 3 McLean, 571.

The following points have been decided in Maryland:

A lease granting the license, right, and privilege of guaging, getting out, working, and carrying away *granite stone*, does not confer the right of carrying away *rubble stone*. *Emery v. Owings*, 6 Gill, 191.

Gravel-stone is a known article of commerce, sold by the cubic foot, and is called dimension stone, while rubble stone is sold in the mass, or by the perch. *Ib.*

On the 11th June, 1840, A leased to B, and B to C, a granite quarry, known by the name of D, with the license of quarrying and getting away stone, for the term of six years from 10th November following, and the lessees went into possession. On the 25th July, 1836, E and F, who had title, leased to G all their estate and interest, being two-third parts of all that lot within the farm of A, called D, for five years, which, before action brought, came to B or C by assignment, as to one-half. The metes and bounds in both leases were the same. In an action by A for the rent due November 1, 1841, under the lease of June, 1840, it was held, that the lease of 1836 was a grant of the superficies of the soil, and did not pass a right to quarry, as it was not opened at the date of that lease; that this case was not one of conflicting leases; the deed of 1836 being a lease of the surface of the soil, that of 1840, a lease or license to quarry stone; that, if a man hath land, in part of which there is a mine open, and he leases the land, the lessee may dig the mine; as the mine is open, and he leases all the land, it shall be intended that his interest is as general as his lease; and that a declaration in a lease, dated 1840, that a quarry "had been recently, or a short time ago possessed and worked by W," could not be understood as meaning that the quarry was opened four years previously. *Ib.*

The lessor of a coal mine, in Pennsylvania is not liable for injuries to a house on the surface, occasioned by the working of the mine by his tenant. *Offerman v. Starr*, 2 Barr, 394.

The owner of a mine demised the right to mine, at a rent payable on each ton of coal taken out, reserving the right to view and examine the mine, and to re-enter on non-payment, neglect, &c. Held, that he was a landlord, and was not liable for an injury resulting from the prosecution of the work by the tenant. *Ib.*

citizens of the United States; also, all mines of other metals on lands of citizens, if the ore contains less than two-thirds in value, of copper, tin, iron or lead. But the owner of a gold or silver mine may enjoy its produce for twenty-one years, if he give notice of the discovery.(1)

30. A similar principle is often applicable to *growing trees*, which, though standing upon, and rooted in the soil, may be the subject of a distinct ownership. But if the limbs of a tree overhang another man's ground, they still belong to the owner of the root. If the root extends into the ground of a neighboring owner, whether he is a tenant in common of the tree with the planter, or whether the whole tree belongs to the latter, is a point somewhat doubtful. In Connecticut, it has been decided, that though both the roots and branches of a tree extend to land of an adjoining owner, the whole tree, with all its fruit, belongs to the owner of the land upon which it stands;(2) but a tree, standing directly upon the line between adjoining owners, belongs to both alike; and either may maintain trespass against the other for cutting and destroying it.(3)

31. It is said, that a grant or devise of an interest in *growing wood* is (that of) an interest in the soil itself. But it is otherwise with a grant or reservation of *trees*.(4)(a)

32. Where A conveyed to B a lot of land in fee, and B, on the same day, reconveyed to A, his heirs and assigns, all the trees and timber standing and growing on said land, forever, with free liberty to cut and carry away said trees and timber, at all times, at their pleasure forever: Held, A retained an inheritance in the trees and timber, with an exclusive interest in the soil, so far as it might be necessary for the support and nourishment of the trees.(5)

33. It was anciently held that trees, like the chamber of a house, could not be the subject of a freehold estate.(6) But it has since been settled, that trees reserved from a conveyance for life are not personal estate, but real, and will therefore pass, without being named, with a subsequent grant of the reversion, notwithstanding such grant expressly refers to the reversion of that which was previously leased.(7) But it is said that a grant of trees passes them to the grantee *as chattels*, and that he may maintain trespass for any injury. If no time is fixed for their removal, the law implies a reasonable time.(8)

34. It has been held in New Hampshire, that a sale of growing trees, to be taken within a certain time, is within the Statute of Frauds, and must be in writing, though not necessarily by deed. So in Illinois, a

(1) 1 N. Y. Rev. Stat. 281, 124; Walk. Intro. 43. See *Raine v. Alderson*, 4 Bing. N. 702; *Grubb v. Guilford*, 4 Watts, 223.

(2) 1 Swift, 104; *Waterman v. Soper*, 1 Lord Ray. 737; *Masters v. Pollie*, 2 Rolle's Rep., 141; *Holder v. Coates*, 1 Moo. & M. 112; *Lyman v. Hale*, 11 Conn. 177. See *Bank v. Crary*, 1 Barb. 542

(3) *Griffin v. Bixby*, 12 N. H. 454.

(4) *Wright v. Barrett*, 13 Pick. 44; *Liford's*

Case, 11 Co. 50; See Com. Dig. *Biens*, G. 2; See *Nettleton v. Sikes*, 8 Met. 34.

(5) *Clap v. Draper*, 4 Mass. 266; *Rehoboth v. Hunt*, 1 Pick. 224; *Howard v. Lincoln*, 1 Shepl. 122.

(6) Bro. Abr. *Demand*, 20.

(7) *Liford's Case*, 11 Co. 47.

(8) *Stukely v. Butler*, Hob. (Am. ed.) 310; 1 Shepl. 122; *Sawyer v. Hammatt*, 3 Ib. 40.

(a) A conveyance of growing trees is not within the recording Act, and, though not recorded, is valid against a subsequent purchase of the land without notice. *Warren v. Leland*, 2 Barb. 613. And where land is so conveyed without any reservation of the growing trees, the owner of the trees may maintain replevin in the *cepi* against him. *Id.*

constable cannot, under an execution from a justice of the peace, enter upon land and sell fruit-trees there standing and growing, they being part and parcel of the land, and not goods and chattels. But in Massachusetts it is held that sect. 1, c. 74 of the Revised Statutes—the Statute of Frauds—does not apply to an agreement for the sale of mulberry trees, growing in a nursery, and raised for sale and transplanting, to be delivered on the ground where they are growing, on payment of the price; as being an interest in or concerning lands, &c. In a later case it is said, whether a sale of growing wood is a sale of *real estate*, may depend on the terms of sale; whether the wood is to stand any time, to be sustained and nourished by the soil; or whether there was, or was meant to be, a written memorandum of the contract. And in a still more recent case it was decided, that a contract for the sale of growing wood and timber, to be cut and removed by the purchasers, is not within the Statute of Frauds. So a mortgage of growing wood and timber, by a purchaser thereof, is a mortgage of personal property, to take effect when the wood shall be severed, and well recorded in the town-clerk's books. In case of a levy on the land, (after a valid sale of timber,) subject to the vendor's right, and a subsequent conveyance without such reservation; the timber does not pass, though the sale of it was neither recorded, nor known to the purchaser of the land.(1)

35. From what has been said, it may be seen that growing trees, though they may be disannexed from the soil by some act of the owner, are still, independent of any such act, a part of the soil, and owned accordingly. The same rule seems, in general, applicable to other vegetable productions. *Prima facie* they belong to the soil, and pass by a conveyance thereof, though, it is said, not under a *judicial* sale; but may be separated from it by some special transfer.(a)

36. It is to be observed, however, that corn, a crop of potatoes, or any other product of the soil, raised annually by labor and cultivation, when ripe is personal estate, may in general be seized or sold on

(1) Putney v. Day, 6 N. H. 430; Olmstead v. Niles, 7, 522; Adams v. Smith, 1 Bree. 221; Whitmarsh v. Walker, 1 Met. 313; Robinson v. Green, 3 Met. 160-1; Clafin v. Carpenter, 4 Met. 580. See Bostwick v. Leach, 3 Day, 176.

A agreed with B, that he might cut the trees on A's land, peel them, and take the bark for his own use. Held, not within the Statute of Frauds. Nettleton v. Sikes, 8 Met. 34.

In England, an agreement for the sale of growing fruit is held to concern an interest in land. Rodwell v. Phillips, 9 M. & W. 501.

So the sale of a crop of growing grass. Crosby v. Wadsworth, 6 E. 602; Evans v. Roberts, 5 B. & C. 829. And of growing hops and turnips. Waddington v. Bristow, 2 Bos. & P. 452; Emmerson v. Heelis, 2 Taun. 38. Otherwise with wood or timber, growing, and to be cut and delivered. Smith v. Surman, Barn. & C. 561. But see Teal v. Awty, 2 Brod. & B. 99.

In North Carolina, a grant of the *vesture* or *herbage* passes a particular right in, and possession of, the land, which will sustain trespass. But a sale of *fructus industriales* is a sale of goods. Saunders v. McLin, 1 Ired. 572.

(a) "By contract, custom, or special rules of law." Calhoun v. Curtis, 4 Met. 415. See Foot v. Colvin, 3 John. 222; Bank, &c. v. Wise, 3 Watts, 394; Com. Dig. *Biens* H. 3. Growing fruit trees have been called, perhaps somewhat inaccurately, *fixtures*. Mitchell v. Billingsley, 17 Ala. 391.

In connection with the ownership of trees, it may be stated, that *bees*, which take up their abode in a tree, belong to the owner of the soil, if unreclaimed; but, if reclaimed and identified, to their former owner. Goff v. Kiltz, 15 Wend. 550. Merely finding a tree on another's land, which contains a swarm of bees, and marking it, does not give the finder a title to the bees. Gillet v. Mason, 7 John. 16.

execution as such, and, upon the owner's death, passes to his executor.(1)

37. But, by express statutes, in Kentucky, a crop shall not be levied upon while growing, excepting corn after the first of October. In Alabama, not till gathered. In Michigan, there may be a levy, but no sale. And the creditor retains a lien thirty days after the crop is ripe or severed. In Mississippi, an unripe crop is not subject to execution, nor does the lien of a judgment attach to it. In Tennessee, a crop shall not be seized before the 15th of November, except for rent, where the tenant has absconded and left the country. In Kentucky and Georgia, the growing crop will pass with the land, where the latter is sold on execution.(2)

38. It has been held in England, that if a crop is mature—as for instance, a crop of potatoes—the sale of it in the ground, to be gathered immediately, is not within the Statute of Frauds; that the ground is a *mere warehouse*, till the crop can be removed. It would be otherwise, if the potatoes were still growing.(3) It is remarked by Mr. Chief Justice Savage of New York, that the English cases on this subject seem not quite consistent; and, in the later decisions, the fact that the corn or potatoes were still growing has been held to make no difference.(4)

39. If the owner of the land sell the crop upon it by a parol contract, and afterwards convey the land to another purchaser, the crop does not pass to the latter. But a parol reservation of such crop to the grantor himself is void.(5)(a)

40. In this connection, may properly be considered the subject of *emblemments*.

41. *Emblemments*—from the French word *embleer*, to sow—are *the crops growing upon land*. The word, however, is generally used, in law, to denote crops which are claimed by some person other than the general owner of the land, as incident to a particular estate therein.

(1) *Planters' &c. v. Walker*, 3 Sm. & M. 409; *Coombs v. Jordan*, 3 Bland, 312; *Cassidy v. Rhodes*, 12 Ohio, 88; *Penhallow v. Dwight*, 7 Mass. 34. (See Clay, 224; *Bradshaw v. Ellis*, 2 Dev. & B. 23; *Ex parte Big-nold*, 2 Dea. & Ch. 398.) An *attachment* of such property, as of any other chattel, requires actual possession. It must be severed and retained by the officer. *Heard v. Fairbanks*, 5 Met. 511.

(2) 1 Ky. Rev. L. 657; Alab. L. 319; Tenn. Stat. 1833, ch. 20. See *Craddock v. Riddle-barger*, 2 Dana, 206; *Parham v. Thompson*, 2 J. J. Mar. 159; Mich. St. 1840, 224; *Plant-*

ers, &c. v. Walker, 3 Sm. & M. 409; Miss. St. 1804, 29; *Thompson v. Craigmyle*, 4 B. Monr. 392; *Pitts v. Hendrix*, 6 Geo. 452.

(3) *Parker v. Stainland*, 11 E. 362; *Warwick v. Bruce*, 2 M. & S. 205; *Evans v. Roberts*, 5 B. & C. 829.

(4) *Austin v. Sawyer*, 9 Conn. 42. See *Carrington v. Roots*, 2 Mees. & W. 248; *Jones v. Flint*, 2 Per. & Dav. 594; 10 Ad. & Ell. 753; *Northern v. State*, 1 Carter, 133.

(5) *Austin v. Sawyer*, 9 Cow. 39. But see *Heermance v. Vernoy*, 6 John. 5; *Gibbons v. Dillingham*, 5 Eng. 9.

(a) Devise of lands in fee, with all the crops thereon, whether gathered or growing at the testator's death. Held, this included not only the crops of the year in which he died, but those of the preceding year, remaining on the land, and those brought there from other lands, to be stored. *Carnagy v. Woodcock*, 2 Munf. 234. A deed of land will pass the grain growing thereon, although the grantor subsequently takes charge of the crop and of the fences enclosing it, without objection from the grantee. *Wilkins v. Washbinder*, 7 Watts, 378. If a lessor reserves the growing crop and afterwards conveys the land, not mentioning the crop, it belongs to the purchaser. *Burnside v. Weightman*, 9 Watts, 46. Lease of land, reserving for rent a proportion of the crops. While these were growing, the lessor conveyed the land without reservation. Held, the deed passed the rent, and the tenant was bound to attorn; but the grantor could not maintain trespass against the grantor, for entering and taking the crops. *Gibbons v. Dillingham*, 5 Eng. 9.

42. *Emblements* include only such vegetables as yield an annual profit, and are raised by annual expense and labor, or "great manurance and industry"—such as grain; but not trees, nor fruits, clover, grass, &c., though annual, because they are spontaneous. And even though grass be improved by labor, as by trenching or sowing hay seed, it is not a subject of emblements. (a) Otherwise with *hops*, though growing on ancient roots; and the artificial grasses, as *clover*, *saintfoin*, &c. (1)

43. The doctrine of emblements is founded on the clearest equity and the soundest policy, and ought to receive a liberal encouragement. (2)

44. Where a tenant for life dies before harvest time, his executors shall have the crops then growing, as a return for his labor and expense in tilling the ground; and, if sold after his death, they shall have the proceeds, deducting only the expenses of sale. (3)

45. Where the estate is terminated in any other way than by his death, either by act of God or act of law, the tenant himself has the emblements. But not if he terminates it by his own act. (4)

46. Thus, where one is tenant *pour autre vie*, and the *cestui que vie* dies before harvest, the former shall have emblements. So if an estate be made to husband and wife during coverture, (which is a life-estate,) and they are afterwards divorced *causa præcontractus*, he shall have emblements; because the divorce, although founded on the application of a party, is itself the act of law. (b) But if a woman, tenant during widowhood, marries again; or if a tenant forfeits by breach of condition; they have no emblements, because the estate is determined by

(1) Co. Litt. 55 b, and n. 2; Com. Dig. *Biens* G. 1; Latham v. Atwood, Cro. Car. 515; 1 Rolle Abr. 728; Grantham v. Hawley, Hob. 132; Evans v. Inglehart, 6 Gill & J. 188; Kittredge v. Woods, 3 N. H. 504; 2 Dana, 206; Ladd v. Abel, 18 Conn. 513.

(2) Stewart v. Doughty, 9 John. 112.

(3) 1 Cruise, 80; Hunt v. Watkins, 1 Humph. 498.

(4) Ib. Debow v. Colfax, 5 Hals. 128; 3 N. H. 504.

(a) Growing grass cannot be taken as chattels on execution, even though the defendant turns out the grass to the sheriff. But there may be a legal severance of trees or grass from the land, without an actual severance; as where the owner sells and conveys them in writing, and where he conveys the lands, reserving the trees and grass. A mortgage of such trees or grass will not work a severance until the mortgage becomes absolute. Bank, &c. v. Cray, 1 Barb. 542.

Where A demised to B his farm for 999 years, B, in consideration thereof, covenanting to furnish A with "one half of all the produce of the farm;" and B cut, carried off and sold wood and timber, in an action brought by A against B for one half of the avails of such wood and timber, *held*; the expression "yearly produce," as used in this covenant, did not comprehend the wood and timber of the farm, but only such crops as are annually gathered. Ladd v. Abel, 18 Conn. 513.

The right of *emblements* does not apply to a crop, which ordinarily does not repay the labor of producing it within the year in which such labor is expended, as, for instance, a second crop of clover, although the first crop, taken at the end of the term, did not repay the expense of cultivation. Graves v. Weld, 5 B. & Ad. 105.

(b) If a husband lease lands of the wife, and, during the term, she obtain a divorce *a vinculo*, the emblements belong to the tenant. Gould v. Webster, 1 Tyl. 409. Where lands are conveyed in trust for a husband and wife, during their joint lives and the life of the survivor, the crops growing at the husband's death, which were planted before the conveyance, survive to the wife. Otherwise with those planted by the husband. Haslett v. Glenn, 7. Harr. and J. 17.

Where a wife rented land, and made corn on it, by the labor of slaves which were secured to her separate use; *held*, the corn belonged to the wife, and was not subject to the husband's debts. Young v. Jones, 9 Humph. 551.

their own act.(1) So, where a parson terminates his estate by his voluntary resignation, he has no emblements.(a)(2)

47. The right to emblements being founded upon the supposition of labor and expense incurred by the tenant, they are not allowed where this reason is wanting.(3)

48. Thus if A sows corn, and then conveys the land to B, remainder to C; upon B's death before harvest, C takes the crop.(4)

49. So where the tenant dies before sowing, though after having prepared the ground for seed, emblements are not allowed.(5)

50. Hence, an agreement to allow a tenant "for preparing the ground for seed, and for any other extra labor," applies to the clearing, manuring and plowing of the land, and does not interfere with his implied right to emblements.(6)

51. The executor of a deceased joint tenant cannot claim emblements, such tenant having had no *exclusive* title to the land. Nor can one tenant in common claim them, who, without leave or objection from the others, occupied the land exclusively, and sowed it; partition having been made while the grain was growing. He is neither a tenant for life nor at will, and acted with the knowledge that the land was at any time subject to partition.(7)

52. At common law, a *dowress* was not entitled to emblements, the land being often sown when she came into possession of it, after the husband's death. But by Statute of Merton, 20 Hen. 3, ch. 2, she may devise the growing corn; and if she does not, it passes to her executors.(8) In New Jersey, South Carolina, North Carolina, Rhode Island, Virginia, Kentucky, it is provided, that widows may bequeath their crops.(b)(9)

53. *Tenant for years* is not, in general, entitled to emblements, whether the lease is upon a pecuniary rent or upon shares; because, knowing the determination of his estate, it is his own folly to sow, where he knows he cannot reap.(c) This being the reason of the rule, it is not applicable, where such estate is terminated by an event previously uncertain. Thus, if the tenant for years holds under a tenant for life, and the estate terminates by the death of the latter, the former

(1) Co. Litt. 55, b.; Com. Dig. *Biens* G. 2. Hawkins v. Skegg, 10 Humph. 31; Davis v. Byton, 7 Bingh. 154.

(2) Bulwer v. Bulwer, 2 B. & A. 470.

(3) Haslett v. Glen, 7 Har. & J. 17; Thompson v. Thompson, 6 Munf. 518.

(4) Hob. 133.

(5) Gee v. Young, 1 Hay, 17.

(6) Stewart v. Doughty, 9 John, 112.

(7) Cro. Eliz. 61; Calhoun v. Curtis, 4 Met. 413.

(8) 1 Cruise, 130.

(9) Anth. Shep. 255, 564; N. C. Rev. St. 615; 1 Vir. Rev. C. 171; 1 Ky. Rev. L. 575.

(a) But if a parson, having sowed the parsonage land, sells the growing crop, and then dissolves his connection with the church, and leaves the land before harvest; the purchaser cannot maintain trover against one who carries away the crop, although the officers of the church disclaim all title to it. Debow v. Colfax, 5 Halst. 128.

(b) In Pennsylvania, *any tenant for life* may bequeath them as personalty. Park & J. 467. If, before assignment of dower in certain land, the heirs sow such land; after assignment, but before acceptance of the commissioners' report, which, however, is subsequently accepted, the widow may cut and carry away the crops. Parker v. Parker, 17 Pick. 236.

In Arkansas, the widow may bequeath her crop; if she does not, it passes to her administrator. Rev. St. 342.

(c) Upon the same principle, where one occupies by a pre-emption right, and sows the land, knowing that the crop cannot ripen before such right will terminate, a purchaser from government will hold the crop. Rasor v. Qualls, 4 Blackf. 288.

shall have emblements. So, also, where one holds for so many years, if A live so long, and A dies before the end of the time; the former has emblements.(1) But where a woman, tenant during widowhood, leases for years and marries, the lessee for years has no emblements.(2)

53 *a.* Where a father conveyed a farm to his son, but continued to occupy it himself until his death, and worked it jointly with his son, each contributing a certain number of negroes; held, the corn and fodder growing thereon at the death of the father belonged to his estate, and passed to his administrator; the son being entitled to retain, if anything, no more than his share of the crop.(3)

54. Where the tenant terminates the estate by his own act—as by forfeiture—he has no emblements. So, where he surrenders his lease.(4)

55. A lessor agreed to renew the lease, “if he did not want the farm for his own use.” Before its expiration, the tenant surrendered, having previously sold the growing crop to a stranger. Held, the landlord was entitled to the crop.(5)

55 *a.* A leased a farm to B at an advance rent, for a specified time, giving the lessee the right to go upon the premises and harvest and take away his crops, after the determination of the lease. B underlet to various persons, some of whom were to pay a part of the crop as rent; and one of them raised a crop of oats, which were stacked on the premises as the property of B, after he had surrendered the premises to A. During the following spring, A threshed and sold the oats, and B sued him therefor in trespass. Held, the action could be maintained; that A had no claim for a forfeiture; and that his remedy against B was on the covenants of the lease.(6)

56. In Pennsylvania, a tenant for years is by custom entitled to emblements, under the name of a *way-growing crop*.(a) But the custom is limited to leases from spring to spring, where there is no crop in the ground at the commencement of the lease. And where A leased to B, for five years, three months' notice to be given in case of a sale during the term, and no rent to be paid for the year, and there was a winter crop in the ground at the time of leasing, and the tenant, after a sale by the lessor, left in the fall; held, he was entitled to emblements at common law, notwithstanding a knowledge or even direct notice of the sale three months before leaving, the custom of a way-going crop not being applicable to this case.(7)

(1) Co. Lit. 55 b, *Whitmarsh v. Cutting*, 10 John. 361; *Demi v. Bossler*, 1 Penns. 224; *Davis v. Brocklebank*, 9 N. H. 73.

(2) *Oland's Case*, 5 Rep. 116.

(3) *McLaurin v. McCall*, 3 Strobb. 21.

(4) Co. Lit. 55 b.

(5) *Bain v. Clark*, 10 John. 424.

(6) *Van Valkenburgh v. Peyton*, 2 Gilm. 44.

(7) *Stultz v. Dickey*, 5 Bin. 289; *Biggs v. Brown*, 2 Ser. & R. 14; *Comfort v. Duncan*, 1 Miles, 229. See *Faviell v. Gaskoin*, 8 Eng. L. & Equ. 526.

(a) The same custom is said to prevail in New Jersey and Delaware; applying, however, in all these States, to grain sown in the fall, and to be reaped at the next harvest. 1 U. S. Digest, 697; *Biggs v. Brown*, 2 S. & R. 14; *Van Doren v. Everitt*, 2 South. 460; *Templeman v. Biddle*, 1 Harring. 522. If a lessor injure the way-going crop, even after the lease has terminated, and the tenant quit possession, he is liable to an action of trespass. *Forsythe v. Price*, 8 Watts, 282. This crop includes *straw*. *Craig v. Dale*, 1 W. & S. 509. *Idings v. Nagle*, 2, 22. A like custom prevails, and is enforced by the courts, in some parts of England, even notwithstanding a written contract, in which such custom is not referred to. *Higglesworth v. Dallison*, Doug. 201; *Senior v. Armitage*, Halst. 197. But see *Roberts v. Barber*, 1 Cr. & Mees. 203. See also, *Boraston v. Green*, 16 E. 71; *Beaty v. Gibbons*, ib. 116.

57. If a lessor for years covenant and grant to the lessee, to carry away the corn which shall be growing at the end of the term ; this is not a mere covenant, nor is it void as a grant *in futuro* of a thing not *in esse* ; but passes the property when it comes into being.(1)

58. The question of emblements, though usually arising between landlord and tenant, may also grow out of other relations known to the law. Thus, where one is forcibly dispossessed of land ; after recovering it by a judgment, he is entitled to the crops raised by the trespasser or disseizor, though gathered, if still remaining on the premises.(2)

59. If one in possession of land, under a judgment recovered upon a writ of entry, being sued in a writ of right, pending this suit sow the land, and the demandant recover judgment, and obtain seizin and possession before the crops are gathered ; the demandant is entitled to the crops.(3)

59 *a*. Upon a sale on execution, the sheriff gave a deed to the purchaser, while grain was growing on the land. Afterwards, a creditor of the judgment-debtor levied on the grain and sold it, and the purchaser brings an action against the tenant of the sheriff's grantee, for cutting and removing the grain. Held, the grain passed with the land, and the action could not be maintained.(4)

59 *b*. Where one leases land which is subject to a judgment against him, and the land is afterwards sold, the purchaser will be entitled to the growing crop, and not the tenant.(5)

60. A mortgagee, not in possession, has no right to emblements. When severed by the mortgagor, they are absolutely his without any liability to account for them.(6)

61. Nor is the lessee of a mortgagor entitled, as against the mortgagee, to the crops on the land at the time of foreclosure and sale ; but he is liable in trespass to the mortgagee for taking them, if the latter purchase the land.(7)

61 *a*. The purchaser of mortgaged premises, sold pursuant to a statute foreclosure in New York, entered, harvested, and carried away the crop. In an action of trover against him, by one who had purchased the crop before the foreclosure, on execution against the mortgagor ; held, the defendant was entitled to the crop.(8)

62. The right to emblements is not a mere personal privilege, incapable of transfer ; but, in this respect, a crop, even while growing, and unripe, seems to stand on the same footing with any other property.

63. Thus, a growing crop may, it seems, be sold by a tenant before the termination of his estate, and the vendee will have the right to enter and gather it, after such termination.

64. So an execution against the tenant may be levied upon the growing crop. And it was held in New York, that the officer might levy the execution in December, making a declaration to that effect, and delay to sell till the ensuing August, when the crop became ripe ; although

(1) *Grantham v. Hawley*, Wms. Hobart, 286.
 (2) *Thomes v. Moody*, 2 Fairf. 139. See
Tyson v. Hollingsworth, 2 Bland, 334.
 (3) *King v. Fowler*, 14 Pick. 238.
 (4) *Bear v. Bitzer*, 16 Penn. 175. See
Groff v. Levaw, *ib.* 179.

(5) *Sallade v. James*, 6 Barr, 144.
 (6) *Toby v. Reed*, 9 Conn. 225.
 (7) *Lane v. King*, 8 Wend. 584 ; *Crews v.*
Pendleton, 1 Leigh, 297 ; 1 Bland, 76.
 (8) *Shepard v. Philbrick*, 2 Denio, 174.

it might legally be sold at the former period. He took all the *possession*, that was practicable in the case.(1)(a)

65. The right to emblements involves the right of removing them from the land; and therefore the tenant is allowed a reasonable time for this purpose, during which the reversioner or remainder-man cannot lawfully enter and occupy.(2)

66. In several of the States, the subject of emblements is to some extent regulated by the statute law.

67. In Maryland, "the crop on the land of the deceased, by him or her begun," is made assets in the hands of the executor, &c. So in South Carolina(b) and Virginia. So in Illinois, the executor is empowered to sell the growing crop.(3)

68. The same provision is made in New York, with regard to growing crops, and all produce raised annually by labor and cultivation, except growing grass and fruit not gathered.(4)

69. In Virginia, South Carolina and Kentucky, as an incident to right of emblements, the slaves of a person deceased, though held by him only for life, shall be continued on the land from March 1st to December 1st; and, in Virginia and Kentucky, as a compensation for their services, the executor or administrator shall deliver to the reversioner or remainder-man three barrels of Indian corn for every slave. In all the three States above named, a crop does not pass as emblements, if the tenant die between December 1st and the first of March following, or if not gathered before the former period. In Ohio there are no emblements, unless he die between March 1st and December 1st following.(5)(c)

70. Sometimes, where substances in their nature movable are thrown upon a man's land, they become his property, as part of the land.

71. Thus, *sea-weed*, thrown upon the sea-shore, belongs to the owner of the shore; because it increases, not suddenly but gradually; is useful

(1) Whipple v. Foot, 2 John. 418.

(2) Bevens v. Briscoe, 4 Harr. & J. 139.

(3) Anth. Shep. 428, 489, 575; Illin. Rev. L. 642.

(4) 2 N. Y. Rev. St. 83.

(5) Anth. Shep. 489, 575, 653-4; Walk. Intro. 277; Green v. Cartright, Wright, 788. See Vir. Code, 573.

(a) In Ohio, where lands are valued for judicial sale, the annual crops are not included in the estimate. Cassily v. Rhodes, 12 Ohio, 95.

(b) By a marriage settlement, the husband was to have the use and occupation of the wife's land and the proceeds of the real and personal estate during their joint lives, and, in case of her death, living the husband, leaving issue, the property to be divided, according to law, between the husband and issue, the legal title to remain, in the mean time, in her trustee. The wife died in February, leaving a daughter, her only issue, and the husband in July of the same year, having devised and bequeathed to the daughter all the property of which his wife was possessed at the time of the marriage, and directing that she should be suitably maintained out of the proceeds. In the spring of that year, the husband planted a crop with his own slaves and those of the trust estate. Held, under the statute of South Carolina, (5 Cooper, 111, § 23,) the executor was entitled to the crop severed before the last day of December of the year of the testator's death, charged with the maintenance and education of the daughter, and the hire of her slaves. Gage v. Rogers, 1 Strobh. Equ 370.

(c) This must be the meaning of the language, "if the tenant die between the first of March and the last of December, they go to the personal representatives; otherwise to the real." See Shelton v. Shelton, 1 Wash. 53; Thompson v. Thompson, 6 Munf. 514.

as manure and a protection to the bank; and is also some compensation for the encroachments of the sea upon the land.(1)

72. The same is true with regard to *wreck*, as against all the world but the former owner.(2) So, where *wood and timber* floats in the water covering a man's land, he has the exclusive right to seize it, and retain it till claimed by the owner in reasonable time.(3)(a) But the lessor of a farm, lying upon the bank of a river, cannot bring replevin for drift-wood taken from the river and piled up on the farm by the lessee, as he has no property in such wood, unless there be some provision in the lease giving him a right to it.(4)

73. It has been held that *dung in a heap* is personal property; but when spread, becomes part of the land, because it cannot well be gathered without gathering part of the soil also.(5) A late case in New Hampshire decides that manure, made in the ordinary course on the land, passes by a conveyance of the land, unless expressly reserved—whether lying in a field, yard, in heaps at the windows, or under cover.(6)

73 a. *Gravel*, unlawfully removed from a close, and sold, becomes personal property, by the severance; and trover lies in favor of the owner of the close against the purchaser, who used the gravel for filling up other land.(7)

74. In this connection, may properly be considered the subject of *fixtures*(b)—one of sufficient extent and importance to be discussed, as it has been with much ability, in a distinct elementary treatise,(c) and upon which very numerous decisions and nice distinctions are to be found in the books.

75. The law of fixtures relates to those cases, where a thing affixed to land, and, until removed, constituting a part of the freehold, is taken

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| <p>(1) Phillips v. Rhodes, 7 Met. 323; Emans v. Turnbull, 2 John, 313; 1 U. S. Dig. 141; N. H. Rev. St. 237-8; Kenyon v. Nichols, 1 R. I. 106; See 9 Conn. 38.</p> <p>(2) Barker v. Bates, 13 Pick. 255.</p> <p>(3) Rogers v. Judel, 5 Verm. 223.</p> <p>(4) Dyer v. Haley, 29 Maine, 277.</p> | <p>(5) Yearworth v. Pierce, Alleyn, 31. See Daniels v. Pond, 21 Pick. 367; infra, <i>Estate at Will</i>. Law Reporter, Jan. 1854, 481; Roberts v. Barber, 1 Cr. & Mees. 208.</p> <p>(6) Conner v. Coffin, 2 Fost. 538.</p> <p>(7) Riley v. Dalrymple, Mass. S. J. C. Mar. 1853; Law Rep. May, 1853, p. 41.</p> |
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(a) In Massachusetts, the owner of timber, which floats from any water upon another's adjoining land, may remove it within eighteen months, paying all damages of removal. After this period, it becomes the property of the latter. Rev. Stat. 389. In Wisconsin, one year. Rev. St. 249. See N. H. Rev. St. 259.

The owner of land upon which property is stranded cannot appropriate it to his own use, though he may cast it back into the stream, after the owner has been notified and neglected to remove it. *Fosterv. Juniata, &c.* 16 Penn. 393. The owner of the property may enter on the land to remove it, but is not bound to do so, and incurs no liability for injury done by it; even, it seems, after notice to remove it, unless guilty of negligence in the management of it. *Ib.*

(b) There seems to be a prevailing inaccuracy or uncertainty in the application of this term, similar to that which will hereafter be noticed in the use of the word *waste*. (See *Waste*.) As the latter word sometimes signifies merely the *destruction*, and sometimes the *unlawful destruction*, of things pertaining to the inheritance: so the word *fixture* is indiscriminately used, to denote merely something *affixed to the freehold*, whether lawfully removable or not; and something which, by the very force of the term, *is always to remain affixed*, and can never be lawfully taken away by one not the owner of the freehold. Chancellor Kent considers the proper definition of fixtures to be, "things fixed in a greater or less degree to the realty." Comm. 2, 344, n. A recent definition is, "the right of severance of chattels attached to the soil, and not part of the freehold." *Horsfall v. Key*, 17 L. J. Exch. 266. See *Teaff v. Hewitt*, 1 McCook, 511.

(c) See Amos and Ferard, on the Law of Fixtures.

away by some party not the owner of the land, as a chattel belonging to him. This class of cases, though analagous to those already considered, in which one man erects buildings upon the land of another by *special permission or contract*, differs from the latter in two important particulars. In the first place, in the case of fixtures, there is ordinarily *no express permission or contract* for their erection; (1) and, in the second place, until removed, they are a *part of the freehold*; while, in the other case, the thing attached to the land is from its first creation a mere *chattel*, and no part of the freehold. The latter part of this distinction seems to be opposed by some dicta, (2) which speak of fixtures as *chattels* or personal property, and as being "deemed personalty for many other purposes." Thus, as will be seen, they are liable to be taken on execution as personal property. Mr. Amos, (3) however, is of opinion, that by annexation they become a part of the freehold, and re-assume their character of chattels, only upon removal. This seems to be clearly laid down in the case of *Lee v. Ridon*. (4) It is there remarked, that the stealing of such articles would not be felony. So, as will be seen hereafter, a mortgagor may remain in possession of them, without rendering the transfer fraudulent. So they are not *distrainable* till permanently separated; and it has been questioned whether *replevin* will lie for them, even when separated from the land. (5)(a)

76. It is said that to constitute a fixture, that is, to give a chattel anything of the character of real estate, so as to justify a question in regard to it, there must be a *complete annexation to the soil*. (6) Thus, a building upon blocks, rollers, stilts or pillars; or a varnish-house upon a wooden plate resting on brick work, the quarters being morticed into the plate; or a wooden barn, upon a brick and stone foundation; or a stove, in a house without fire-place or chimney, except from the chamber floor, the pipe of which passes into the lower end of the chimney; or a post wind-mill, laid on cross traces not attached to the ground; or

(1) *White v. Arndt*, 1 Whart. 95.

(2) 2 Browne, 285; *Van Ness v. Pacard*, 2 Pet. 144; 3 Kent (5th ed.) 340, n.

(3) *Amos*, 9, 10, 814. See *Horsfall v. Key*, 2 Wels. H. & G., 778.

(4) 7 Taun. 190.

(5) *Reynolds v. Sherler*, 5 Cow. 323; *Vansce v. Russell*, 2 M'C. 329; *Powell v. Smith*, 2 Watts, 126.

(6) *Amos*, 5, 274, *et seq.*; *Wansbrough v.*

Maton, 4 Ad. & El. 884; *Freeland v. Southworth*, 24 Wend. 191; *Despatch, &c. v. Bellamy*, &c. 12 N. H. 205; *Teaff v. Hewitt*, 1 M'Cook, (Ohio), 541. (This very recent case contains a learned and elaborate examination of the law of fixtures, in some of its most important aspects.) *Regina v. Haslam*, 6 Eng. L. & Eq. 321; *Vanderpoel v. Van Allen*, 10 Barb. 157; *Lawrence v. Kemp*, 1 Duer, 363; 2 Harr. Dig. (Suppl.) 1686; *Wood v. Hewett*, Ib. 688.

(a) But the tenant has an *interest*, not a mere *power*, as in case of a lease, *without impeachment of waste*. (See *Poole's case*, *infra*. 66, n. 3; also, *Davis v. Banks*, 16 L. J. Exch. 213.) A party cannot avail himself of his own wrong in interfering with fixtures, to deny that they are part of the realty. Thus, if the landlord distrains them, and afterwards severs and removes them for sale, and the tenant brings trover, the defendant cannot defend on the ground that the plaintiff, by bringing this suit, has treated them as chattels, and therefore distrainable. *Dalton v. Whithem*, 3 Gale & Dav. 260. See *Clark v. Holdford*, 2 C. & K. 540. A fixture, when lawfully severed, becomes personal property, and may be sued for in replevin. *Heaton v. Findlay*, 12 Penn. 304; *Haslaw v. Haslaw*, 15 Ib. 507. The owner of land sold a fixture thereon to A, which was temporarily severed. He then sold the land to B, with notice of the previous sale. The fixture was never delivered, and was soon re-annexed, and continued to be used. At the time of sale of the fixture, there was a judgment against the owner of the land, constituting a lien upon it, under which the land was sold to the owner's grantee. Held, he thereby gained a title to the fixture, notwithstanding his knowledge of the previous sale, and his admissions that the fixture belonged to A. Ib.

on a sliding fender, to prevent the escape of water from a mill-stream; or loose, movable machinery, used in prosecuting some business, and fastened to the building by belts and bands, or by cleats tacked to the floor, and movable without injury to the building; or a door, which may be lifted from its hinges; is not a fixture, but a mere chattel. So, gas fixtures and sitting stools, placed by a tenant in a shop or store, though fastened. So, machinery erected for manufacturing purposes, on timbers imbedded in the ground, or fastened to the timbers of a building by bolts, screws, pins or cleats, if put up with a view to its being removed without injury to the building, is not a fixture, passing with a freehold on a sale of the latter.(1) So, a pump and pipe, balances and scales, and beer-pumps, are *prima facie* personal property; and whether they are fixtures, depends, in New York, upon the point whether they are annexed to the freehold within the meaning of the statute. (Rev. Sts. 83.)(2) But sheds built upon posts, by a tenant, for the purpose of making brick, are fixtures.(3)

77. Whether an article is a fixture, is partly a question of fact and partly of law. Every case must depend mainly on its own circumstances.(4)

78. Several general considerations are of importance, in settling whether a thing annexed to the freehold can lawfully be removed. These are, *the nature of the thing*, whether in itself a personal chattel or not; usage; the comparative value of the land before and after the removal; the injury which would be caused by removal, in regard to which it is said, "the principal thing shall not be destroyed by taking away the accessory;" the situation and business of the tenant; but chiefly the purpose and object of the erection, whether for trade, agriculture, ornament, or general improvement of the estate.(5)(a)

79. It is the general rule of the common law,(b) that whatever is once annexed to the freehold becomes a part of it, and therefore cannot be removed by the party making the annexation, who is not the owner of the land.(6) It will be seen, that the former part of this proposition is chiefly important, as involving the consequence stated in the latter part. For, if the owner of the land himself make annexations to it, so long as he continues to be the owner, he has the absolute control, both of the land and of what is affixed to it. In regard to him, therefore, it is of

(1) *Farmer v. Chauffette*, 5 Denio, 527.

(2) *Hovey v. Smith*, 1 Barb. 372.

(3) *Beckwith v. Boyce*, 9 Miss. 560.

(4) *Steward v. Lombe*, 1 Brod. & B. 510.

(5) *Amos*, 7; *Van Ness v. Pacard*, 2 Pet. 148; *Lawton v. Lawton*, 3 Atk. 15; *Wetherby v. Foster*, 5 Verm. 136; *Trappes v. Harter*,

3 Tyrwh. 603; *Buckland v. Butterfield*, 2 Brod. & B. 54; *Davis v. Jones*, 2 B. & A. 166; *Teaff v. Hewitt*, 1 McCook, 511.

(6) 2 Pet. 144; *Hubbard v. Bagshaw*, 4 Sim. 338; *Leland v. Gassett*, 2 Washb. 403; *Buckley v. Buckley*, 11 Barb. 43; *English v. Foote*, 8 S. & M. 444.

(a) The rule, that objects must be actually and firmly affixed to the freehold, to become realty, or otherwise, to be considered personalty, is far from constituting a criterion. Doors, window-blinds and shutters, removable without damage, and even though, at the time of a conveyance or attachment, actually detached, are, it seems, part of the house, and pass with it. So, it seems, mirrors, wardrobes and other heavy furniture, though firmly screwed to the walls, are chattels. Per Shaw, Ch. J., *Winslow v. Merchants*, &c. 4 Met. 314. In case of a partition between tenants in common of a woolen factory, machinery, not affixed or fastened to the land or building, has been held to be personal property. *Walker v. Sherman*, 20 Wend. 636. A mortgagor commenced a building, designed for a dwelling-house, and to remain on the land; also, a smaller one, upon posts fixed in the ground, intended to be occupied till completion of the former. Held, these were fixtures. *Butler v. Page*, 7 Met. 40.

(b) *Quicquid plantatur solo, solo cedit.*

little *practical* consequence, whether the annexations become a part of the freehold or not. In some of the States, however, the statute law has assumed to settle this particular question. Thus, in Connecticut,(1) it is provided that the machinery in a cotton or woolen factory, may be mortgaged, either with or without the building, *as if it were real estate*. So, while it may be attached like real estate, it is sold on execution as personal. But in Rhode Island,(2) the main water-wheels, upright and horizontal shafts, drums, pulleys and wheels secured to the building, and necessary for operating the machinery, and all kettles set, are declared to be real estate, while other parts are personal.(a)

80. By the ancient law, it seems, even a tenant had no right to remove things once attached to the freehold; as, for instance, windows, wainscot, benches, &c.(3) *Poole's case*(4) first definitively settled a different principle, in regard to erections *for trade*, although this exception is said to be almost as old as the rule itself. In a very ancient case it is referred to by the phrase, *pur occupier son occupations*—"to occupy his occupation."(5)

81. The general distinction upon the subject is this: that where a thing is accessory to anything of a personal nature, such as trade, it is a chattel; but where a necessary accessory to the enjoyment of the inheritance, it is a part of the inheritance.(6)

82. In a leading case(7) upon this subject it is said, (though not, as will be presently seen, with perfect accuracy,) that questions as to fixtures arise in three cases.(8) 1. Between heir and executor. That is, when the owner of real estate dies, the question is, whether things attached to the land shall pass with or as a part of it, to the heir, or as personal property, to the executor. In this country, this branch of the subject is comparatively of little consequence, because the personal and real property of one deceased is ordinarily subject to precisely the same appropriation, either for the benefit of creditors or the next of kin.(b)

(1) Conn. L. 67-8.

(2) R. I. L. 205.

(3) Co. Lit. 53 a; *White v. Arndt*, 1 Whart. 93; *Amos*, 22.

(4) 1 Salk. 368.

(5) *Van Ness v. Pacard*, 2 Pet. 144-5; 20

Hen. 7, 13 a & b.

(6) *Hunt v. Mullanphy*, 1 Misso. 508; *Olympic*, &c. 2 Browne, 285.

(7) *Elwes v. Maw*, 3 E. 38.

(8) 1 Whart. 93.

(a) In Delaware, real fixtures, such as steam engines, &c., placed on the premises by the owner, and attached to the freehold, as a fixed establishment, are a part of the freehold, subject to real estate liens, and not liable to be seized as chattels. *Rice v. Adams*, 4 Harring. 332. In Massachusetts and Michigan, for the purposes of taxation, *real estate* includes all buildings and other things erected on, or affixed to lands. Mass. Rev. St. 75, Mich. St. 1843, 60. By a statute in Massachusetts, all machinery used in manufacturing is taxed like real estate, in the place where it is situated. Mass. St. 1837, 20-1. In Vermont, machinery in a woolen factory is held to be personal property, and, if mortgaged with or without the realty, the mortgagee must take possession to acquire a title against creditors. *Sturgis v. Warren*, 11 Verm. 433. To convey that, which forms part of the realty, but by severance may become a chattel, with effect against those not excepted in the statute, the same formalities are necessary as in a conveyance of the land, unless a severance is first made. *Trull v. Fuller*, 28 Maine, 545.

(b) In Maryland, articles which can be removed without injury to the premises, are made assets in the hands of the executor, &c. Anth. Shep. 428. In New York, things annexed to the freehold or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support. 2 N. Y. Rev. St. 83. All the erections connected with a mill or factory, carried by water-power, including the dams, water-wheels and gearing, and machinery fastened to the ground or buildings, are *prima facie* part of the realty, and pass to the heirs. *Buckley v. Buckley*, 11 Barb. 43. So, they belong to the remainder-man, after the death of tenant for life. *Ib.* Acc. *Fisher v. Dixon*, 1 Cl. & Fin. 312.

As between heir and executor, the law is strict in favor of the former, but still allows erections *for trade* to be removed. 2. Between the executor of a tenant for life, and the remainder-man or reversioner. Here the law is liberal, in allowing the former to remove the tenant's own erections.(a) 3. Between landlord and tenant. And here, in modern times, the tenant is highly favored by the law, in regard to the right of removing fixtures;(b) particularly such as pertain to trade and manufactures, which are said to be matters of a *personal nature*, and the former of which has been called, in England, *the pillar of the State*. The general modern rule is, that the tenant may remove anything erected by him, which can be removed without injury to the premises, or putting them in a worse plight than they were in when he entered. Whether this can be done is a question for the jury. If the erection taken down is substituted for another, the latter must be restored or replaced.(1)

83. As a general summary of the law of fixtures in reference to landlord and tenant, it is said,(2) that a tenant may remove; 1. *Implements of trade*;(b) as, for instance, furnaces, or the vats and coppers of a soap-boiler; or a kettle or boiler in a tannery, put up with brick and mortar; or stills set up in furnaces, for making whiskey; or a hydraulic press let into the ground, and walled up with solid masonry, and wooden parts of it nailed to the building, the same being necessary to the business for which the building is occupied.(c) 2. *Machinery*; as a steam engine or a pump, if removable without injury to the freehold; or a post windmill, or machinery for spinning and carding, though nailed to the floor.(d) 3. *Buildings for trade*; in regard to these, if permanently built, the right of removal seems questionable in England, but is well established in this country. The question is not as to the size, form, or mode of erection of a building; but whether it is *for trade*. And it matters not, though the trade be of an *agricultural* nature; nor though the building be in part constructed from the materials of an old one stand-

(1) 2 Kent, 280; Whiting v. Brastow, 4 Pick. 310; Penton v. Robart, 2 East, 90; 6 John, 5; 2 Browne, 285; Gaffield v. Hapgood, 17 Pick. 192; Winslow v. Merchants', &c. 4 Met. 310; Coombs v. Jordan, 3 Bland, 311; 2 Washb. 403; Avery v. Cheslyn, 5 Nev. & M. 373; Foley v. Addenbrooke, 13 Mees. & W. 197.

(2) Amos, 274, *et seq.*; Hunt v. Mullanphy, 13 Mis. 291.

(a) But a tenant by the *curtesy* cannot remove permanent buildings, such as a two story brick dwelling-house and a large barn, erected by him during the life of his wife and child. M'Cullough v. Irvine, 1 Harr. (Pen.) 438. The grantee of a tenant by the *curtesy* has all the rights of a tenant for life; and, in respect to erections made by him for the purposes of trade, the question is substantially between the tenant for life and remainder-man. Buckley v. Buckley, 11 Barb. 43.

(b) The privilege in favor of *trade* applies only as between the landlord and tenant, not in favor of third persons. Oves v. Oglesby, 7 Watts, 106.

(c) Otherwise with iron salt-pans, for boiling, in salt-works, resting on brick-work. Mansfield v. Blackburne, 6 Bing. N. C. 426. In this case, there was a lease of salt-springs, the lessee to erect works and pay rent in proportion, and to leave the works in repair. *Ib.*

(d) Sheds erected upon posts, by a tenant, for the purpose of making brick, are fixtures, and, if not removed within the term, vest in the landlord. Beckwith v. Boyce, 9 Mis. 560. Spinning-machines, fixed by screws, some in the floor, some in lead, which was melted and poured into holes made in stone, are not part of the freehold, but subject to distress. Hellawell v. Eastwood, 3 Harr. Dig. (Supple.) 684.

ing on the land, provided it is a different and distinct erection, and not merely the old one repaired or reconstructed.(1) Thus a tenant may remove a wooden dwelling-house, with a cellar of stone or brick, and a brick chimney, erected by him for the business of a dairy-man, and the residence of those engaged in it, and in part improved for carrying on his trade of a carpenter.(2) An erection may be in part only for purposes of trade: as in the case of a cider-mill; or where a grazier also follows the occupation of a butcher; or a farmer uses his grain for distilling; or of machinery for working mines; in all which, the erections, though *connected with trade*, are used as means or instruments of *obtaining the profits of the land*. So in the case of a dairy-man's house, used partly for trade, and partly as a habitation. In such instances, it is suggested that the right of removal will depend upon the question, what is the *primary* business carried on.(a) 4. The tenant may remove articles erected for *ornament or domestic use*—unless the removal will cause great injury; such as hangings, glasses, chimney-pieces, blinds, stoves,(b) coffee-mills, shelves, bells, book-cases, cornices, fire-frames, &c., and in general such things as are necessary to domestic comfort, may be easily severed, and will be equally useful in another dwelling. Upon this point a distinction has been made between *fixtures* and *fixed furniture*.(3)

84. Upon the principle of the third class of cases, it seems, gardeners, nursery-men, &c., occupying as lessees, may remove trees and shrubs, which they themselves have planted for the purpose of *sale*; but not where they are planted for any other purpose. Whether green-houses erected by such occupants are removable, *quæ*.(4)(c)

(1) 1 Whart. 94; Beers v. St. John, 16 Conn. 322.

(2) Van Ness v. Pacard, 2 Pet. 137.

(3) Amos, 61-5; Avery v. Chesslyn, 5 Nev. & Man. 372; 2 Pet. 137; 17 Pick. 192; Birch v. Dawson, 2 Adol. & El. 37; Tayl. L.

& T. 365; see also Longstaff v. Meagoe, 2 Ad. & Ell. 167.

(4) Panton v. Robart, 2 E. 91; Lee v. Risdon, 7 Taun. 191; Amos, 66; King v. Wilcomb, 7 Barb. 263. See Adams v. Smith, Bre. 221.

(a) Where the tenant, being a tavern-keeper, erected a building which was used for a shed, stable, store-room and barn; held, they might be removed, if it could be done without injury to the land. Dubois v. Kelly, 10 Barb. 496.

(b) In Massachusetts, where a house was set off on execution, iron stoves, fixed to the brick-work of the chimneys, were held to pass with them. Goddard v. Chase, 7 Mass. 432. A question has been recently raised in England, whether a *door-plate* is a fixture. Lane v. Dixon, 11 Jur. 89.

(c) A the lessee of land, permitted B to occupy the land as a nursery-garden. The object of the garden was to cultivate trees, shrubs, plants, &c., for sale. B sold the trees, &c. to C. The fruit-trees having been attached, held, C might maintain trespass *de bon. aspor.* against the officer. The plaintiff had a right to remove the trees. He had the same title as his vendor. They were articles of produce, reared to be sold, and must be considered as personal property. Whether they could have been attached in a suit against the owner of the land, *quære*. Miller v. Baker, 1 Met. 27. If one, having a temporary interest in land, makes improvements, to more fully enjoy it while such temporary interest continues, he may at any time, before his right of enjoyment expires, remove such improvements, provided such removal do not leave the inheritance in a worse condition than when the tenant took possession. Thus where land is let for nurturing trees and plants, until they are fit to be transplanted, without any specific limitation of time, the interest of the owner of the trees in the land continues until that purpose is accomplished. King v. Wilcomb, 7 Barb. 263. See Whitmarsh v. Walker, 1 Met. 313.

In case of a green-house erected by a tenant, who has covenanted to yield up at the end of his term all erections and improvements; removal of the sashes and frame-work, fixed to the walls only by being laid on them, imbedded in mortar, is a breach of covenant. West v. Blakeway, 3 Scott, N. R. 218. And this, notwithstanding a license during the term to erect, and an agreement that the tenant might remove them. Ib. 2 Man. & G. 729. See Mansfield v. Blackburne, 8 Scott, 720.

85. On the other hand, a tenant in husbandry cannot remove his own erections for merely agricultural purposes, even though he leave the premises precisely as he found them; as, for instance, a beast-house, carpenter-shop, or cart-house. Nor can a mere farmer, who is not a professed nursery-man or gardener, carry away young fruit-trees raised on the land, for the purpose of planting in his gardens or orchards.

86. Neither can a tenant plough up strawberry-beds in full bearing, though he purchased them of a prior tenant, conformably to a general usage. (a) Nor can he remove a border of box—the tenant not being a gardener. (1)

87. It has been questioned, however, whether the strict rules of the common law as to agricultural erections are to be considered as adopted in this country, where so large a portion of leased property consists in wild lands, which it is the interest of landlords to have cleared and built upon. (2)

88. Where a tenant has the right of removing fixtures, he must, in general, exercise it before quitting possession; though not necessarily before the end of the term; (b) but the rule applies only to *fixtures* properly so called; not to chattels which are not so connected with the realty as to become a part of it; (see sec. 76;) and if the estate is uncertain in duration—as, for instance, an estate at will, or *pour autre vie*—he shall have a reasonable time after its expiration. It has been held, that for entering after the term expires, a tenant is liable only for a trespass upon the land; not to the articles removed. (3) Mr. Amos (4) questions this principle, and limits the right of removing fixtures, after the term expires, to the case where the tenant holds over. This he supposes to be the point settled in *Penton v. Robart*; (5) and that where the tenant quits possession without removing a fixture, he is supposed to make a dereliction of it to the landlord. The doctrine contended for by Mr. Amos seems to be confirmed by late decisions in England. (6) (c)

(1) *Watherell v. Howells*, 1 Camp. 227; *Empton v. Soden*, 4 Barn. & Ad. 655; *Wyndham v. Way*, 4 Taun. 316.

(2) 2 Pet. 145; *Lawrence v. Kemp*, 1 Duer, 363.

(3) *Holmes v. Tremper*, 20 John. 29; see

Heap v. Barton, 10 Eng. L. & Equ. 499; *Beckwith v. Boyce*, 9 Miss. 560.

(4) p. 86, *et seq.*

(5) 2 E. 88.

(6) *Hubbard v. Bagshaw*, 4 Sim. 338; *Weeton v. Woodcock*, 7 Mees. & W. 14.

(a) This case, however, was decided on the ground that the circumstances showed *malice*. It was said, that to take up strawberry-beds would not *per se* be actionable.

(b) On the other hand, if a tenant removes and sells fixtures *during the term*, not immediately replacing them; this is not *per se* a breach of a covenant to repair and uphold and deliver up the premises, *with all things affixed thereto*. *Doe v. Burnett*, 3 Harr. Dig. (Suppl.) 684.

(c) Where a lease was forfeited by bankruptcy of the tenant, and the lessor entered, but the assignees retained possession, and, three weeks after such entry, removed certain fixtures erected for trade, held, such removal was unlawful. *Weeton v. Woodcock*, 7 Mees. & W. 14. And, in Pennsylvania, it has been recently settled, (see sec. 89,) that as between a tenant for life and remainder-man, the removal must take place during the estate of the former. But in New York, a tenant, making improvements, which, by parol license or agreement, he has the right to remove, may remove them after his term expires, and while he remains in possession. *Dubois v. Kelly*, 10 Barb. 496.

So, although the lessor have conveyed his estate, and the improvements were made after, but without notice of such conveyance. *Ib.*

So, where the lessor of a mill agreed that the tenant might make repairs, the expense to come out of the rent, and put in fixtures, to be removed by him at the end of his term, or paid for by the landlord; and the landlord obtained an injunction against their removal

89. A, tenant for life, leased for years to B, under an agreement, that if the latter made certain erections, he should have the right to remove them, or they should be taken by A, at a valuation. B erected a frame stable and shops. A died before expiration of the lease, but B continued to occupy under, and pay rent to the remainder-man, C. C afterwards sold the premises. In an action for rent by C against B, B defended, on the ground that he had not been allowed for his erections, and that C had received the value of them in the sale. Held, B's right of removing ceased on A's death, and C was not bound by the contract between A and B.(1)

90. A fire-frame, fixed in a common fire-place, with brick laid in between its sides and the jambs, is a fixture; and a tenant, who has placed it there, cannot remove it after the expiration of his term and after leaving the premises, though he may before.(2)

91. A landlord offered the house for sale at auction, reserving a fixture placed in it by the tenant, but the house was not sold. At the expiration of his lease, the tenant sold the fixture, and quit the house. Held, the purchaser could not afterwards sever and remove the fixture.(3)

92. If a lessee without qualification surrender his lease, though he also take a new one from the same landlord; he loses his right to remove a building erected by himself. Otherwise, where he neglects to remove under a verbal agreement to buy the fixtures.(4)

93. In addition to the three classes of cases, enumerated by Lord Ellenborough in *Elwes v. Maw*, in which the question of fixtures arises; there are others, perhaps of less importance, but often occurring in practice, and referred to in the books.

94. Thus, while a tenant himself has the right of removing certain things affixed to the realty, *his creditors* may attempt to seize them, as

(1) *White v. Arndt*, 1 Whart. 91.

(2) *Gaffield v. Hapgood*, 17 Pick. 192. So with a furnace. *Stockwell v. Marks*, 5 Shepl. 455.

(3) *Ib.*

(4) *Shepard v. Spaulding*, 4 Met. 416; *Fitzherbert v. Shaw*, 1 H. Bl. 258; *Hallen v. Runder*, 3 Tyr. 959. See *Mitchell v. Speedley*, 10 Barr, 198; *Bratton v. Clawson*, 2 Strobb. 478.

during the term; held, they might be removed within reasonable time afterwards, though the tenant was no longer in possession. *Finney v. Watkins*, 13 Miss. 291.

The rule in the text has been held, as above stated, (sec. 88,) not to apply, where the duration of the tenant's interest is contingent; as where he holds for a life; in which case he has a reasonable time for removal after its termination. *Weeton v. Woodcock*, 7 Mees. & W. 14. So, where land is let for the nurturing of trees and plants, till they are fit for transplanting, the tenant may cultivate them till they are thus prepared, and then, from time to time, remove them. *King v. Wilcock*, 7 Barb. 263.

A lessor agreed with his lessee for years, to allow him, or any of his sub-lessees, the value of improvements made by them on portions of the demised premises, or the privilege of purchasing such portions at the appraised value, at the expiration of the term. The lessor, after portions had been sub-let, procured an assignment of the original lease to his son, the lessor paying the consideration therefor. In a bill by one of the sub-lessees, against the lessor, after the expiration of the term, to restrain a suit at law to recover possession, and also for a specific performance, it was not stated whether or not the other sub-lessees had made improvements, and the son of the lessor was not made a party. Held, that no relief could be granted upon the complainant's bill, as framed. *Ostrander v. Livingston*, 3 Barb. Ch. 416.

In England, an out-going tenant is sometimes allowed, by custom, to retain possession of the land on which his *away going* crops are sown, with the use of the barns and stables for housing and carrying them away; while the in-coming tenant has the privilege of entering, during the old tenancy, for the purpose of ploughing and sowing. *Boraston v. Green*, 16 E. 71. See *Beaty v. Gibbons*, 16 E. 116.

chattels, on legal process.(1) And there seems no room to doubt, that whatever the tenant himself might remove, may also be thus taken by creditors. Indeed, the question of a tenant's own rights is often raised in this way; and, therefore, the case of a *creditor's* claim upon fixtures may perhaps, with sufficient accuracy, be classed under the third of Lord Ellenborough's divisions.

95. Analogous to the case of a lessee, is that of one who occupies the land of another person as his *agent*. And the latter seems to stand on a less favorable footing, in regard to fixtures, than the former.

96. Thus, the agent of a mill-owner, occupying by permission and indulgence of the latter, who was his brother, inserted in the mill his own mill-stones and irons. Held, they became the property of the mill-owner, and were not liable to the creditors of the agent, though the mill had been carried away by a flood, and these alone remained on the premises, and were afterwards removed and offered for sale by the agent.(2)

97. Another case of very frequent occurrence relating to the law of fixtures, is that of *vendor* and *purchaser*;(a) where the owner of land conveys it to another, and the question arises, what shall pass with and as a part of the land. And here the law is no less strict in favor of the purchaser, than it is in favor of the heir, as between him and the executor.(3) Things personal in their nature, but fitted and prepared to be used with real estate, and essential to its beneficial enjoyment, pass with the realty. Thus, the conveyance of a *saw-mill*(b) passes the mill-chain, dogs and bars connected with it; that of a brewery, passes a malt-mill attached to it; that of a cotton-mill passes the waters, flood-gates, &c., and also the machinery, whether affixed or not. So kettles for manufacturing ashes, though not set, have been held to pass with the premises in which they were used. So fencing stuff, which has been used for fences, though temporarily detached from the land, but without any intention of a permanent separation. So manure in a barn-yard,

(1) *Wetherby v. Foster*, 5 Verm. 136.

(2) *Goddard v. Bolster*, 6 Greenl. 427.

(3) *Miller v. Plumb*, 6 Cow. 665; *Holmes v. Tremper*, 20 John. 30; 2 Washb. 403; *Des-*

patch, &c. v. Bellamy, &c., 12 N. H. 205; *Buckley v. Buckley*, 11 Barb. 43; *English v. Foot*, 8 S. & M. 444; *Petrie v. Dawson*, 2 Carr. & K. 138.

(a) The rule as to fixtures, between the owner and purchaser, at a sheriff's sale, is the same as between vendor and purchaser at private sale. *Farrar v. Chaffetete*, 5 Denio, 527. See *Bratton v. Clawson*, 2 Strobb. 478.

(b) It is to be observed, however, that this construction depended in part upon the use of the word *mill*, as a term of description. The grant of a saw-mill or grist-mill, with its privileges and appurtenances, will pass the land under it, and that required for the use of the mill; also, the head of water necessary to its enjoyment. *Maddox v. Goddard*, 3 Shepl. 218; *Rackley v. Sprague*, 5 Shepl. 281. So also the right of flowing back upon otherlands of the grantor, as before the conveyance. *Ib.* The grant of a "mill-site" passes all the land covered by the mill. *Crosby v. Bradbury*, 2 Appl. 61.

Conveyance of a lot of land, with one rolling-mill establishment, buildings, apparatus, steam engine, boilers, bellows, &c., attached to the establishment. Held, *rolls* passed as part of the machinery, though temporarily detached. *Voorhis v. Freeman*, 2 W. & Serg. 116; *Pyle v. Pennock*, *Ib.* 390.

A clapboard machine and shingle machine, fastened into a saw-mill, to be there used, are to be considered a part of the realty, and will pass to the creditor or purchaser by a levy upon the real estate, or a sale thereof. *Trull v. Fuller*, 28 Maine, 545.

It is held, in a late case, that if a conveyance of a mill or manufactory use words commonly applied to machinery, it will pass with the mill; otherwise, if not. *Teaff v. Hewitt*, 1 M'Cook, 540.

even though (it seems) lying in heaps. So a steam-engine, with fixtures, used to drive a bark-mill, and pounders for breaking hides in a tannery, erected by the owner; is part of the realty, and passes by a conveyance thereof. And there are many articles, absolutely necessary to the use and enjoyment of the land, which will pass to a purchaser, whether actually upon the land or not. Such are doors, windows, locks, keys, mill-stones, &c. They are *constructively annexed*.(1)

98. Nor is it material, whether the erection is for trade or manufactures, or merely *agricultural*. If the article in question is necessary for carrying on the business meant to be followed, it passes to the purchaser. Thus, a cotton-gin, attached to the gears in the gin-house upon a cotton plantation, passes with the land.(2)(a)

99. But where the owner of land having a tanning-mill upon it sold the land, with a parol reservation of the mill, and afterwards sold the latter to another purchaser; held, (it seems) that a mill-stone, affixed to the mill with iron fastenings, did not pass with the land.(3)(b)

100. Where the land conveyed is *public property*, the grant will not pass wood, which has been previously cut and corded by a person without title; but the latter may have an action against the purchaser for taking it away.(4)

101. It has been formerly questioned, whether fixtures would pass

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| <p>(1) Liford's case, 11 Co. 51; Leroy v. Platt, 4 Paige, 77; Farrar v. Stackpole, 6 Greenl. 154*; Phillipson v. Mullanphy, 1 Misso. 620; Goodrich v. Jones, 2 Hill, 142; Voorhis v. Freeman, 2 W. & Serg. 119; Oves v. Ogels-</p> | <p>by, 7 Watts, 106; Harlan v. Harlan, 15 Penn. 507.
(2) Farris v. Walker, 1 Bai. 540.
(3) Heermanee v. Vernoy, 6 John. 5. See 9 Cow. 39.
(4) Jones v. Snelson, 3 Misso. 393.</p> |
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(*) This case contains an interesting exposition of the law of fixtures, as modified by the numerous inventions and improvements of modern times, both for purposes of domestic convenience, and more particularly for carrying on the various branches of manufactures.

(a) Where the owner of land erects a dye-house upon it, and sets up dye kettles therein, firmly secured in brick-work, they become a part of the realty, and pass without express words, by a deed of the land. Noble v. Bosworth, 19 Pick. 314. The floor of a bar-iron mill, consisting of plates, kept down by their own weight, and removable without injury, passes with the mill to an execution purchaser. Pyle v. Pennock, 2 W. & Serg. 390.

(b) Though the criterion of fixtures in a mansion or dwelling, be actual and permanent fastening to the freehold, it is not such in case of a mill or manufactory. But machinery, necessary to the existence of a mill, &c., *as such*, is part of the freehold, though not fastened to the floor or walls, as between vendor and purchaser, heir and executor, execution debtor and creditor, or co-tenants of the fee; but not between tenant and landlord or remainderman. Thus, a sheriff's sale and conveyance, under a judgment on mortgage, of a lot and iron rolling-mill, "with the buildings, apparatus, steam engine, boilers and bellows attached to the same," passes the entire set of rolls with their duplicates, even though for a time detached. So, these would pass by the mortgage, as chattels, under the term *apparatus*. Voorhis v. Freeman, Penn. Sept. T. 1841, Law. Rep. Mar. —42, p. 452.

A cotton-gin, in its place, that is to say, connected with the running works in the gin-house, is a fixture that passes to the purchaser of the house. Bratton v. Clawson, 2 Strobb. 478.

Where an action of trespass, for carrying off a gin, was brought by a plaintiff, who had purchased, at sheriff's sale, the land upon which stood the gin-house, with the gin attached in the usual way, by a band, without proof of notice that the gin was excepted or severed from the house; and where the defendant had purchased the gin as a movable, the former owner, who was the defendant in the execution, having directed the sheriff to levy on the gin separately, and given bond for its delivery; held, such direction and conduct, on the part of the defendant in execution, was merely an inchoate arrangement, and did not amount to a practical severance of the gin from the rest of the machinery, so as to make it personal property, not passing with the house as a fixture. *Ib.*

by a *mortgage* of the land, without being specially named.(1)(a) But there seems to be now no reason to doubt that they do pass. Thus the mortgagee may have a bill for an injunction against waste in their removal.(2) And the mortgagor's possession is not deemed fraudulent, as in case of mere chattels.(b) So, although an erection, which the jury find to be not a fixture, is separately conveyed in a mortgage of the land, the mortgagee need not take possession of it as a chattel to give him title against creditors of the mortgagor.(3) So, as between mortgagor and mortgagee, fixtures put up on premises leased for years, pass by a mortgage of the land.(4)

101 *a.* A steam-engine, erected in a permanent manner in a tan-yard, to facilitate the process of tanning, and used there for such purposes for two or three years, but which could be removed without injury to the building with which it was connected by braces; was held to be a fixture, and to pass by a mortgage of the land.(5)

102. The tenant of a house, in which certain fixtures had been erected, mortgaged it without mentioning them. He afterwards assigned the premises and all his estate and effects to trustees, and, while the trustees were in treaty for selling the fixtures, the mortgagee, his debt being due, entered forcibly, and refused on demand to deliver them. Held, trover did not lie against him.(6)

103. Of somewhat similar nature is the case of a *mechanic*, claiming a lien upon a building, which he has erected. Where such building was a *theatre*; held, the lien embraced the permanent stage, but not the movable scenery and flying stages; the former being a part of the freehold, but the latter only necessary for theatrical exhibitions—a species of *trade*. A mechanic's lien will embrace a steam engine used for propelling a saw-mill.(7)

103 *a.* An engine house, partly of stone and partly of wood, with stone foundations for a steam-engine, erected by a tenant for years for the use of a coal-mine, he having the privilege of removing all fixtures at the expiration of his term, is not the subject of a mechanic's lien.(8)

104. As between mortgagor and mortgagee, a different question arises in regard to fixtures, viz.; whether either of them may remove erections, which he himself has made upon the land. In Massachusetts, one holding land subject to redemption may, even after a decree

(1) Quincy, 1 Atk. 477. This case was evidently decided on its own phraseology, and not on any distinction between conditional and absolute sales.

(2) Amos, 188, *et seq.*; Union, &c. v. Emerson, 15 Mass. 159; Robinson v. Preswick, 3. Edw. 246.

(3) Steward v. Lombe, 1 Brod. & B. 510; See Wheeler v. Montefiore, 1 Gale & Dav.

493; Hitchman v. Walton, 4 Mees. & W. 409; Buckley v. Buckley, 11 Barb. 43.

(4) Day v. Perkins, 2 Sandf. Ch. 359.

(5) Sparks v. State Bank, 7 Blackf. 469.

(6) Longstaff v. Meagoe, 2 Ad. & El. 167.

(7) Olympic, &c., 2 Browne, 285; Morgan v. Arthurs, 3 Watts, 140.

(8) White's Appeal, 10 Barr, 252.

(a) It has been held that gas-fixtures and sitting stools, placed by a tenant in a shop or store, though fastened, are mere chattels, and may be mortgaged as such; and in an action by the landlord, against a subsequent tenant, for not delivering them, he may set up in defence, the title of the mortgagee. Lawrence v. Kemp, 1 Duer, 286.

(b) Where a landlord distrained certain fixtures, and an action of trover was brought against him; held, an allegation in the writ, describing them as goods and chattels, did not estop the plaintiff to rely upon the fact of their being annexed to the realty, as making the distress illegal. Dalton v. Whitem, 3 Ad. & El. N. S. 961.

Fixtures are not distrainable, because not capable of being restored or put back. Darby v. Harris, 1 Ad. & El. N. S. 895.

to redeem, remove a barn and blacksmith's shop erected by him, and so slightly affixed, that they may be removed with but little disturbance of the soil. In the same State, it has been since held, that a kettle, set by the owner of a freehold, who afterwards mortgages such freehold, cannot be removed by him, or taken as his personal property, but passes by the mortgage, though *appurtenances* are not expressly named. And in a recent case, the same general principle has been settled, with regard to additions to the freehold made by the mortgagor *after* the mortgage; and the reason for the distinction between such a case, and that of improvements made by a *tenant*, very clearly and satisfactorily shown to consist in the fact, that both a mortgagor and a tenant are presumed to make the improvements *for their own benefit*; which object will be best effected by treating them in the former case as part of the freehold, and in the latter as personal property, removable by the tenant. The further consideration was suggested, that one of the most usual purposes of mortgaging real estate, is the raising of money to be expended on its improvement.(1)

105. In New Hampshire, a mortgagor in possession is a trespasser, if he remove a *mill* which he himself has built, or anything attached to it. This decision proceeds upon the ground, that the mortgagor has only to redeem, in order to have the benefit of the building; and, if not worth redeeming, he ought not to do anything to lessen the value of the property.(2)(a)

106. In South Carolina a statute provides, that a tenant shall not alter or remove buildings, without written permission from the landlord, under penalty of forfeiting the residue of the term.(3)

107. In England, *shares* in some corporations have been held to be real estate; as for instance in the *New River water*, in the navigation of the river Avon, and in some navigable canals.(4)

108. So, in Connecticut, shares in a turnpike were held to be real estate. But a subsequent statute has provided otherwise.(5)(b)

(1) Taylor v. Townsend, 8 Mass. 411; 15 Mass. 159; Winslow v. Merchants', &c., 4 Met. 306.

(2) Pettengill v. Evans, 5 N. H. 54.

(3) S. C. St. 1817, 37.

(4) 1 Cruise, 38; 2 Ves. 652. Chancellor Kent says, that in England, shares in companies acting on land exclusively, as railroad, canal and turnpike companies, are held to be real estate. 3 Comm. 310, n. 5th ed.

But see, as to shares in *Water Works*, that they are *personal*, Bradley v. Holdsworth, 3 M. & W. 422: Bligh v. Brent, 2 Y. & Coll. 268. If A. & B. build a bridge across a river between their respective lands, by authority of the Legislature; the bridge is real estate. Meason, 4 Watts, 341.

(5) Welles v. Cowles, 2 Conn. 567; Dutt. 46. See Price v. Price, 6 Dana, 107.

(a) If a mortgagor erects fixtures, he cannot remove them before payment of the debt. And if the mortgagee removes them after the mortgagor's death, they do not belong to the executor of the latter. Butler v. Page, 1 Met. 40.

(b) A testator bequeathed the interest and proceeds of the residue of his property, "of every description it might be at his death," to certain persons for their lives; and after the decease of the survivor, he bequeathed the residue in equal moieties between the British and Foreign Bible Society, and the Home Missionary Society. Part of the testator's property consisted of railway shares. On a bill filed by the treasurer of one of the charities, it was held, *without prejudice to the question whether the railway shares were or were not real estate* within the mortmain act, that the ultimate remainder-men were entitled to have the railway shares sold, and the produce invested in consols. Thornton v. Ellis, 10 Eng. Law and Eq. 85.

In Kentucky, shares in a railroad corporation have been held real estate, descending, as

109. In Massachusetts, shares in a corporation are personal property, even though the corporation be instituted merely for the purpose of holding real estate.(1) Shares in a railroad corporation are expressly made personal estate.(2) And it has been decided in Rhode Island, that shares in a bridge corporation were personal property; and also, that when they belonged to a wife, and the husband died without doing any act to reduce them to possession, they vested in the wife, not in his administrator.(3) In North Carolina and Ohio, shares in corporations are personal estate.(4) And this is undoubtedly the general principle of American law.

110. In equity, money directed or agreed to be *laid out in land*, is regarded as land. A court of equity, regarding the substance, and not the mere forms and circumstances, of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance; provided the purposes for which the acts are to be done are legal, and can be carried into effect. The true meaning of this maxim is, that equity will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been.(5)

111. Thus, where one devises and bequeaths all his real and personal estate to trustees to be sold, and then bequeaths the proceeds to an alien; the interest bequeathed to the latter is personal estate, and he shall hold it. So, where land is devised to a wife, but with orders that it be turned into money, the husband takes the absolute title. So, land held for trading purposes, is in equity treated as personal property.(6)

112. Where money is directed or agreed to be turned into land, or the converse, if the *cestui que trust* has the whole beneficial interest, he may, at any time before the conversion takes place, either by his acts or declarations, or by application to a court, elect to take either the

(1) Sull. on L. T. 71; 4 Dane, 670; Russell v. Temple, 3 Ib. 108.

(2) Mass. Rev. Sts. 343.

(3) Arnold v. Ruggles, S. J. C. Sept. 1837.

(4) N. C. Rev. St. 121; Walk. Intr. 211.

(5) 3 Wheat. 578; Hawley v. James, 5 Paige, 318; 1 Story on Eq. 79; See Coster v. Clarke, 3 Edw. 428; Beardsley v. Knight, 10 Verm. 185; Arnold v. Gilbert, 5 Barb. 190; Lindsay v. Pleasants, 4 Ired. Equ. 320.

(6) Craig v. Leslie, 3 Wheat, 563; Proctor v. Fenebee, 1 Ired. Equ. 143; Bligh v. Brent, 2 Y. & Coll. 268; Thomas v. Wood, 1 Md. Ch. 296. See Queen v. St. Margaret, &c., 2 Ad. & Ell. (N. S.) 559; Wood v. Keyes, 8 Paige, 365; Bogert v. Hertell, 4 Hill, 492;

Foster v. Hilliard, 1 Story R. 77; Bleight v. Manufacturers &c., 10 Barr, 131; Johnson v. Corbett, 11 Paige, 265; Swartwout v. Burr, 1 Barb. 495; Peter v. Beverly, 10 Pet. 533; Gott v. Cook, 7 Paige, 534; Kane v. Gott, 24 Wend. 660; Rutherford v. Green, 2 Ired. 122; Reading v. Blackwell, 1 Baldw. 166; Tilghman, 5 Whart. 44; Amphlett v. Parke, 2 R. & My. 221; Dawes v. Haywood, 2 Dev. & B. Equ. 313; Grieveson v. Kissopp, 2 Keen, 653; Harcourt v. Seymour, 5 Eng. L. & Equ. 203; White v. Smith, 8 Ib. 77; Slocum v. Slocum, 4 Edw. Ch. 613; Coyte, &c., 3 Eng. L. & Equ. 224; Rawley v. Adams, 7 Beav. 548.

such, to heirs, and subject to dower. Price v. Price, 6 Dana, 107. Otherwise in Ohio, Johns v. Johns, 1 McCook, (Ohio,) 350.

In Maryland, where a statute provided, that the property of a corporation should be held as real estate; held, this applied only to the stockholders themselves, not as between them and third persons: and, therefore, that the levy of an execution must be as upon personal property. Cape Sable, &c., 3 Bland, 670. On the other hand, canal stock, though declared to be personal property, is still real, and governed by the same law as the land over which the canal passes. Binney, 2 Ib. 138.

land or the money. If he make no election, and die, as to his representatives, the conversion shall be intended to have taken place. The mere direction of a testator will not change the proceeds of land sold into personalty. They will still remain mere equitable assets.(1)

113. Where by will land is appropriated to the payment of debts and legacies, the heir or residuary legatee has a resulting trust in the land, subject to the fulfilment of this object: and he may either restrain the trustee from selling more than is required, or offer to pay the debts and legacies; and either a portion of the land or the whole, as the case may be, will then be held as land, and not as money. Otherwise, where the evident intent is, to give the character of personalty to the whole proceeds. If the legatee of the money to be raised by a sale of land elect to take the land instead, the law regards it as a new acquisition by him, and it will descend from him as such, and not as inherited property.(2)

114. In England it has been held, that the land shall be treated as land, with reference to a residuary legatee, even though he have made no election. But this doctrine is expressly overruled in this country.(3)

115. Where land of one deceased is sold by order of court for payment of debts, the surplus shall be distributed as real estate. So a recognizance, given to husband and wife for her share in the estate of one deceased, survives to her upon the husband's death—following the nature of the land. So an annuity secured to a widow in lieu of dower is treated as land, and as such passes to her second husband. But a bond, given to one heir for his share of the land descended, is personal property;(a) and, if an order contained in a will for the sale of land is *conditional*, it does not become personalty till actually sold.(4)

(1) 3 Wheat. 563; *State v. Nicols*, 10 Gill & J. 27; *Clay v. Hart*, 7 Dana, 6; See *Haggard v. Rout*, 6 B. Mon. 247.

(2) 3 Wheat. 582-3-5; *Simpson v. Kelso*, 8 Watts, 247.

(3) *Ib.* *Roper v. Radcliffe*, 9 Mod. 167.

(4) *Diller v. Young*, 2 Ye. 261; *Yoke v. Barnet*, 1 Binn. 364; *Lode v. Hamilton*, 2 S. and R. 493; *Parke & J.* 287. See *Henry v. McCloskey*, 9 Watts, 145; *Parker v. Stuckert*, 2 Miles, 278; *Wright v. Rose*, 2 Sim. & Stu. 323; *Moses v. Murgatroyd*, 1 John. Cha. 130; *Ch. 34*, § 1, n.; *Burn v. Sim*, 1 Whar. 252; *Simpson v. Kelso*, 8 Watts, 247; *Tilghman*, 5 Whar. 44; *Reading v. Blackwell*, 1 Bald. 166; *Rinehart v. Harrison*, *Ib.* 177; *Wharton v. Shaw*, 3 W. and Serg 124;

Hannah v. Swarner, *Ib.* 223. Where land is devised to a married woman, to be sold, the husband will not be allowed to purchase it, and thus acquire an interest as husband. *Samuel v. Samuel*, 4 B. Monr. 256. Where A. agreed with B. to sell land to B., but died before giving a deed, the agreement being then valid, but afterwards ceasing to be so by the *laches* of B.; held, the next of kin, not the heir of A., took the land. *Curre v. Bowyer*, 5 Beav. 6, n. Where one, having made a devise of land, sells it, and a deed is given after his death, the price belongs to the executor, &c., though there is a lien on the land therefor. *Farrar v. Winterton*, 5 Beav. 1. See *Simpson v. Ashworth*, 6, 412; *Evans v. Salt*, 6, 266.

(a) These several points have been decided in Pennsylvania. They seem hardly reconcilable. The first conforms to the Statute Law of Massachusetts. *Rev. St.* 457. See *Stover v. Com.* 16 Penn. 387.

Where, upon partition in the orphans' court, the land is adjudged to a part of the heirs, who give their recognizance, the conversion of the other heirs' share of the realty into personalty is complete, when the recognizance is given, and the land is adjudged to the acceptors. *Ebbs v. The Commonwealth*, 1 Jones, 374.

The following somewhat miscellaneous decisions may be cited to illustrate the several principles stated in the text.

A testator devised his estate to his widow for life, and directed his executors, after her decease, if the majority of his children should agree, to sell the real estate, and out of the proceeds to pay a debt, and a certain sum to each of his children, and to distribute the re-

116. The distinction between real and personal estate, though less important in the United States than in England, where, by the common

sidue among his children three years thereafter. Held, the real estate was not converted into personalty until a sale by consent on the death of the wife; and that the share of a married daughter, dying in the lifetime of the wife, descended to her children, and did not pass to her administrator. *Nagle's Appeal*, 1 Harris, 260.

Husband and wife conveyed the equity of redemption in land belonging to the wife to a trustee, in trust to sell the same for their benefit. Held, a conversion of the land into personalty, so that the husband might dispose of it in the lifetime of the wife, and after her death hold it absolutely and against her heirs, although the land were not sold under the trust. *Siter v. M'Clanachan*, 2 Gratt. 280.

The land thus being converted into personalty, the husband may make a valid mortgage of it without having his wife join in the deed. *Id.*

Real estate, settled in trust for a wife for life, &c., was sold by the husband under a power of sale, and the proceeds invested in stocks, though required by the settlement to be invested in land. The husband, wife, and surviving trustee, by a deed declared the stock to be held on the trusts of the former deed. The husband died in the wife's lifetime, intestate. She made her will after his death, whereby she gave all her personal estate and effects "whatsoever and wheresoever, and of every kind soever, which she should be possessed of or entitled to at the time of her death, in possession, remainder, reversion, or expectancy," to her two daughters. The produce of the sale of the land was never re-invested in land, pursuant to the trusts of the original settlement. Held, the stock was to be treated as real, and not personal estate; that it did not pass by the will of the wife, the words there used relating exclusively to personal estate; and that it descended to the heir at law. *Gillies v. Longlands*, 5 Eng. Law and Eq. Rep. 59.

Where the land of a married woman was sold by order of a court of equity for partition; held, the husband was entitled to a life estate in the proceeds of the sale, in the same manner as he would have had a life estate in the land, if it had remained unsold. *Forbes v. Smith*, 5 Ired. Eq. 369.

Where the real estate of a married woman has been converted into personalty by operation of law, during her lifetime, it will be disposed of by the court, after her death, in the same manner as if she had herself converted it into personal property previous to her death. *Graham v. Dickinson*, 3 Barb. Ch. 169.

Conveyance of the estate of a feme covert, by her and her husband in trust, with a provision that, upon her death, the husband should have a life estate in the land, or, in lieu thereof, \$2,500 out of the proceeds, if he should prefer to sell. After the wife's death, the husband let the land for a year, and afterwards elected to sell; but, as the trustee was dead, a new one was appointed by a friendly suit in chancery, and the land advertised for sale, but the husband died before the day of sale. Held, the husband having elected to sell in lieu of a life estate, such election was an equitable conversion of the land into money, on the principle that that which ought to have been done should be considered as done, that the election was not defeated by his death, and that the sum of \$2,500 should be paid his executor, deducting the rent reserved. *Washington v. Abraham*, 6 Gratt. 66.

A testator devised his lands to his executors to be sold, and gave a legacy of \$2,000 to his niece, to be paid to her out of the proceeds of the sale of his real estate. Held, the surviving husband of the niece had the same title to demand this legacy bequeathed to his wife, as if it had been payable out of the personal estate of the testator; and that it made no difference whether the wife died before or after the sale actually took place. *Thomas v. Wood*, 1 Maryland Ch. Decis. 296.

Where, for the purpose of making partition, a wife's land was sold, and, after the sale, the husband assigned the purchase-money, but, while it remained in the commissioners' hands, the wife died; held, the purchase-money was to be regarded as land, that the marital rights had never attached, and that the assignee of the husband took only his share in the fund, as distributee of his wife. *Ex parte Mobley*, 2 Rich. Eq. 56.

A testator in Kentucky devised land to his widow during life or widowhood. By statute and judicial proceedings there, she was empowered to sell the land and invest the proceeds in land in Missouri. Held, that the money received by the sale was to be regarded as real estate. *Gates v. Hunter*, 13 Mis. 511.

When the land of an infant is sold by a decree of a court of equity for a particular purpose, any surplus of money, that remains after that purpose is accomplished, will be regarded as real estate; and, upon the death of the infant, intestate, will go to his heirs at law, and not to his next of kin. *March v. Berrier*, 6 Ired. Eq. 524.

The statute in New York, authorizing the sale of lands of infants, must be construed according to the principles of the common law at the time of its passage, by which the proceeds of such sale retain the character of real estate, even after the infant attains his majority, in the absence of any act or intent on his part to change its character; and where he

law, lands are not subject even to the payment of debts, except of a certain kind, is, notwithstanding, in many points of view, of the highest consequence. Real estate in many of the States cannot be held by *aliens*. Real estate only can be entailed, or is subject to curtesy and dower. Different formalities are required for the conveyance and devise of real and personal property. Lands and chattels are disposed of differently by executors and administrators, and upon legal process. And the distinction often decides the validity of uses, trusts and remainders. The various tenures, incidents, liabilities and transfers of real property are not, of course, to be properly treated of, in this mere introductory view; but will constitute the subjects of the subsequent portions of the work.

died after attaining his majority, without manifesting such intent, as in case of his retaining a bond and mortgage given for the purchase-moneys of his land sold during infancy, the moneys received thereby were held to go to his heirs at law according to the statute of descents. *Foreman v. Foreman*, 7 Barb. 215. See *Sweezey v. Thayer*, Duer, 286.

Where a lunatic, whose real estate had been sold by order of court, for his maintenance and the payment of his debts, died intestate, and an unexpended balance of the fund from such sale remained in the hands of his committee, it was held, that this balance was to be regarded as land, for the purposes of distribution. *Ib.*

Money paid into court by a railway company, for land taken under the lands clauses act, from a person who was in a state of mental imbecility, and who continued in that state until his death, but was not the subject of a commission of lunacy, was ordered after his death not to be re-invested in, or considered as land, but to be paid to his executors. *Flamank ex parte*, 3 Eng. Law and Eq. Rep. 243.

Equitable conversion takes place in case of an agreement to sell, although the option to purchase within a certain time rests solely with the purchaser. *Kerr v. Day*, 14 Penn. State R. (2 Harris,) 112.

An interest in a contract for the purchase of land is real estate, and descends to the heirs of the purchaser, and the purchaser's administrator, if he receive rent for such land, or money for the sale of the intestate's interest therein, is accountable to the heirs for the amount so received. *Griffith v. Beecher*, 10 Barb. 432.

A devise of land to executors to sell for the payment of debts is a conversion of it, and the proceeds are applicable to pecuniary legacies. *Sharpley v. Forwood*, 4 Harring. 336.

CHAPTER II.

ESTATES IN LAND. ESTATE IN FEE SIMPLE.

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| 1. <i>Estates, &c.</i> —meaning of the terms.
5. <i>Freehold</i> .
8. <i>Fee simple</i> .
9. Feudal law and American tenures.
16. <i>Seizin</i> .
21. Entry.
26. Seizin of heirs— <i>continual claim</i> . | 31. Seizin <i>in law</i> and deed.
33. <i>Disseizin</i> .
45. <i>Abeyance</i> .
48. Freehold <i>in futuro</i> .
50. Rectors and parsons.
56. <i>Incidents</i> to a fee simple. |
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1. AN *estate* in land, is the interest which the tenant has therein ; or the condition or circumstance in which the owner stands with regard to his property. It implies some kind of actual interest or ownership—not a bare possibility, as in case of an heir apparent ; or a mere power, as where one orders his executors to sell his land.(a) The words *estate*, *right*, *title* and *interest*, express substantially the same idea, more especially when used in a *devise*.(1) The land is one thing, says Plowden, and the estate in the land is another thing ; for an estate in the land, is a *time in the land*, or *land for a time*.(2)

2. Estates may be considered with respect to their *quantity* and their *quality*. *Quantity* is the extent of time or degree of interest ; as in fee, for life, &c. *Quality* refers to the nature, incidents and other collateral qualifications of interest, as a condition, joint-tenancy,(3)(b) &c.

3. Another classification of estates is, 1, as to the quantity of interest ; 2, as to the time when it takes effect, whether immediate or future ; 3, as to the number and relation of the owners.(4)

4. Any person holding an interest in land, for years, for life, or any greater estate of freehold, in reversion or remainder, is an *owner*.(5)(c)

(1) *Newkirk v. Newkirk*, 2 Caines, 351 ; 1 Steph. Comm. 216 ; *Jones v. Roe*, 3 T. R. 93 ; *Knocker v. Bunbury*, 8 Scott, 414 ; *Doe v. Tomkinson*, 2 M. & S. 170 ; *Queen v. St. Margaret, &c.*, 2 Ad. & Ell. N. S. 559 ; *Doe v. Shotton*, 8 Ad. & Ell. 905.

(2) *Walsingham's Case*, Plow. 555.

(3) Co. Lit. 345 a ; 1 Cruise, 39 ; 2 Bl. Com. 103 ; 1 Pres. on Est. 7 ; see Wisc. Rev. Sts. 313.

(4) *Ib.*

(5) *Ellis v. Welch*, 6 Mass. 251 ; *Davenport v. Farrar*, 1 Scam. 316.

(a) Trustees under a will being empowered "to grant and sell the whole or any part" of the testator's "estate, real or personal, with full power to execute any deed or deeds effectual in law to pass a complete title thereto," held, the legal estate did not vest in the trustees. *Fay v. Fay*, 1 Cush. 93.

As to the technical meaning of the words "propriety" and "liberties," when used in ancient colonial statutes, see *Com. v. Alger*, 7 Cush. 70, 71.

(b) It is said, that qualified and conditional fees differ from fees simple only in *quality*. With respect to *quantity*, these estates stand on equal ground. Co. Lit. 18, a ; 1 Steph. Comm. 224-5.

(c) A statute provided a penalty for cutting timber, recoverable by the *owner* of the land. Held, the owner in fee was the party intended ; and a devisee for life, with a naked and contingent power to dispose of the land, if necessary, for a special and limited purpose, with remainder over, could not sue for the penalty. *Jarrot v. Vaughn*, 2 Gilm. 132. A contractor for the erection of a house, who has an equitable title to it, is an *owner* under the New York lien law of 1851. *Belmont v. Smith*, 1 Duer, 675.

5. With respect to the quantity of interest, the primary division of estates is into *freehold* and *less than freehold*.

6. A freehold is defined to be an estate in lands or other real property, held *by a free tenure*, for the life of the tenant, or that of some other person, or for some uncertain period. It was formerly characterized, as an estate which could be created only by *livery of seizin*, or as the possession of the soil by a *freeman*; a freeman being one who could go where he pleased.(1)(a) Neither of these definitions is applicable to the United States. All claim to be freemen, and livery of seizin is universally dispensed with, either by usage, or by the express language or necessary implication of statutory provisions. A freehold is now(b) well described, as any estate of inheritance or for life in real property.(2) It seems quite superfluous to add *immobility* as another quality of freeholds. Immobility is a property of land itself, but not of an interest in land.

7. Freeholds are divided into *estates of inheritance* and *estates not of inheritance*. These again are subdivided, as will be seen hereafter.

8. The highest estate in lands known to the American law is a *fee simple*. A fee simple is a *pure inheritance* or *absolute ownership*, clear of any qualification or condition; or "a time in the land without end;" and upon the death of the proprietor gives a right of succession to all his heirs. This application of the word *fee*, to express the quantity of interest in land, and not the tenure by which it is held, is as old as Littleton and Plowden, and, although questioned by some later commentators, has been on the whole successfully vindicated.(3)

9. The learned author of a "Digest of the laws of England respecting real property" prefixed, to the *second edition* of his valuable book, "a preliminary dissertation on Tenures;" rightly treating this portion of his labors as rather an introduction to the work than a component portion of the work itself. In entering upon a view of the *American* law of Real Property, it can serve no practical purpose to go into all the intricacies of the Feudal Law. The early settlers of this country left that law behind

(1) Brit. c. 32; Lit. s. 59; 2 Bl. Com. 80; Dalrymple on Feud. Prop. 11; 1 Cruise, 39; Wisc. Rev. Sts. 313.

(2) 4 Kent, 23-4. See 1 N. Y. Rev. Sts. 722.

(3) 2 Bl. Com. 81; Lit. s. 1 & n. 1; Plow. 555; Wisc. Rev. Sts. 313.

(a) "A free tenement (freehold), is that which one holds to him and his heirs. So, also, for his life only, or for an indeterminate period, without other certain limitation of time; as, until something is done or not done; as if it is said, I give to such an one, until I shall provide for him. But freehold cannot be predicated of anything which one holds for a certain number of years, months, or days; although for the term of a hundred years, which exceeds the lives of men." Bracton, 207, a.

(b) A tenant for his own life, or for the life of another, is a freeholder, and may levy a fine. Roseboom v. Van Vechten, 5 Denio, 414.

A person in the adverse, though wrongful possession of land, holding as owner, has a tortious estate, and is a freeholder *de facto*. Such tortious estate authorizes the levying of a fine, which, after five years' non-claim, would bar the rights of the remainder-men and strangers. *Ib.*

Where a widow, seized of land *durante viduitate*, the remainder being in her children, conveyed in fee, with full covenants, to one who entered and held the land, claiming to be owner in fee, and the defendant, having entered and held as owner under mesne conveyances from the grantee of the widow, levied a fine with proclamations while the New York statute of fines, was in force; held the fine was valid, and barred the remainders. *Ib.*

them;(a) or, if any relic of it survived till the revolution, all was then swept away. The feudal law was a *political* system, which never made any part of American institutions. The policy and government of some States, indeed, approached nearer to it than that of others. New Hampshire, New York, Virginia, the Carolinas(b) and Georgia, administered by royal commissions; and Pennsylvania, Maryland and Delaware, by proprietary patent—were less decidedly *anti-feudal*, than Massachusetts, Rhode Island and Connecticut, with their free and well-defined corporate charters. Still the *feudal system*, with all its cumbrous machinery, such as it was when abolished in England by St. 12 Cha. 2, c. 24, was never transferred to the United States in practice, and in some instances, as in Massachusetts by a colonial act of 1641, was expressly abrogated; and it has been truly said, that every real vestige of *enure* is annihilated.(1)(c)

(1) 4 Kent 24; Jurist, No. 31, page 97.

(a) "Our New England ancestors left behind them the whole feudal system of the other continent." Webster, Speech in Convention, Speeches, 205.

(b) In North Carolina, before the Revolution, statutes were enacted "by his Excellency the Palatine, and the rest of the true and absolute Lords Proprietors of the Province of Carolina, by and with the advice and consent of the rest of the members of the general assembly."

(c) Chancellor Kent gives the following clear and precise accounts of *feuds*. "These grants, which were first called *benefices*, were, in their origin, for life, or perhaps only for a term of years. The vassal had a right to use the land and take the profits, and he was bound to render in return such feudal duties and services as belonged to a military tenure. The property of the soil remained in the lord from whom the grant was received. The right to the soil and to the profits of the soil, were regarded as separate and distinct rights. This distinction continued when feuds became hereditary. The king, or lord, had the *dominium directum*, and the vassal, or feudatory, the *dominium utile*; and there was a strong analogy between lands held by feudal tenure, and lands held in trust; for the trustee has the technical legal title, but the *cestui que trust* reaps the profits. The leading principle of feudal tenures, in the original and genuine character of feuds, was the condition of rendering military service. Prior to the introduction of the feudal system, lands were *allodial*, and held in free and absolute ownership, in like manner as personal property was held. Allodial land was not suddenly, but very gradually supplanted by the law of tenure; and some centuries elapsed between the first rise of these feudal grants and their general establishment." Commentaries, vol. 3, pp. 494-5. He goes on to remark, that in England, from the earliest periods, lands were held by feudal tenure alone, although this species of title was first fully established by the Norman conquest. Tenures were either by *knight service*, consisting of *military services*, or by *socage*, in which the services were generally *predial* or *pacific*. The former class, though held the more honorable, were subject to divers burdens and exactions of a very oppressive character; that of *aids*, or pecuniary payments, when ever the lord married his daughter, made his son a knight, or was himself taken prisoner; *reliefs*, paid by an heir of the tenant, upon succeeding to the inheritance; *wardship* and *marriage*, the guardianship and disposition in marriage of an infant heir; *fine*, upon any alienation of the land; and *escheat*, or a reverting of the land to the lord for the crime, or upon failure of heirs, of the tenant. *Ib.* pp. 501-3.

Socage tenure denotes lands held by a fixed and determinate service. It is of feudal extraction, and retains some of the leading properties of feuds. *Ib.* 509. It was the tenure prescribed in all the early colonial charters or patents in this country, under the terms, "according to the free tenure of lands of East Greenwich, in the county of Kent, in England, and not in *capite* or by knight's service." *Ib.* 511, n.; 1 Story on the Constitution.

Upon this subject Chancellor Kent further remarks:—"The only feudal fictions and services which can be presumed to be retained in any part of the United States, consist of the feudal principle, that the lands are held of some superior or lord, to whom the obligation of fealty, and to pay a determinate rent, are due. The act of New York in 1787, provided, that the socage lands were not to be deemed discharged of "any rents certain, or other services incident or belonging to tenure in common socage due to the people of this State, or any mean lord, or other person, or the fealty or distresses incident thereunto." The Revised Statutes also provide, that "the abolition of tenures shall not take away or discharge any rents or services certain, which at any time heretofore have been, or hereafter may, be, cre-

10. In England, the king—himself not a tenant(1)—is held to be the only original source of title to real estate. *Theoretically*, a similar principle has been adopted in this country; to wit, that individual property in lands can be deduced only from the crown, the ante-revolutionary, United States or State governments.(2)(a) By the law of nations, the discovery of a new continent gave to the discovering nation an exclusive right to acquire the soil from the native inhabitants; and individual citizens, no less than foreign governments, were precluded from purchasing it, except through the intervention of the public authority. Thus, in New York, it was held, that the court would not notice claims to lands within the State, under grants from the French government in Canada before the treaty between Great Britain and France in 1763; such claims being at most merely equitable, and a foundation for application to the government. It was subsequently decided, that such French grants were mere nullities, affording no legal evidence of title; that any possession under them was wholly unavailing, being not ad-

(1) "Because he hath no superior but God | (2) 3 Kent, 307-8.
Almighty." Co. Lit. 1 b.

ated or reserved. The lord paramount of all socage land, was none other than the people of the State, and to them and them only, the duty of fealty was to be rendered; and the quit-rents which were due to the king on all colonial grants, and to which the people succeeded at the Revolution, have been gradually diminished by commutation, under various acts of the Legislature, and are now nearly, if not entirely, extinguished." 3 Kent, 509-10.

"The continental jurists frequently considered *homage* and *fealty* as synonymous; but this was not so in the English law, and the incident of homage was expressly abolished in New York by the act of 1787, while the incident of fealty was expressly retained." Ib. 510. "This Statute saved the services incident to tenure in common socage, and which it presumed might be due, not only to the people of the State, but to any mean lord or private person, and it saved the fealty and distresses incident thereunto. But this doctrine of the feudal fealty was never practically applied, nor assumed to apply to any other superior than the chief lord of the fee, or, in other words, the people of the State; and then it resolved itself into the oath of allegiance, which every citizen, on a proper occasion, may be required to take." Ib. 511-12.

In New York, the people are the owners of all the lands within the state, which had not, prior to, or have not since, the revolution, been granted to others; and in their right of sovereignty they are deemed to possess the original and ultimate property in all the lands of the state. *People v. Livingston*, 8 Barb. 253; ——— *v. Van Rensselaer*, Ib. 189.

Being the source of title, the people are presumed to be the owners of land not granted by them, until the contrary appears. And in an action to recover the possession of premises, brought in their name, it is sufficient in the first instance, to entitle them to recover, to show that such premises are vacant, uninclosed and unoccupied. Ib.

By the American revolution the people succeeded, as owners, to all the lands within the limits of the state, which had not prior thereto been legally granted, held, or possessed, by persons or corporations, or in whom the title had not been legally vested. Ib.

The absolute property, of all kinds, and all right and title to the same, which on the 9th of July, 1776, vested in, or belonged to, the crown of Great Britain, became from that date forever vested in the people of the State, in their sovereign capacity. But with respect to lands which prior to Oct. 1775, had been legally granted to individuals, by the crown, or to which the title had been legally acquired by individuals in any other way, neither the revolution, nor the change of the form of government, nor the declaration of the sovereignty of the people, worked any change or forfeiture in the ownership of such property. Ib.

In Massachusetts, Shaw. C. J., says, (*Com. v. Alger*, 7 Cush. 66,) "it is not necessary to trace the powers of the colonial government further. They were then regarded, and have ever since been acknowledged to be ample and sufficient to grant and establish titles to land, and to all territorial rights and privileges. To the grants and acts of the government, all titles to real property in Massachusetts, with their incidents and qualifications, are to be traced as their source."

(a) It is said, in a republic, a title to land derived from government, *springs from the law*, *McConnell v. Wilcox*, 1 Scam. 344.

verse to any private right, but rather a controversy between the two governments, and therefore did not avoid the effect of a grant from the provincial government after the conquest of Canada. A question was long made in the same State, whether the constitutional prohibition of purchases from the Indians was applicable to purchases from individuals, or only those from the nations or governments. It was finally held to extend to the former, being introduced for the benefit and protection of the Indians as well as the good of the State, and therefore entitled to a benign and liberal interpretation.(1)(a)

11. In Delaware, a statute declares the title to lands in that State to

(1) Jackson *v.* Ingraham, 4 John. 163; 543; Cherokee, &c. *v.* Georgia, 5 Pet. 1; ——— *v.* Waters, 12, 365; Goodell *v.* Jackson, 20, 693; acc. De Armas *v.* Mayor, &c., 5 State *v.* Foreman, 8 Yerg. 256; Holland *v.* Pack, Peck, 151; Blair *v.* Pathkiller, 2 Yerg. 407; Clark *v.* Smith, 13 Pet. 195. In Tennessee, State grants of land, to which the Cherokee title has not been extinguished, are adjudged void. Gillespie *v.* Cunningham, 2 Humph. 19. See Kennedy *v.* McCartney, 4 Port. 141.

Cranch, 87; Johnson *v.* McIntosh, 8 Wheat.

(a) "In the colonies, both of Massachusetts and New Plymouth, early laws were passed, prohibiting individuals from purchasing lands of the Indians; sometimes declaring such conveyances void, and sometimes providing that they should inure to the use of the government." Per Shaw, Ch. J., Clark *v.* Williams, 19 Pick. 500. Brown *v.* Wenham, 10 Met. 495. See Martin *v.* Waddell, 16 Pet. 367. Conn. Sts. 1850, 37. Kellogg *v.* Smith, 7 Cush. 375; Stephens *v.* Westwood, 20 Ala. 275.

The title of the native Indians to their lands is an absolute ownership: and the right of pre-emption of lands in the western part of the State of New York, ceded to Massachusetts by the convention of 1786, was simply a right to purchase the lands from the Indians when they chose to sell them; therefore the grantee of the pre-emptive right cannot maintain trover for saw logs cut on such lands by the Indians and sold to the defendants. Fellows *v.* Lee, 5 Denio, 628.

The title to the lands of Indian reservations, in New York, is in the State or its grantees; the use and possession alone belongs to the Indians, until they voluntarily relinquish it. Strong *v.* Waterman, 11 Paige, 607.

Lands not under Indian government, but held by individual Indians as tenants in common, are subject to the jurisdiction of the State or territory in which they lie. [Per OLNEY, J.] Telford *v.* Barney, 1 Iowa, (Greene,) 575.

The laws and customs of the Choctaws were not abrogated, as to members of the tribe, by the extension of the jurisdiction of the State of Alabama over their territory; nor, would be, except by positive enactment. Wall *v.* Williamson, 8 Ala. 48.

The first article of the treaty of 1814, with the Creek Indians, confers upon the chiefs and warriors provided for, a qualified inheritable estate, which is determined by the sale of the reserve, the cesser of occupation, and his removal from the State; and immediately upon such abandonment of possession, the reservation becomes a part of the public domain, without any positive assertion of right upon the part of the United States. Crommelin *v.* Munter, 9 Ala. 594.

Though the title to a reservation under that article be vested in the United States by the voluntary abandonment of the reserve, it is not subject to entry under the pre-emption laws of Congress. *Ib.*

Such article does not invest the chiefs, warriors, or other reservees, with an estate alienable at their pleasure. James *v.* Scott, 9 Ala. 579.

A person having possession of a tract of land, on which an Indian, the head of a family, was located under the treaty with the Creek Indians, may have an interest that may be levied on and sold, although five years have elapsed since the date of the treaty, and no patent has issued to any one, and the president has not approved a sale of the land by the reservee. Rains *v.* Ware, 10 Ala. 623.

In the absence of proof that a savage tribe of Indians have laws, or customs having the force of law, regulating the descent of property, the presumption arises that the property of a deceased person would belong to the first occupant. Brashear *v.* Williams, 10 Ala. 630.

After the extension of the laws of the State over a tribe, property in the possession of Indians is *prima facie* liable to the payment of their debts. *Ib.*

be founded upon the cession made by the treaty of peace to the citizens of the United States, by virtue of which the soil of the State became the property of its citizens; and proceeds to declare invalid all grants by former proprietaries, but at the same time confirms them "discharged from all rents, fines and services."⁽¹⁾

12. But although American titles to real estate are *originally derived* from the government, yet, after they have been acquired, the tenant in fee is to all intents and purposes *absolute owner*. Principles undoubtedly remain in American law which are of purely feudal origin, and probably would not originally have made a part of any other than the feudal system. The claim has been set up, that in Ohio, and the other States formed out of the North Western Territory, by reason of the great ordinance of 1787, which constitutes the ground-work of their law, and the absence of any express adoption or immemorial use of English principles; not one doctrine remains in force that can be deduced from *tenure*, but real estate is owned by an absolute and *allodial*(a) title.(2) It may well be doubted, whether this is a distinguishing peculiarity of the North Western States. In New York,(3) the legislature have formally abolished feudal tenures, or more properly disclaimed their existence, and declared all lands to be *allodial*; and this principle has been incorporated in the constitution.(b) So the statute law of Connecticut,(4) after reciting, that whereas, by the establishment of the independence of the United States, the citizens of this State became vested with an *allodial* title to their lands, provides that every proprietor of lands in fee simple has an *absolute and direct property and dominion* therein, and that patents or grants from the general assembly of the colony, according to the charter of Cha. II., are effectual in passing an estate to the purchasers and their heirs forever. So in Maryland, Pennsylvania, Michigan and Wisconsin,(5) lands are declared to be holden by an *allodial* title.(c) In South Carolina, the statute of Cha. II., establishing the tenure of *free and common socage*, was early adopted by statute with the great body of the common law.(6)

13. On the whole it may be safely said, that with regard to the whole United States alike, the feudal system, *as a law of tenures*, is abolished; and the remark of Chancellor Kent(7) is strictly true, that an estate in

(1) Del. Rev. L. 545; acc. 16 Pet. 367.

(2) Jurist, Jan. 1834, 94.

(3) 1 Rev. St. 718; Const. 1846, art. 1, sects. 12, 13.

(4) Rev. L. 348.

(5) Sarah, &c., 5 Rawle, 112-3; Matthews

v. Ward, 10 Gill & J. 443; Mich. L. 393; Wisc. Rev. Sts. 313.

(6) 1 Brev. Dig. 136.

(7) 4 Com. 3; Cornell v. Lamb, 2 Cow. 652.

(a) The term applied in the English law to such estates of the subject as are not holden of any superior. 2 Bl. Com. 39, 47, 81; Co. Lit. 1 b; see 3 Kent, 497, n.

(b) By the Revised Statutes (719, sects. 8, 10), every citizen of the United States may hold lands in the State, and take them by descent, devise or purchase, and every person capable of holding lands, except idiots, persons of unsound mind, and infants, seized of or entitled to any interest in lands may alien it, according to law.

(c) The charter to Wm. Penn was in free and common socage, with power to aliene, &c., reserving services, rents, &c., to him, not to the king. Hence the statute *quia emptores* was never in force in Pennsylvania. Ingersoll v. Sergeant, 1 Whart. 348. In Maryland, the Lord Proprietor held in *free and common socage*, with the incident of feudal services. And his grantees, before the revolution, held in like manner; but by that event both tenure and services were abolished, and the title became *allodial*. 10 Gill & J. 443. Quit rents, due any subject of a foreign prince, are abolished. Md. L. 158.

free and pure *allodium*, and an estate in fee simple absolute, both mean the most ample and perfect interest which can be owned in land.(a) We need not spend time to show, that there is nothing *feudal* in the principle, by which lands derived by patent from the government may be forfeited for non-payment of taxes;(1) nor is there much more of the feudal character, or of limitation to absolute ownership, in the doctrine of *escheat*, by which, upon failure of heirs, the land of a tenant in fee simple passes to the State or *the people*. With us, escheats take effect, not upon principles of tenure, but by force of our statutes, to avoid the uncertainty and confusion inseparable from the recognition of a title, founded in priority of occupancy.(2)(b) Moreover, inasmuch as lands and goods, upon failure of heirs, follow the same destination, if escheat is an infallible symptom of *feudality*, we must admit that every merchant holds his stock in trade by a feudal tenure.

14. The absolute ownership of a tenant in fee simple is indeed subject to one other qualification, which may, in this connection, be briefly noticed. This, however, is not an existing paramount *title* in the government, but a mere *power*, to be exercised on the happening of a future contingency. We refer to the power on the part of the government, common to the United States and all other civilized nations, of taking private property for public purposes, subject to the obligation expressly imposed by the constitution of every State, of paying a fair compensation therefor. This right is termed the right of *eminent domain*. It is exercised in a variety of instances, but for the most part in the taking of private lands for highways, turnpikes, canals and railroads. The subject will be noticed in a future portion of this work.

(1) *Clay v. White*, 1 Mun. 170.

(2) *Sarah Desilver*, 5 Rawle, 112-3; 10 Gill. & J. 443.

(a) "When the early settlers of Massachusetts, holding their lands under the freest and most liberal English tenure, that of tenants in fee simple in free and common socage, were making provision for granting and taking titles to real estate for themselves and their posterity, and when a certain valuable right and interest was annexed to and made part of such grants of estate by the government, competent to impress such character upon it; they understood, both those who made and those who proceeded to take titles and settle the country under such grants, that the grantees acquired a legal right and vested interest in the soil, and not a mere permissive indulgence or gratuitous license, given without consideration, and to be revoked and annulled at the pleasure of those who gave it." Per Shaw, C. J., *Com. v. Alger*, 7 Cush. 71.

(b) In the foregoing remarks, I would by no means be understood to undervalue the importance of studying the Feudal Law (so earnestly contended for by the learned author of "a Course of Legal Study"), as *matter of history*, or as furnishing an *explanation* of some principles now in force. Let it be deeply inquired into, like the *History of England*, or the *Civil Law*, by the ingenuous and philosophical student. I have merely wished to explain why it is omitted as a constituent portion of *American Law*. The observations already made upon the subject may properly be closed by the following forcible remarks of Chancellor Kent, showing conclusively that the American student is not to neglect the study of the feudal law. "It is a singular fact—a sort of anomaly in the history of jurisprudence—that the curious inventions, and subtle, profound, but solid distinctions, which guarded and cherished the rights and remedies attached to real property, in the feudal ages, should have been transported, and should for so long a time remain rooted in soils that never felt the fabric of the feudal system; whilst, on the other hand, the English parliamentary commissioners, in their report, proposed, and Parliament executed, a sweeping abolition of the whole formidable catalogue of writs of right, writs of entry, writs of assize, and all the other writs in real actions, with the single exception of writs of dower, and *quare impedit*." 4 Kent, 70-1, n.

15. In view of the foregoing considerations, it may safely be laid down, that one who holds lands in fee simple is the absolute owner. The methods of acquiring this title will be treated of hereafter.

16. An owner in fee simple, as well as of every other freehold estate, is said to be *seized*; while the owner of an estate less than freehold has *possession* merely, and not *seizin*. Anciently, the possession of a feud was called *seizin*, denoting the completion of the investiture by which the tenant was admitted to the feud. Upon the introduction of the feudal law into England, this word was only applied to the possession of an estate of *freehold*; in contra-distinction to that precarious kind of possession by which tenants in *villénage* held their lands; which was considered to be the possession of their lords, in whom the freehold continued.(a)

17. *Seizin* is of two kinds—*seizin in deed*, or as Lord Coke terms it, “a natural *seizin* ;” and *seizin in law*, or “a civil *seizin*.” The former is *actual possession* of a freehold; the latter a *legal right* to such possession. Formerly *seizin in deed* could be acquired only by an actual occupation. In case of a purchase or conveyance, the ceremony of *livery of seizin* was required to vest a title; and, in case of descent, the heir was not seized in deed, until he had by himself or another actually entered on the land.

18. How far these principles are in force in the United States, will be more particularly considered hereafter.(b) It is sufficient to say here, that for most purposes an heir is considered as actually seized, without entry, and that a conveyance, by deed, executed, acknowledged and recorded, or, in general, by a patent under the seal of the Commonwealth, if there be no adverse possession, gives a *seizin in deed*, *without entry*.(1)(c) The recording of a deed is the legal equivalent for livery of *seizin*.(2) And

(1) *Pidge v. Tyler*, 4 Mass. 546; *Knox v. Jenkins*, 7, 494; *Goodwin v. Hubbard*, 15, 214; *Clay v. White*, 1 Mun. 170. (2) *Barr v. Galloway*, 1 McLean, 476; *Prop'rs. &c. v. Permit*, 8 N. H. 512; 4 Mass. 546; *Ward v. Fuller*, 15 Pick. 185.

(a) A tenant *in fee* cannot maintain an action for the *freehold*, as distinct therefrom. So with a tenant in tail. *Webster v. Gilman*, 1 Story R. 499. See *Howe v. Wildes*, 34 Maine, 566. If a tenant for life die, pending a suit for the land, the court may render judgment; and, if heirs succeed to the title, may issue execution in their favor. *Wilson v. Hall*, 13 Ired. 489.

(b) See *Deed, Descent, Livery of Seizin*.

(c) So, in Massachusetts, a devisee of vacant land may maintain a writ of entry therefor, without an actual entry. *Green v. Chelsea*, 24 Pick. 71.

So the levy of an execution upon land of the debtor gives the creditor actual *seizin*. *Munroe v. Luke*, 1 Met. 462; *Blood v. Wood*, *Ib.* 534. But if an execution against A is levied on land of B, B is not so far disseized, that he cannot bring trespass, without re-entry, against the judgment creditor or those acting under him. *Blood v. Wood*, 1 Met. 528.

And a mixed possession of land, under a deed from one without title, does not convey a *seizin*, as against one claiming by virtue of a like possession. *Magoun v. Lapham*, 21 Pick. 135.

If the land of a debtor was attached upon the original writ, by the levy of his execution, the creditor gains the same *seizin* as if the debtor had given him a deed at the time of attachment. *Bryant v. Tucker*, 1 Appl. 383. *Nason v. Grant*, 8 Shepl. 160. By such levy, the debtor becomes a tenant at will; and, if he resists the creditor's entry, may be treated as a disseizer at his election. *Ib.* To vest the title to real estate in the creditor who levies an execution upon it, there must be a delivery of *seizin* to him, and, if he refuse to receive *seizin*, the previous proceedings in making the levy will not operate to satisfy the execution. *Jackson v. Woodman*, 29 Maine, 266.

The delivery of *seizin* must be shown by the return of the officer, and the declarations of the creditor are not evidence upon the question of title. *Ib.*

a deed duly acknowledged and recorded, is *prima facie* evidence of seizin in the grantor and in the grantee. In Ohio, Massachusetts, and Connecticut (and the law is the same, it seems, in Pennsylvania,) it is said, seizin means nothing more than *ownership*. It is further remarked, that there is no distinction between seizin in law and seizin in deed, and, in Ohio, that entry probably is not necessary to complete the title of an heir.(1)(a)

19. But where one gave a deed of wild land, having no title, although the deed was acknowledged and recorded, and the grantee entered, but exercised no open and exclusive ownership by fencing or otherwise; it was held, that these facts did not give an adverse seizin against the will of the owner, the registration not being constructive notice to him.(2)

20. In Kentucky, a *patent* of lands by the Commonwealth gives only a right of entry, not actual seizin.(3)

21. Entry, to give seizin, may be made by the owner, or by his agent.(b) The entry must be made, not by consent, invitation or hospitality of the occupant, as, for instance, to remove the goods of the party entering; but with the intent to gain seizin—*animo clamandi*—and accompanied by some act or declaration showing such intent, and challenging the right of the occupant. The intent is a question for the jury. If the entry is such as would be a trespass in a mere stranger, it is effectual; otherwise, not. If there be no one residing on the land, it is not necessary to seek the adverse occupant and give notice of the claim under which entry is made. If made by an agent, it is the usual and perhaps most prudent course, to give him a power of attorney under seal. But a general agency is sufficient authority; and if the principal bring a suit founded on the entry, this ratification is sufficient, without previous authority.(4)

22. And where an agent was empowered by the owners of certain unoccupied land to "look up the land for them," and entered to survey and take possession, without making any declaration of his intent; held, such declaration was unnecessary.(5)

23. If one disseized, having a right of entry, enter and give a deed on the land, the deed is effectual to pass a title.(6) So if one disseized, having the right of entry, enters peaceably, the land being vacant, and takes possession under his title; and the disseizor or others afterwards break and enter the premises; the disseizee may bring an action of trespass against them.(7)

(1) Walk. Intro. 324, 330; Bush v. Bradley, 4 Day, 305-6; Cook v. Hammond, 4 Mass. 489.

(2) Bates v. Norcross, 14 Pick. 224.

(3) Speed v. Buford, 3 Bibb, 57. See Rogers v. Moore, 9 B. Mon. 401; Hinman v. Cavanaugh, 9 Barr, 40; Steadman v. Hilliard, 3 Rich. 101.

(4) Richards v. Folsom, 2 Fairf. 70; Stearns,

45; Co. Lit. 245, b; Plow. 92-3. In England, an authority to deliver seizin must be by deed. Co. Lit. 52, a; See Altemas v. Campbell, 9 Watts, 28; Holly v. Brown, 14 Conn. 255; Campbell v. Wallace, 12 N. H. 162; Cowan v. Wheeler, 31 Maine, 439.

(5) Tolman v. Emerson, 4 Pick. 160.

(6) Oakes v. Marcy, 10 Pick. 195.

(7) Tyler v. Smith, 8 Met. 599.

(a) Seizin is *possession*, under an express or implied claim of freehold. Towle v. Ayer, 8 N. H. 57; Straw v. Jones, 9, 400. When used in statutes, it may have an enlarged signification, if necessary, to effect the intent. Matthews v. Ward, 10 Gill & J. 443.

(b) So an occupation for 20 years by an agent gives a good title. Goodwin v. Sawyer, 33 Maine, 541.

24. Where one enters on land claiming no title, he gains no seizin but by ousting the occupant, and not beyond his actual possession. But if there is a claim and color of title, especially if clearly defined in extent, entry on a part may give seizin of all to which the title extends, although the land be not enclosed, provided there is no adverse possession.(1)(a)

24a. The general principle applies, only where the quantity of the land and the attendant circumstances, reasonably induce the belief, that the land was bought and entered upon for the ordinary purposes of cultivation and use; but not where a person takes and maintains possession of a few acres in an uncultivated township, for the mere purpose of gaining a title to the township by possession, against the lawful owners.(2)

24b. Adverse possession, under a claim of right, extends to so much of the land within another's survey, as is within known bounds, up to

(1) *Ellicott v. Pearl*, 10 Pet. 414; 1 McL. 214; *Proprietors, &c. v. Springer*, 4 Mass. 418; *Green v. Lister*, 8 Cranch, 229; *Bank, &c. v. Smyers*, 2 Strobb. 24; *Barr v. Gratz*, 4 Wheat. 213; *Shrieve v. Summers*, 1 Dana, 239; *Farfar v. Eastman*, 1 Fairf. 191; *Thompson v. Milford*, 7 Watts, 442; *Johnson v. Farlow*, 13 Ired. 84; *Heiser v. Riehle*, 7 Watts, 35; *Crowell v. Bebee*, 10 Verm. 33; *Hubbard v. Austin*, 11, 129; *Griffith v. Dicken*, 2 B. Mon. 24; *Shackleford v. Smith*, 5 Dana, 239; *Watkins v. Holman*, 16 Pet. 25; *Webb v. Sturtevant*, 1 Scam. 183; *Blackburn v. Baker*, 7

Por. 284; *Stearns v. Palmer*, 10 Met. 32; *Osborne v. Ballew*, 12 Ired. 373; *Moor v. Campbell*, 15 N. H. 208; *Waggoner v. Hastings*, 5 Barr. 300; *Kite v. Brown*, Ib. 291; *Bailey v. Carleton*, 12 N. H. 9; *Doe v. McCleary*, 2 Cart. 405; *Noyes v. Dyer*, 25 Maine, 468; *Northrop v. Wright*, 7 Hill, 476; *Putnam v. Fisher*, 34 Maine, 172; *Altemus v. Long*, 4 Barr, 254; *Saxton v. Hunt*, 1 Spencer, 487; *Virg. Code*, 560; *Missc. Sts.* 1847, 55.

(2) *Chandler v. Spear*, 22 Verm. 388.

(a) Lord Coke seems to limit the latter principle to the case, where an entry is made merely to complete a *seizin in law*, like that of an heir; and to regard it as inapplicable where the entry is adverse, as by a disseizee, or a feoffor for condition broken. But he elsewhere explains the distinction between a *bare title*, such as a condition, involving no interest in, or right of action for the land, and the claim of a disseizee. Co. Lit. 15 a, 252 b.

Where a rightful owner enters upon part of the land, this will be sufficient for the whole, although another person, having no color of title, enters upon the vacant portion. *Hubbard v. Austin*, 11 Verm. 129. See *Ralph v. Bayley*, Ib. 521. A statute of limitation gives title not only to such part of the land as is enclosed and cultivated, but to all which is advantageously used as a portion of the farm—as, for instance, woodland. *Lawrence v. Hunter*, 9 Watts, 64. So, to all the lands included in marked lines. *Bell v. Hartley*, 4 U. & S. 32. See *McCall v. Coover*, Ib. 151; *McCaffrey v. Fisher*, Ib. 181. Where two distinct grants or deeds *lap*, and neither party is in possession of the lapped portion, the law gives it to the owner of the better title. But, if one is in possession, he is the exclusive owner. *Williams v. Buchanan*, 1 Ired. 535. See *Smith v. Ingram*, 7, 175. In case of a demise of mines and minerals upon a long tract of waste, working under a part gives legal possession of the whole. *Taylor v. Parry*, 1 Man. & G. 604.

An entry upon a tract of land, under a survey bill or record, giving a definite and certain extent to the land, and the occupation of part of the land, without evidence to limit or restrict the possession, will give constructive possession of the whole tract surveyed. But this may be restricted and controlled by evidence of the acts and declarations of the occupant. *Brown v. Edson*, 22 Verm. 357. Where one enters upon wild lands, and marks out boundaries with the intention of taking possession, the possession embraces all within those boundaries. *Campbell v. Thomas*, 9 B. Mon. 82.

A tenant put in possession by the grantee, without definite boundaries, will be held as in possession of the whole tract. *Ellicott v. Pearl*, 1 McL. 214.

The deed, contract or plat, under which possession is acquired, constitutes color of title, and defines or shows the extent of the occupant's claim. *Gray v. Bates*, 3 Strobb. 498.

The rule, that one in actual possession of part of a tract will be deemed in possession of the whole, does not apply as against the real owner, who is also in possession of a part. To create an adverse possession as against such owner, there must be actual occupation. *Cottle v. Sydnor*, 10 Mis. 763.

which a claim has been made, with such use as farmers make of their farms, by one residing on a part of the land claimed; although his house was not within the lines of the survey, and the land was not enclosed.(1)

24c. A party entered upon two tracts of wild land, cultivated a very small portion of them in the midst of the woods, and held them for seven years. Held, by his adverse possession, he gained a title to the whole of the tracts included in his fictitious grants.(2)

24d. The owner of a large tract of land made a parol gift of it to his two sons, who, with him, during his life, for more than fifteen years, occupied the land. The father had made a will conformably to this gift, but afterwards made another one, not altering the devise to his sons. After his death, the sons bring a joint action for the whole land. Held, their adverse possession during the father's life included only the parts enclosed by them, there being no deed or plat giving a colorable title to the whole; and that their joining in suit did not strengthen their claim, they being mere co-trespassers.(3)

24e. Where a patentee settles a tenant upon the land included in his patent, without limiting his possession, he has a constructive possession of the whole. But, where a stranger settles upon patented land without license from the patentee, an intention to occupy the whole may be inferred, but is not a presumption of law.(4)

24f. A small improvement, made by a person on one of two quarter sections of land, which were distant from each other a half of a mile, is no authority for his setting up an adverse possession of the other quarter section, though both were conveyed to him by the same deed.(5)

24g. An entry on a lot of land by the owner, to survey it and put up monuments of boundaries, gives him seizin, as against wrong-doers, of all within the boundaries, though including more than his lot.(6)

24h. Where one person is seized, entry by another, claiming under a registered deed, upon a part thereof, does not constitute a disseizin of the whole by election, unless the latter continues in possession of the part entered upon.(7)

24i. Where one, having the elder title to land, enters under his deed, with intent to take possession to the boundaries of his deed, he is in possession to that extent, though another person be in possession under a junior title to the same land, but outside of the interference.(8)

24j. Where one goes into possession of land under a survey, and by mistake occupies beyond the limits of the survey, the possession beyond the limits of the survey is not adverse, and, being continued twenty years, will give him no right against the owner.(9)

24k. When land is enclosed by a river, fence or road, and a disseizor occupies it as near the boundary as is convenient, considering the nature and situation of the land, and intends to occupy the whole lot; this may be an occupation of the whole, though there is a narrow strip by such boundary not actually cultivated.(10)

(1) *Fitch v. Mann*, 8 Barr, 503.

(2) *Lenoir v. South*, 10 Ired. 237.

(3) *Golson v. Hook*, 4 Strobb. 23.

(4) *Wickliffe v. Eusor*, 9 B. Mon. 253.

(5) *Stephenson v. Doe*, 8 Blackf. 508.

(6) *Parker v. Brown*, 15 N. H. 176.

(7) *Robinson v. Brown*, 32 Maine, 578.

(8) *Grughler v. Wheeler*, 12 B. Mon. 183.

(9) *Hunter v. Chrisman*, 6 B. Mon. 463.

(10) *Allen v. Holton*, 20 Pick. 458. See *Barker v. Salmon*, 2 Met. 32.

24 *l.* The tenant fenced in part of the demandant's land, in order to protect a crop on his own, and cut a tree and some brushwood on this part, but without intending to claim or occupy, or exclude the demandant from it. Held, the demandant might elect to consider himself dis-seized.(1)

25. Entry upon land must *ensue* or correspond with the party's action for its recovery. Hence, one entry can never be sufficient, upon lands lying in different counties, or wrongfully taken by different disseizors, or let by one disseizor to different tenants *for life*; because in each of these cases there must be several actions. On the other hand, if the lands are in one county, let by one disseizor to several *tenants for years*, or taken by one disseizor at several times; one entry *in the name of the whole* may be sufficient, because one action would lie. So, where one enters, without title, on a tract of land lying in two counties, in one of those counties, and keeps possession of the same, claiming to hold the whole tract; his possession extends only to the lines of the county in which the entry was made.(2) An analogous distinction is established in England as to livery of seizin. But it is said not to apply, where one manor extends into two counties. This however is doubted.(3)(a)

26. Where an heir is deterred by bodily fear from entering upon the lands descended to him, it will be sufficient to go as near as he can and claim them; which act shall be repeated once in a year (called in the old law a year and a day), and is then called *continual claim*, and has the effect of actual entry.(4)

27. If the land is in possession of a tenant for years, at the death of the ancestor, the heir becomes seized in deed, without entry or even receipt of rent. So also where the heir is an infant, and the land is in possession of his guardian.(5)

28. If the land is in possession of a tenant for life, the heir becomes seized of the rent by receipt of an instalment; but whether of the land also, has been doubted.(6)

29. Where, after the ancestor's death, a stranger enters upon the land, such entry is termed an *abatement*, and defeats the seizin in law of the heir. But the latter may regain seizin by entry, unless the abator have died seized, in which case the heir must in general resort to an action to recover possession.(7)

30. In some cases, however, the entry of a party without title does not defeat the seizin of the heir, but on the contrary gives him a seizin in deed. This is where the entry may be supposed to be not adverse, but amicable, and made to prevent the entry of strangers. As where a mother, or, in England, a younger brother enters. And even the

(1) *Ib.*

(2) Co. Lit. 252 b; *Roberts v. Long*, 12 B. Mon. 194.

(3) Lit. 61; Co. Lit. 50 a. n. 2.

(4) 1 Cruise, 42; *Stearns*. 18. By St. 3 & 4 Will. 4, c. 27, such claim is ineffectual to pre-

serve a title, without actual change of possession.

(5) Co. Lit. 15 a.

(6) *Ib.*

(7) 1 Cruise, 42.

(a) Littleton places this rule upon the ground that the younger son claims by *the same title* with the elder; as heir to his father. It is abolished by St. 3 & 4 Wm. 4, c. 27, s. 13.

death of a party so entering will not prevent an entry by the heir.(1)(a) So, when land descends to several heirs, a part of whom enter thereupon, their entry is presumed to be according to their legal title, and ensures to the benefit of all, so that all are seized, unless those who enter claim adversely and oust the others.(2)

31. It may not be unimportant to notice the distinction between *seizin in law* and by *operation of law*; and between *seizin in deed*, and by *deed* or by *purchase*.(b) It has been seen that an heir, who claims by operation of law, is seized only *in law*, until actual entry. But there are other cases, hereafter to be more particularly noticed, where a party, coming to an estate by operation of law, is seized in deed without entry or any other formality. Thus a tenant by the curtesy, upon the death of the wife, becomes fully seized by mere operation of law. So in the case of dower, although the widow does not perfect her title until an actual assignment is made, yet, when made, her title relates back to the death of the husband; she holds, not by the assignment, but by law, and merely in continuation of the husband's estate.

32. The reason of these rules is obvious. Although neither husband nor wife acquires a complete title till the death of the party from whom such title is derived; yet both acquire an *initiate* title before that event—the one upon marriage and birth of issue, the other by marriage alone. And the husband by his own possession, and the wife by her husband's possession, may be regarded as actually seized during the marriage.

33. Intimately connected with the subject of *seizin* is that of *disseizin*; of which it has been remarked(3) "there is scarcely a subject in the English law so obscure." This observation of an English writer, derives additional force from the various and conflicting decisions upon the subject, to be found in the American cases.

34. *Disseizin* is defined as a wrongful putting out of him that is seized of

(1) Lit. s. 396; Gilb. Ten. 28; Doe v. Keen, 7 T. R. 386; (See 3 Nev. & M. 331; Burrows v. Holt, 20 Conn. 459.

(2) Means v. Welles, 12 Met. 356.

(3) 1 Cruise, 43; Watson v. Gregg, 10 Watts, 289; Graffius v. Tottenham, 1 Watts & S. 488.

(a) The owner of a farm died in 1778, leaving his widow and ten children in possession. The tenant, one of his sons, then seventeen years of age, carried on the farm, living there, with the co-heirs, until 1793, when the rest of the heirs went away. His sisters having married, he was left in possession of the farm, which he continued to manage until his death, in 1822. It did not appear that he ever made any claim of title to the whole farm. Held, he acquired no title by adverse possession. Campbell v. Campbell, 13 N. H. 483.

Where land is set off to two persons jointly, the possession of one, claiming the whole, is not adverse to the other, within the statute of limitations. Brooks v. Towle, 14 N. H. 248. So an entry by one cotenant gives *seizin* to all in the whole lands, according to their respective titles. Thomas v. Hatch, 3 Sumn. 170. So if a disseizor, after five years' possession, give up to one tenant in common all the title of the latter to the land; the title of all the tenants revests in them. Vaughan v. Bacon, 3 Shepl. 455.

A judgment was recovered in the name, and with the knowledge and consent of A, for the benefit of B; execution issued, and land was thereupon set off to A, possession received by B as his attorney, and the land was held and occupied by B, with the knowledge of A, for over 20 years. Held, B did not gain a title by *disseizin*, sufficiently to sustain a writ of entry. Peabody v. Tarbell, 2 Cush. 226.

Upon a somewhat similar principle, a party in possession of land, holding under another person, cannot render his possession adverse, except by an open and notorious act. If he take a secret conveyance in fee of the land from one claiming to be owner, and keep it secret, the character of his possession is not changed. Sharpe v. Kelley, 5 Denio, 431.

(b) See 1 Steph. 367, n.

the freehold ;(1) or it is, "where a man entereth into lands or tenements, where his entry is not *congeable* (i. e., by leave or permission) and ousteth him which hath the freehold." (2)

35. To constitute disseizin, it is held, that an entry must be *at the time under claim or color of title* ;(a) otherwise it is a mere trespass. It must be such as to raise the presumption of a deed. If made under a deed, the character of the possession may be shown by the terms of the deed. If these are indefinite, they will not control the extent of actual occupancy. So entry by a party as purchaser under a judgment is a disseizin. *The intention guides the entry*, and fixes its character. Adverse possession must be *continued, uninterrupted, notorious, and exclusive* ; and the burden of proof is on the party alleging it to be so. To make a continuity in successive persons, there must be privity of blood, contract or estate. As has been stated, disseizin may be proved by a conveyance, though defective, and disproved by an offer of purchase, or any act or declaration implying recognition of another's title. Whether possession under an executory contract to purchase can be deemed adverse, is a point left somewhat doubtful.(b)

(1) *Taylor v. Horde*, 1 Burr. 110 ; a very leading case upon this subject, the prominent doctrine of which is, that, except in cases of *actus*^{as} forcible dispossession, it shall depend upon the *election* of the owner, whether an interference with his title shall constitute disseizin. Acc. *Jewitt v. Ware*, 3 Price, 535 ; *Blowder v. Forster*, 1 Taun. 578 ; *Doe v. Lynes*, 3 B. & C. 388 ; *Bonham v. Badgley*, 2 Gilm. 622 ;

But see 2 Prest. on Abstr. 279 ; *Prescott v. Nevers*, 4 Mass. 326 ; *Towle v. Ayer*, 8 N. H. 57. Whether every possession of the land of another is not *prima facie* adverse, until the contrary is proved—*quere*. *Conyers v. Kenan*, 4 Geo. 308. There cannot be two seizins of the same land. *Putnam, &c. v. Fisher*, 34 Maine, 172.

(2) Lit. sec. 279.

(a) As under a grant, though void for irregularity, if the deed and entry are *bona fide*. *Moody v. Fleming*, 4 Geo. 115 ; *Macklot v. Dubrenil*, 9 Miss. 477 ; *Noyes v. Dyer*, 25 Maine, 468. But a deed void on its face has been held insufficient. *Simpson v. Downing*, 23 Wend. 316.

If a person enters into possession of land under one title, and afterwards purchases in an adverse claim, his subsequent possession will not be regarded as adverse to his former title, but under both. So of those claiming under him. *Pleak v. Chambers*, 7 B. Mon. 565.

Where a party is in actual possession, and has a right to possession under a legal title which is not adverse, but claims the possession under another title which is adverse, the possession will not be deemed adverse. *Nichols v. Reynolds*, 1 Angell, 30.

A sheriff's deed, without producing the judgment and execution under which the land was sold, is sufficient to show the character of the grantee who claims under it, and renders his possession adverse. *Riggs v. Dooley*, 7 B. Mon. 236.

And where the grantee in such deed went into possession, before he obtained the deed, under a purchase from two of five heirs ; held, the statute of limitations began to run against the others from the time of notice of the adverse holding. *Ib*.

(b) Thus in Massachusetts it has been held, that in case of an agreement to buy and sell, no payment made or deed given, and an entry by the purchaser, he is presumed to enter by consent, and holds as tenant at will. But if payment is made, and consent given for the purchaser to enter and hold the land as his own, but the deed is delayed, accidentally or for convenience, and with the agreement to give it without further consideration or condition, and possession taken ; this is a disseizin. *Brown v. King*, 5 Met. 173 ; acc. *Fosgate v. Herkimer, &c.*, 12 Barb. 252 ; and see *Sellers v. Hayes*, 17 Ala. 749 ; *Fain v. Garthright*, 5 Geo. 6. So, in South Carolina, he who goes into possession of land, under a contract to purchase, holds the land adversely to the claims of all other persons, except him from whom he bought ; and his possessions, both before and after he receives titles, may be coupled together, to make up a statutory title. *Bank, &c. v. Smyers*, 2 Strobb. 24. Continued possession under a license from the owner gives a title. *Pope v. Henry*, 24 Verm. 560.

On the other hand, if a *vendor* continue in possession after giving a deed, he is a tenant at will, unless there be an explicit disclaimer of the relation. If he deny the title and resist the claim of the vendee, the latter may at his election sue him as a disseizor. *Burhan v.*

If a lessee *pour autre vie* hold over, under the false representation that the *cestui que vie* is living; his possession is not adverse. But where the husband of a woman, tenant for life, held the land for twenty years from her decease; held, he thereby acquired a good adverse title. The general rule is, that when seizin is once proved, it is presumed to continue till some adverse possession is shown, and *prima facie* evidence of disseizin is not sufficient to change the burden of proof. So a possession originally adverse is presumed to continue so. A tenant cannot disseize his landlord, but at the election of the latter, unless he give notice, or make some change in his mode of occupation, which may put the landlord on his guard. His declaration to a stranger is no evidence of disseizin.(1)(a)

(1) Ripley *v.* Yale, 18 Verm. 220; Rung *v.* Shoneberger, 2 Watts, 23; Stillman *v.* White, &c., W. & M. 538; Corwin *v.* Corwin, 9 Barb. 219; Fosgate *v.* Herkimer, &c., Ib. 287; Lane *v.* Gould, 10 Barb. 254; Mitchell *v.* Lite, 8 Yerg. 179; Ewing *v.* Burnett, 11 Pet. 41; Avery *v.* Baum, Wright, 576; Kinsell *v.* Daggett, 2 Fairf. 309; Jackson *v.* Johnson, 5 Cow. 74; Tubb *v.* Williams, 7 Humph. 367; Jones *v.* Chiles, 2 Dana, 31; Miller *v.* Lindsey, 1 McL. 33; Thomas *v.* Hatch, 3 Sumn. 170; Brower *v.* King, 5 Met. 173; Alden *v.* Gilmore, 1 Shepl. 178; Crane *v.* Marshall, 4 Ib. 27; Stearns *v.* Godfrey Ib. 158; Dow *v.* Plummer, 5 Ib. 14; King *v.* Axbridge, 4 Nev. & M. 477; Doe *v.* Gregory, Ib. 308; South, &c. *v.* Blakeslee, 13 Conn. 227; Wickliffe *v.* Euson, 9 B. Mon. 253; Long *v.* Mast, 11 Penns. 189; School, &c. *v.* Benson, 31 Maine, 38; Story *v.* Saunders, 8 Humph. 663; Stansbury *v.* Taggart, 3 McL. 457; Peirson *v.* Doe, 2 Carter, 123; Clason *v.* Rankin, 1 Duer, 337; Fosgate *v.* Herkimer, &c., 12 Barb. 352.

Van Zandt, 7 Barb. 91. Carver *v.* Earl, 1 Shepl. 216. See Millay *v.* Millay, 6 Ib. 387. Possession for over seven years in North Carolina, will not enable such vendor to maintain a suit for the land, unless he show a subsequent colorable title, and occupation under it, which he is not estopped from doing. Johnson *v.* Farlow, 13 Ired. 84. Where one enters, claiming title under a parol gift, twenty years' possession gives him the absolute ownership. Summer *v.* Stevens, 6 Met. 337. So where an execution defendant remains in possession of the land sold, such possession is not necessarily permissive, nor is he estopped from setting it up as adverse; and, if continued twenty years, it gives him a good title. Chalfin *v.* Malone, 9 B. Mon. 496.

If one enter upon land of tenants in common by license of one of them, and erect and occupy a building thereon, he is presumed to hold under them, till the contrary is proved. Buckman *v.* Buckman, 30 Maine, 494.

A corporation being in possession of land as tenants of the crown, a grant was made to the corporation by the colonial governor, after which none of the rents in the lease were paid, which before had been paid, but only the quit rents reserved in the grant; and these were finally discontinued, and long leases made by the corporation. Held, the corporation were in possession, not as tenants, but grantees, of the crown; and acquired a perfect and absolute title after a possession of one hundred and forty years. Bogardus *v.* Trinity, &c., 4 Sandf. Ch. 633.

In 1829, land was leased for twenty-one years to the defendant. He applied to the lessor for leave to take in a piece of ground adjoining, but the lessor declined to permit it, stating that other persons, purchasers of adjoining houses, had a right of way over the ground. The defendant, notwithstanding, enclosed and for twenty years occupied it, without payment of rent or acknowledgment of title; held, the piece of ground was no part of the demised premises for which rent was paid, and therefore an action by the lessor was barred by St. 3 & 4 Will. 4 c. 27. Palmer *v.* Eyre, 6 Eng. L. & Eq. 355.

Where adverse possession for thirty years is admitted, it makes no difference that the entry was first made through a mistake of boundaries. Melvin *v.* Proprietors, &c., 5 Met. 15; acc. Otis *v.* Moulton, 2 Appl. 205. But see Proprietors, &c. *v.* Day, 7 N. H. 457; Hale *v.* Glidden, 10, 397. So one may claim title by disseizin, though he has previously relied upon a deed which does not include the premises. Ib. And see Greenlaw *v.* Greenlaw, 1 Shepl. 182.

Color of title may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it or from the defective conveyance that is used; a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law. Beverly *v.* Burke, 9 Geo. 440.

(a) Where one party protested against the acts of the other, during the possession of the latter, and consulted counsel in regard to them; held, the possession was not adverse.

36. In Maine and Massachusetts,(1) every person in possession of land and claiming a freehold, or claiming less than a freehold, if he has turned or kept the owner out of possession, may be treated as a disseizor. Neither force nor fraud is necessary to constitute a disseizin.(2) But it has been held in New York,(a) that a disseizin which will *cast a descent*, so as to *toll entry*, (that is preclude an entry, and require an *action* by the true owner against an *heir* of the disseizor) must be a *disseizin in fact*, expelling the true owner by force or some equivalent act; and in Pennsylvania, that adverse possession is not to be inferred, but possession is presumed to be in subordination to the legal title. The same doctrine is held in Kentucky.(3)

37. It has been held in Massachusetts,(4) that actual knowledge, on the part of the owner of land, of an adverse occupation, is not necessary to constitute disseizin. It is enough that there are acts in their nature public and notorious, such as fencing or building on the land. So, it has been held in the Supreme Court of the United States, that no acts of improvement are necessary to have this effect, where there has been an entry under claim and color of title, followed by a possession for twenty-one years, and where the land is so situated as not to admit of improvement.(b)

(1) Mass. Rev. Sts. 610-11; Me. Ib. 610.

(2) *Small v. Proctor*, 15 Mass. 495; 8 N. H. 57.

(3) *Smith v. Burtis*, 6 John. 197; *Rung v. Shoneberger*, 2 Watts, 23; *Robertson v. Ro-*

bertson, 2 B. Mon. 238.

(4) *Poignard v. Smith*, 6 Pick. 172; *Hapgood v. Burt*, 4 Verm. 155; *Alden v. Gilmore*, 1 Shepl. 178; *Ewing v. Burnett*, 11 Pet. 41.

Stillman v. White, &c., 3 W. & M. 538. Where one enclosed with his own land, by mistake, land of an adjoining owner, claimed no title beyond the true line, and did not prevent the other from occupying to that line; held, not a disseizin. *Lincoln v. Edgecomb*, 31 Maine, 345.

(a) In this State it is held, that an adverse possession of land, so as to vest the title, where there is no deed or written instrument, can only be made out by showing a real, substantial enclosure, an actual occupancy, which is definite, positive and notorious, or that the premises have been usually cultivated or improved; and such possession must be regularly continued and accompanied throughout by a claim of title for twenty years. *Lane v. Gould*, 10 Barb. 254. By the new *Code of Procedure*, (pp. 33-4) in case of adverse possession, founded upon a writing or a judgment; *possession and occupation* mean, 1, that the land is usually cultivated or improved; 2, protected by a substantial enclosure; 3, if not enclosed, used for the supply of fuel or fencing timber, for purposes of husbandry, or the ordinary use of the occupant. Where a known farm or single lot has been partly improved, the part not cleared, or not enclosed, according to usage, is held to be *occupied*. Otherwise where land is divided into separate lots.

In case of continued, actual occupation under claim of title, exclusive of any other right, and not founded upon a writing or judgment, a title is gained only to the part actually occupied; where it is, 1, protected by a substantial enclosure; 2, usually cultivated or improved.

The possession of a tenant is that of his landlord, till twenty years from termination of the tenancy; if there were no lease, twenty years from the last payment of rent; though the tenant has acquired another title or claimed to hold adversely.

(b) In Maine, to constitute a disseizin which would, at common law, defeat the deed of the proprietor, there must be an occupancy of a part under a recorded deed, or such an open and visible occupancy, that the proprietor may at once be presumed to know the extent of the claim and occupation. *Foxcroft v. Barnes*, 29 Maine, 128.

An occupation, according to statutes 1821, c. 62, and Rev. Sts. c. 147, does not constitute such a disseizin, as will prevent the owner from conveying his land, although it might defeat a writ of entry brought by the owner for the possession, if it were continued for twenty years. *Ib.*

The question of adverse possession is not for the court, but exclusively for the jury. *Hobart v. Hanrick*, 16 Ala. 581; *Hatch v. Smith*, 4 Barr, 109; *Grafton v. Grafton*, 8. S.

38. It is said, that the fencing(*a*) or enclosing of land has no peculiar efficacy in regard to seizin. It merely raises a presumption; and other acts, such as raising a crop, making improvements, or felling trees,^(b) do the same. So the erection of a fence on wild land, by felling trees and lapping them together, or the *blazing* of trees, will not warrant a jury in presuming a grant, or that the owner of the land had notice thereof, nor does it constitute a disseizin. So, cutting wood on woodland for use and sale, clearing land for cultivation, running lines, marking them by lopping trees, and a sale of part of the land, do not constitute disseizin, though done with notice to the owner. So with the payment of taxes, suing trespassers, &c. On the other hand, a new parol agreement between adjacent owners, upon a divisional line, followed by a corresponding possession of one party, is a disseizin of the others.⁽¹⁾

38 *a*. An entry upon land, in order to take possession of it under a claim of title, and marking the lines by spotting the trees around it, is a sufficient possession against one without title; although, without actual enclosure, not such an adverse possession against the owner as to bar his right by the statute of limitations.⁽²⁾

38 *b*. Upon such possession, trespass will lie for an entry upon the land against a wrong-doer, or trover for carrying away timber, after it has been cut upon the land.^{(3)(c)}

38 *c*. A testator devised land, of which he obtained the right of possession by a judgment recovered in a petition for partition, after legal notice to parties interested. Held, he died seized of the land, although others who claimed title, occasionally entered and cut wood upon the land, after the judgment of partition.⁽⁴⁾

38 *d*. Clearing and cultivating new fields, turning out old ones, when worn out, and cutting wood promiscuously, are held in North Carolina to constitute sufficient proof of adverse possession. So, entering, ditching, and making woods in a cypress swamp, in order to procure shingles, cutting trees and making shingles.⁽⁵⁾

38 *e*. In an action of trespass for cutting timber upon a lot containing

(1) *Ellicott v. Pearl*, 10 Pet. 414; *Bishop v. Lee*, 3 Barr. 214; *Slater v. Jepherson*, 6 Cush. 129; *Coburn v. Hollis*, 3 Met. 125; *Ewing v. Burnet*, 1 McL. 266; *Boston, &c. v. Sparhawk*, 5 Met. 469; *Hale v. Glidden*, 10 N. H. 397; *Urket v. Coryell*, 5 W. & S. 60. See *Stearns v. Palmer*, 10 Met. 32; *Pasley v. English*, 5 Gratt. 141; *Moor v. Campbell*, 15 N. H. 208; *Chandler v. Walker*, 1 Fost. (N. H.) 282.

(2) *Woods v. Banks*, 14 N. H. 100.

(3) *Ib*.

(4) *Dascomb v. Davis*, 5 Met. 335.

(5) *Wallace v. Maxwell*, 10 Ired. 110; *Treadwell v. Reddick*, 1 Ired. 56.

& M. 77. Hence, the presiding judge cannot properly charge the jury, that the plaintiff's possession is "uninterrupted, continuous, notorious, sufficient and adverse." But, the facts being found by the jury, it is a question for the court. *Macklet v. Gubreuil*, 9 Mis. 477.

(a) Especially if extending beyond the true line by accident. *Gilchrist v. McLaughlin*, 7 Ired. 310.

(b) Sometimes termed *fugitive trespasses*. *Slice v. Derrick*, 2 Pick. 127. A distinction is made between acts of this description, and a possession which is continued so far as is practicable; as, in case of a stream not navigable, by keeping up fish-traps, making and repairing dams, and catching fish every year through the fishing season. *Treadwell v. Reddick*, 1 Ired. 56; see *Flanniken v. Lee*. *Ib*. 293.

(c) The defendant may show a liability to a third person, for the value of the property, in mitigation of damages, though he has made no actual payment. *Woods v. Banks*, 14 N. H. 101.

250 acres, the plaintiff claimed title under a deed from the comptroller, given upon a sale for taxes. At the date of the deed, there was a brush fence between the lot and another lot adjoining, which was occupied under a contract from the plaintiff. In consequence of a crook in the fence, about two and a half rods of the lot in question were enclosed with the lot adjoining, so occupied, and the occupant, and those who had preceded him in the possession of that lot, had mowed grass upon the two and a half rods, but without intention to occupy over the line of the lot, or knowledge that they had done so. Held, the lot in question was not actually occupied within the meaning of the statute (1 Rev. Sts. 412, sec. 83) of New York, so as to require notice to the occupant, before the title could become absolute under the comptroller's deed.(1)

38 *f.* Though there is no written claim of title, where the manner of occupying a part of the land clearly shows the extent of the claim, every occasional entry will be an act of possession, and not a bare trespass, which it would be in one making no claim of title; and this is constructive possession.(2)

38 *g.* If, in an action of ejectment, the defendant claim title by possession, and it appear that the fence of his adjoining land was so constructed and so far extended towards the disputed land, as to give notice to the public and to all concerned, that the defendant and his grantors claimed to exercise exclusive dominion over the disputed land, by extending their fence so as to include this land, whenever it should be convenient to complete the enclosure, and that it was left open for the time, for convenience of use, or because it was not then of sufficient importance to be enclosed; and this have been continued for fifteen years; it will be a sufficient possession to give title.(3)

39. Acts of improvement and ownership done by a *mortgagor*, will not operate as a disseizin of the mortgagee.(4)

40. Mere enjoyment of an *easement*, being the exercise of a right, cannot make a disseizin of the land.(5) Thus, to cover land with water, gives no *pedis possessio*, showing adverse right. It is merely an easement, not inconsistent with title in another.(6)(a)

41. Where one had driven piles into the ground, which was covered by a mill-pond belonging to another, and had erected and maintained buildings on the piles for sixty years, the water of the pond flowing between the piles; held, a disseizin of the owner of the mill-pond.(7)

(1) *Smith v. Sanger*, 4 Comst. 576.

(2) *Buck v. Squiers*, 23 Vt. 498.

(3) *Ib.*

(4) *Hunt v. Hunt*, 14 Pick. 374; *Fenwick*

v. Macey, 1 Dana, 279.

(5) *Stetson v. Veazie*, 2 Fairf. 408.

(6) *Mims v. Weathersbee*, 2 Strobl. 184.

(7) *Boston, &c. v. Bulfinch*, 6 Mass. 229.

(a) Where an island, subject to overflow, and susceptible of use without being enclosed, was used by the defendant for pasturage, whenever it was safe so to use it, for 20 years; held a sufficient possession to bar any other claimant, but not within the seven years' limitation law of Kentucky, for want of actual settlement. *Wells v. Hynes*, 9 B. Mon. 388.

Where the legislature provided that improvements, whether wharfs, houses, or buildings, made out of the water, should be the right, title and inheritance of the improvers forever, and A held land bordering on the water, under a patent, and B erected and maintained a fence, for thirty years and upwards, on a part of the low grounds adjacent to A's land, which was covered by the flow of the tide, and claimed below it; held, A had no possession, property or right in the land covered by the tide, until reclaimed from the water; that B gained no possession by his said acts; and that those acts gave A no right of action against B, either in ejectment or trespass. *Casey v. Inloes*, 1 Gill. 430.

41 *a.* A disseizin of *flats* may be made by an appropriate occupation thereof for that purpose, as by entering upon, and filling them up, or by building a wharf, and using the flats adjoining for laying vessels at the same. But passing with vessels over flats, and anchoring on them, using them for the purpose of access to and egress from a wharf with vessels, being a usage of common right, provided for in the Massachusetts ordinance of 1641, is not inconsistent with the right of the proprietor to a fee in such flats, and constitutes neither a disseizin nor a trespass.(1)

41 *b.* The tenant in a real action, who had acquired title to a wharf by disseizin, had also exclusively occupied the flats at the end of the same, to the distance of 80 feet, for the purpose of laying vessels, and had used the flats in front of the wharf beyond the distance of 80 feet, for the purpose of access to and egress from the wharf with vessels. Held, the exclusive occupation to the distance of 80 feet was a disseizin of so much, but the occupation beyond that distance was not a disseizin of the residue, and the former did not extend to and create a disseizin of the latter.(2)

41 *c.* If a person can acquire title to flats covered by water at high tide only, by cutting "thatched grass" thereon for forty years, his title will extend only to the time of his actual occupation by cutting such grass.(3)

41 *d.* But if the title of a person to such "thatch islands," was extended to low water mark by force of the ordinance of 1641, c. 63, it would not extend over flats adjoining the islands, except those lying between them and low water mark.(4)

42. Where a dock, of which the owner of an adjoining wharf claimed to be seized, was filled up by the town, and in this condition used with the wharf as a highway, and afterwards the whole was paved by the town, though it did not appear that the way had been legally laid out; held, the acts of the town amounted to a disseizin of the dock, but, in respect to the wharf, were so equivocal, as to present a question for the jury as to the intention to disseize.(5)

42 *a.* Where a person entered upon land under a claim of title, and removed iron ore therefrom, from time to time, to supply an adjoining factory, but without any actual enclosure or residence thereupon; held, an actual possession by disseizin, for which the owner might sue in trespass; but that he could not recover for injuries to the freehold, subsequent to such entry and disseizin, till he had recovered possession.(6)

43. A stranger without title took possession of land mortgaged, and built on parts of it a blacksmith's shop and carpenter's shop; and the occupants of the former occasionally used parts of the lot adjacent to their shop to spread their boards on, and the occupants of the latter used other parts of the lot to run carriages on, and put tires on wheels. Held, the mortgagee was hereby disseized only of the part of the land covered by the shops.(7)

44. It is intimated, that the law will require peculiarly strict proof

(1) *Wheeler v. Stone*, 1 Cush. 313; *Drake v. Curtis*, Ib. 395.

(2) *Ib.*

(3) *Thornton v. Foss*, 26 Maine, 402.

(4) *Ib.*

(5) *Tyler v. Hammond*, 11 Pick. 193.

(6) *West v. Lanier*, 9 Humph. 762.

(7) *Poignard v. Smith*, 8 Pick. 272. See *Wickliffe v. Ensor*, 9 B. Mon. 253.

to constitute a possession adverse, in a newly settled country. The property acquired by settlers on public lands, more especially that class termed *squatters*, is novel in its character, peculiar to the Western States, not like that of a baillee or trustee, or that of mere wanton trespassers. With the revolution, it became an object to raise a revenue from the sale of vacant lands, without requiring any actual settlement or cultivation. Hence, it is a settled rule, that the possession of such lands follows the title, and so continues until an adverse possession is clearly made out.(1)(a)

45. There are some cases, where, for the time, an estate is so situated that no person is seized of it in fee. Thus, if land be conveyed to A for life, remainder to the right heirs of B, who is living; during B's life no one is seized in fee. The fee is said to be in *abeyance*; a word derived from the French *bayer*, to expect, and meaning in remembrance, intendment and consideration of the law.(2)

46. An abeyance of the fee, however, is against the policy of the law, on account of several inconveniences which attend it. Thus, the occupant of the land may commit waste, and there is no one who can maintain an action of waste against him. So the title, if attacked, cannot be completely defended, unless the tenant can *pray in aid* a present owner in fee. Nor will a writ of right lie against a mere tenant for life.(3) Abeyance is unpropitious to proper care and vigilance in the preservation of property, and to productive labor and improvement.(4)(b)

47. Sometimes, also, even the freehold is in abeyance, not even an estate for life being vested in any person. But the law rarely allows this; partly for the feudal reason, not in force in the United States, that the lord could call only upon the tenant of the freehold for services, and partly that a true owner disseized, can maintain an action only against such tenant.(5)

48. For these reasons, by the common law, a freehold estate cannot be conveyed to commence *in futuro*. But in the States of Connecticut,

(1) 4 Verm. 155; *Fite v. Doe*, 1 Ind. R. 129; *Jones v. Snelson*, 3 Misso. 393; *Jackson v. Sellick*, 8 John. 270; *Bell v. Fry*, 5 Dana, 344.

(2) Co. Lit. 342; *Bray Peerage, &c.*, 5 Bing. N. 754; 8 Scott, 108.

(3) 1 Cruise, 45.

(4) *Bucksport v. Spofford*, 3 Fairf. 492.

(5) *Withers v. Isam*, Dyer, 71 a; *Sheffield v. Ratcliffe*, Hob. 338; 1 Cruise, 43; *Terrett v. Taylor*, 9 Cranch, 47; *Jewett v. Burroughs*, 15 Mass. 464. See N. H. Rev. St. 282-3.

(a) With regard to lands belonging to the government, it is held, that though one who enters upon such lands is a mere intruder, yet he may maintain a writ of right against any third person. *Thomas v. Hatch*, 3 Sumn. 170. Upon a similar principle, if the State convey land occupied by a third person, he will have a claim for *betterments*, as in other cases, against the grantee. *Kinsman v. Greene*, 4 Shepl. 60. In New Hampshire, unauthorized possession of public lands is subjected to a penalty, and confers no title. N. H. Rev. St. 417. So, in Alabama, possession will not give a title against the government. *Wright v. Swan*, 6 Por. 84. In Wisconsin, a settler on the public land may maintain an action therefor. His possession extends to the bounds of his claim, without enclosure, not exceeding 160 acres. The land may be in two parcels. The claim must be marked out, so as to show its extent, and the land occupied or improved to the value of \$50. A neglect to occupy or cultivate for 6 months, is an abandonment. Wis. Rev. St. 610. A purchaser of lands, knowing the claims and possession of the state, and taking subject to its rights, has no adverse possession. *Kingman v. Sparrow*, 12 Barb. 201.

(b) The feudal reasons for this rule were, that the superior lord might know on whom to call for military services, and any adverse claimant of the lands, against whom to bring his præcipe for their recovery. See Dyer, 71 a; Hob. 338.

Virginia, Wisconsin, Indiana, New York and Ohio, this rule has been abolished or greatly qualified.(1) So, in New Hampshire, a freehold *in futuro* may be conveyed either by deed of bargain and sale, or covenant to stand seized.(2) Under the statutes of Vermont, in reference to conveyancing, a freehold estate may be created, in terms, to take effect in future.(3)

49. By *act of law*, however, the freehold may be in abeyance. One of the few instances of this is, where a *parson* or *minister*, seized of parsonage lands *in jure parochiæ*, dies; in which case the freehold is in abeyance till his successor is appointed.(4)(a)

50. *Rectors* and *parsons* are deemed so far to have a fee-simple that they transmit the estate to their successors; while, for the benefit of those successors, they are restricted in their use of the land within the powers of tenants for life. In England, however, a parson, with the assent of the patron and ordinary, may grant a perpetual rent-charge from the land.(5) In South Carolina, a statute provides, that a parson may bequeath the crop standing on his glebe land.(6)(b)

51. In Massachusetts, as early as 1654, provision was made by a colonial statute for parsonages. By a provincial statute of 28 Geo. 2, c. 9, a congregational minister might convey with the assent of the parish, and an episcopal minister with the assent of the vestry. The same statute made protestant ministers sole corporations.(7)

52. While the fee is in abeyance, the parish is entitled to the profits.(8)

53. A conveyance in fee by the parish to the minister is void.

54. A parish, for certain considerations, released and sold to the minister parsonage property. The minister, by his will, authorized his executors to sell the lands, who accordingly sold them. Held, the above-named release did not in any way enlarge the minister's estate, and that it could not be coupled with the will and executors' sale, so as to constitute a joint conveyance by minister and parish.(9)

55. So, in Maine, where a town with the assent of the minister voted that he should have the use of one-half of the parsonage lands; it was held that the fee of the whole lands still remained in him.(10)(c)

(1) 4 Dane, 646; 1 N. Y. Rev. St. 724; Walk. Intro. 278, 286; Vir. Code, 500; Wisc. Rev. St. ch. 56, sec. 24; Ind. Rev. Sts. 232.

(2) Bell v. Scannon, 15 N. H. 381.

(3) Gorbam v. Daniels, 23 Vt. 600.

(4) Lit. sec. 647.

(5) Co. Lit. 341 a & b; Lit. 648.

(6) Anth. Shep. 564.

(7) Jurist, July, 1836, p. 268.

(8) Weston v. Hunt, 2 Mass. 500; Brown v. Porter, 10, 97.

(9) Austin v. Thomas, 14 Mass. 333.

(10) Bucksport v. Spofford, 3 Fairf. 487.

(a) So, where land is granted to pious uses before there is a grantee in being competent to take it; the fee in the meantime is in abeyance. Pawlet v. Clark, 9 Cranch. 293. So, where a charter is granted, and the corporation is to be brought into being by future acts of the corporators; in the meantime, the franchises or property granted by the charter remain in abeyance. Dartmouth, &c. v. Woodward, 4 Wheat. 691.

(b) One holding the office of minister for life, or for years, is seized of a conditional freehold, and liable for waste. Cargill v. Sewall, 1 Appl. 288. So, he may maintain trespass, and the suit may proceed after he ceases to hold his office. Ib.

(c) A lease for 999 years, of parsonage land, by a parish having no minister, vests in the lessees all rights of entry and possession belonging to the lessor, whether valid against a successor in the ministry or not. Cheever v. Pearson, 16 Pick. 266. See Second, &c. v. Carpenter, 23 Pick. 131.

56. To every estate in lands the law has annexed certain peculiar incidents, rights and privileges, which appertain to it as of course, without being expressly enumerated. In some instances, these incidents are absolutely inseparable from the estate, while in others they may be restricted or destroyed by express provisions and conditions.

56 *a*. A fee-simple being the absolute ownership, the law regards its incidents as inseparable from the estate, and any restriction upon them as repugnant, and therefore void.^(a) Such are the rights of descent, of curtesy and dower, belonging not to the owner himself, but to those claiming under him. These will be considered hereafter. Such also is the right, in the owner himself, of *unlimited alienation*, or of committing *waste*.⁽¹⁾

57. A condition, in a conveyance or devise in fee-simple, against alienation generally, is void. Hence the usual clause in conveyances of the fee, "assigns forever," has no legal effect.⁽²⁾ If used with the word *heirs*, it is superfluous; if without, it confers no new right.^(b)

58. So, any condition or local custom against *leasing* the land is void. But a condition against alienation to any particular person, or an unlawful alienation, as in *mortmain*,^(c) is valid. So, if A convey to B one lot of land, on condition that B shall not alien another lot, of which

(1) Shep. Touch. 131; 1 Cruise, 46; Lit. Craig v. Watt, 1 Watts, 498.
360. See Germond v. Jones, 2 Hill, 569; (2) 2 Prest. Est. 3.

(a) With regard to the *incidents* of estates, there seems to be little uniformity or consistency in the law. While in some instances they are made subject to express limitations and agreements, (according to the principle stated by Bracton, (lib. ii. c. 6), "*modus et conventio vincunt legem*;") in others, they are held to *over-ride* all stipulations against them. Good reasons may be given, why the incidents of an estate in fee-simple should be held inseparable from it. But the same principle is adopted in regard to *estates tail*. Thus, a condition against the right to curtesy or dower in such estates, is void. So, an *estate at will* must be at the will of both parties, though expressed otherwise. So, if land be given to A and *his heirs* for twenty-one years, it goes to his executors. But, on the other hand, though the right of assigning or underletting is incident to an estate for years, it may be controlled by an express condition or covenant. So, although a conveyance to husband and wife ordinarily makes them *joint tenants*, yet a grant to them *to hold as tenants in common* makes them such. Co. Lit. 187 b. So, a mortgage, though personal estate, will pass as real estate where such appears to be the intent of a testator.

(b) A provision in a devise, that the land shall not be "subject or liable to conveyance or attachment," is void. Blackstone, &c. v. Davis, 21 Pick. 42.

Devise of real estate to the testator's wife for life, "the remainder of his estate, whether real or personal, in possession or reversion, to his five children, to be equally divided to and among them or their heirs respectively, always intending, &c., that none of his children shall dispose of their part of the real estate in reversion, before it is legally assigned to them." Held, the children took a vested remainder in the real estate devised to the wife for life, and the restriction upon their right of alienation was void. Hall v. Tufts, 18 Pick. 455. In Kentucky, it is held, that although a condition against alienation, in a deed, is void, yet a bond against it, accompanying the deed, is good, because the latter does not impair the title in the hands of third persons, but merely gives a claim for damages against the obligor. Turner v. Johnson, 7 Dana, 438. Bequest of money and leaseholds to a *feme sole*, "for her own absolute use, without liberty to sell or assign for her life." Held, she took an absolute title, but without the power of disposal. Baker v. Newton, 2 Beav. 112.

Devise to a *feme covert* in fee for her separate use, with a prohibition of any transfer or charge during her life or marriage. "She shall not sell, charge, &c.," "shall hold for her own sole and separate use, benefit and disposal, have the sole management, independent of her husband and his debts." Held, this restraint was effectual, and an equitable mortgage, made with notice thereof, was void against her. Baggett v. Meaux, Coll. Cha. 138; Churchill v. Marks, ib. 441.

(c) A clause was anciently in use, allowing alienation to all but religious men and Jews.

B was previously seized; this condition is valid. And it has been said that a condition against alienation, generally, may be annexed to the creation of a new rent-charge. But Lord Coke says "this is against the height and purity of a fee-simple."⁽¹⁾

CHAPTER III.

QUALIFIED AND CONDITIONAL FEES AND ESTATES TAIL.

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| <ol style="list-style-type: none"> 1. Fees, <i>qualified, conditional, &c.</i> 3. <i>Estates Tail</i>—origin. 5. Description. 6. What may be entailed. 12. Rights and duties of tenant in tail. | <ol style="list-style-type: none"> 18. Conveyance by tenant in tail. 25. Contracts of tenant in tail. 27. Entailment—how barred. 28. Estates tail in the United States. |
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1. HAVING treated of estates in fee-simple, we proceed to consider other *estates of inheritance* of an inferior kind. These have been by some writers included in one class, by others divided into fees *qualified* and *conditional*, and by others into fees *qualified*, fees *conditional*, and fees *tail*; but such minute distinctions of classification are of little consequence.⁽²⁾

2. Where an estate limited to a person and his heirs has a qualification annexed to it, by which it must determine whenever that qualification is at an end; it is a *qualified* or *base* fee. In other words, a *qualified*, *base* or *determinable* fee, is an interest which may continue forever, but is liable to be ended by some act or event, circumscribing its continuance or extent. Thus, if land is granted to Alexander, king of Scotland, and his heirs, kings of Scotland; or to A and his heirs, *tenants of the manor of Dale*; if the heirs of Alexander, in the one case, are not kings of Scotland, or, in the other, whenever the heirs of A cease to be tenants of this manor, their estate terminates.⁽³⁾ So, a devise to trustees and their heirs, upon trust to pay the testator's debts and legacies, and after payment thereof to his sister for life, &c.; gives a base fee to the trustees, determinable on payment of the debts and legacies.⁽⁴⁾

3. To this class of fees or inheritances, belong *conditional fees* and *estates tail*. A conditional fee is a limitation of an estate to *some particular heirs* of a man, exclusive of others—as, for instance, to the *heirs of his body*, or the *male heirs of his body*. This kind of limitation, originally unknown to the common law, gradually at an early period came

(1) Co. Lit. 223 a, b; Dyer, 357 b; Lit. 361; M'Williams v. Nisby, 2 S. & R. 373. See Hawley v. Northampton, 8 Mass. 37; Turner v. Johnson, 7 Dana, 438.
 (2) 2 Bl. Com. 104-9; Co. Lit. 1 b; Plowd. 241; 1 Prest. on Est. 420; 4 Kent, 5; Ed. Seymour's case, 10 Rep. 97 b.; Plowd. 557.
 (3) 1 Cruise, 51; 4 Kent, 9. See Keslin v. Campbell, 15 Penns. 560; Woodroffe v. Daniel, 15 L. J. N. S. 356.
 (4) Willington v. Willington, 1 Bl. R. 645. See Doe v. Woodroffe, 10 Mees. & W. 608.

into extensive use.(a) It was construed by the judges to differ from a fee-simple only in the following points; that its duration beyond the life of the donee depended upon his having issue, and, when this condition was fulfilled, it became liable to alienation, forfeiture and incumbrance, like an absolute estate. The owner might also alienate the estate before the birth of issue, and, if issue were afterwards born, neither the donor, nor the issue, when born, could reclaim it. When the donee died without having had issue, or when his issue died without issue, and not having alienated, the donor might re-enter as for breach of condition.

4. From this form of limitation originated *estates tail*, so called after an ancient German feud—“*feudum talliatum*.”(b) These were established by the statute Westminster 2, 13 Edw. I., entitled the statute “*de donis conditionalibus*.” This act, in general, provides that the will of a donor, manifestly expressed in the charter of his gift, shall be observed, and forbids persons to whom the above-named estates are conveyed, from barring their issue and the donor by alienation. Its passage was procured by the nobility, with the object of perpetuating estates in their families; and, by virtue of it, if the donee die, leaving issue, they shall take the estate; but, if he die leaving no issue, or upon any future failure of lineal heirs of the class to which the estate is limited, it shall return back to the donor or his heirs. The effect of this statute is, that whereas the estate was before a conditional fee, and the donor’s right of re-entry founded on breach or failure of condition; an *estate tail* is viewed as *carved out of the inheritance*, like any other particular estate, and, upon its expiring by limitation, the donor or his heirs re-enter like any other reversioners.(1)

5. An estate tail is defined(2) as an estate of inheritance, created by the statute “*de donis conditionalibus*,” and descendible to some particular heirs only of the person to whom it is granted.(c) It is of two kinds—*general* and *special*; the former descendible to the heirs of the body generally; the latter to some particular heirs of the body. In the

(1) See 1 Burr. 115; 2 Inst. 335; Plow. 248. | (2) 1 Cruise, 56; 2 Bl. Com.; 4 Kent.

(a) Bracton (lib. 2. ch. 6) thus describes it:—“Heirs may be restrained by the mode of the gift, whereby all the heirs generally are not called to the succession; for the mode gives law to the gift, and the mode is to be upheld against common right and against the law, because mode and agreement control law. As if it be said, ‘I give to such an one so much land, with the appurtenances, in N., to have and to hold to him and his heirs, whom he shall have begotten of his body and the wife married to him.’ Or thus, ‘I give to such an one, and such a person his wife, or with such a person, my daughter, &c., to have and to hold to him and his heirs, proceeding from the body of such wife or daughter, either born or to be born; in which case, since certain heirs are expressed in the gift, it will be seen that the descent is only to these very common heirs, through the mode specified in the gift; all his other heirs being wholly excluded from the succession, because the donor has willed it.”

(b) An ancient author (Du Cange) thus describes it. “A fee tail (*feudum talliatum*) is defined, in forensic language, as an inheritance limited to a particular certainty, or a feud granted on certain conditions; as, for example, to a person and his children to be born in lawful marriage. Hence, if he to whom the feud was given die without children, the feud returns to the donor; for to entail is to reduce to a kind of certainty, or to limit an inheritance to something certain.”

(c) Inasmuch as these heirs must be *heirs of the body* or *lineal descendants*, perhaps the definition in the text might be rendered more strictly accurate, by specifying this necessary element in the estate.

former case, the issue of the donor, male or female, by any marriage may inherit. A special entailment may be made either to the issue begotten upon a certain wife; or to issue male or issue female;(a) and no children can inherit who do not fall within these respective descriptions.(b) Thus, in case of an estate in tail male, if the donee has a daughter, she cannot inherit;(1) nor can the son of such daughter inherit, being obliged to claim through her. So, if lands be given to a man and the heirs male of his body, remainder to him and the heirs female of his body, and the donee has issue a son, who has issue a daughter, who has issue a son; this son cannot inherit either of the estates; because he cannot deduce his descent wholly either through the male or female line. So, under a devise to "the eldest male lineal descendant," a person cannot take, who claims in part through a female.(2)

6. Not only lands may be entailed, but every species of incorporeal property of a real nature—such as dignities, in England, *estovers*, commons, or other profits concerning, or annexed to, or granted out of land. So, charters or muniments of title.(3)(c)

7. So, in equity, money directed or agreed to be laid out in the purchase of land may be entailed.(4)

8. But inheritances merely personal, not real rights or interests, or partaking of the realty—as, for instance, an annuity charging only the person and not the lands of the grantor,—are not entailable, but the subjects of a conditional fee at common law, and absolutely alienable on the birth of issue.(5)(d)

9. Thus, an annuity in fee-simple, granted by the crown out of the four and a half per cent. duties, payable for imports and exports at Barbadoes.(6)

10. So, an annuity granted by Parliament out of the revenues of the post-office, redeemable upon payment of a sum of money, to be laid out in land, is not entailable, notwithstanding the latter provision; for Chancery will not treat the annuity as land, merely upon a possibility of such future redemption.(7)

11. The instance of an *annuity* seems to be the only one in which even a conditional fee in a personal chattel can be created. In equity estates *pour autre vie*, terms and chattels, though they may be limited in strict settlement, cannot be entailed. Terms and chattels pass absolutely by a limitation which would operate as an entailment of real

(1) 1 Roll. Abrid. 841, *contra*. See Co. Lit. 33; Co. Lit. 20 a. 19 a. n. 4.

(2) Co. Lit. 25 b; *Oddie v. Woodford*, 3 My. & C. 584. By "male descendants," in a will, are meant those who claim through males alone. *Bernal v. Bernal*, 3 Ib. 559.

(3) 1 Cruise, 58-9; *Nevil's Case*, 7 Rep.

(4) *Ibid*.

(5) *Ib.*; *Stafford v. Buckley*, 2 Ves. 178; Co. Litt. 20 a.

(6) *Stafford v. Buckley*, 2 Ves. 170.

(7) *Holderness v. Carmarthen*, 1 Bro. R. 376.

(a) It has been questioned whether the law would sustain the latter form of limitation; but, it seems, without reason. Co. Lit. 25 a. n. 1.

(b) Before the statute *de donis*, (upon what principle it is difficult to understand,) although the limitation was made to issue had by a certain wife, yet after the birth of such issue, the land became descendible to *any* issue of the donee, whatever. Co. Lit. 19 a. n. 2. See *Doe v. Woodroffe*, 10 Mees. & W. 608.

(c) By the law of Scotland, a jewel or picture. 2 Bell, 2.

(d) *King Chas. II.* granted a perpetual annuity to A and his heirs, payable from coal duties. Held, it passed to heirs, though personal property. *Radburn v. Jervis*, 3 Beav. 450.

estate.(1) In New York, the same restriction is imposed upon perpetuities in chattels real, as in freehold estates.(2)

12. Tenant in tail, being owner of the inheritance, may commit *waste*. But the power must be exercised during his life. Hence, if he sell trees growing on the land, the vendee must cut them during the life of the tenant in tail; otherwise they descend with the land to his heir.(3)

13. The grantee of a tenant in tail, and the grantee of such grantee, may commit waste.(4)

14. Chancery will not interfere to restrain a tenant in tail from committing waste, although he is an infant in feeble health and not likely to live to full age.(5)

15. The power of waste is so far an inseparable incident to an estate tail, that a bond against it is repugnant and void, like a recognizance not to suffer a common recovery; and Chancery will order it to be given up and cancelled.(6)

16. Tenant in tail is entitled to all deeds and muniments belonging to the lands; and Chancery will compel a delivery of them to him.(7)

17. He is not bound to pay off incumbrances. But, if he does, he will be presumed to have done it in exoneration of the estate in fee-simple, because he has the power of making it his own. But such tenant, restrained as to alienation, though having powers of leasing and jointuring, stands in this respect like a tenant for life.(8)

18. The statute *de donis* restrains the tenant in tail from alienating his estate for a longer term than his own life. Where he grants away his whole interest, according to some authorities, the grantee's estate is for the life of the tenant in tail, the reversion being in abeyance; while, according to others, it is a *base fee*, descendible to the grantee's heirs so long as the tenant in tail has heirs of his body, and subject to dower.(9)

19. The prohibition against alienation, though not expressly extended to the issue, applies to them also by implication. The *equal mischief* implies *the like law*.(10)

20. Where tenant in tail conveys away his estate, the interest of the grantee does not terminate *ipso facto* with the death of the former, but is merely defeasible or subject to be avoided by the issue; because he has the inheritance in him, and the statute *de donis* makes no alteration as to him, but merely provides that the issue shall not be disinherited.(11)

(1) 2 Chit. Black. 89, n.; 2 Story on Equity, 252-3; Dorr v. Wainwright, 13 Pick. 330; Betty v. Moore, 1 Dana, 236; Harkins v. Coalter, 2 Porter, 463; Co. Litt. 20 a, n. 5; Adams v. Cruft, 14 Pick. 25; Kirch v. Ward, 2 Sim. & Stu. 409; Ladd v. Harney, 1 Fost. N. H. 514.

(2) 1 N. Y. Rev. St. 724.

(3) Perk. s. 58; Hales v. Petit, Plow. 259; Liford's Case, 11 Rep. 50 a.

(4) 1 Cruise, 60; 3 Leon. 121.

(5) Glenorchy v. Bossville, Cas. Temp. Talbot, 16.

(6) Jervis v. Bruton, 2 Vern. 251.

(7) 1 Cruise, 61.

(8) Jones v. Morgan, 1 Bro. R. 206; Ware v. Polhill, 11 Ves. 277; Shrewsbury v. Shrewsbury, 1 Ves. 227; St. Paul v. Dudley, 15 Ves. 173.

(9) Lit. s. 650; Walsingham's Case, Plow. 554-7; Seymour's Case, 10 Rep. 96 a.

(10) Regina v. Fogossa, Plow. 13; Darby's Case, T. Jones, 239.

(11) Machell v. Clerk, 2 Ld. Ray. 779; Whiting v. Whiting, 4 Conn. 179.

21. But where something is *granted out of* an estate tail; as, for instance, *a rent*; it becomes absolutely void at his death.(1)

22. Where tenant in tail mortgages the land, Chancery will decree him to make as perfect a title as he is capable of making, and to pay the amount due in a certain time, or be foreclosed.(2)

23. Where tenant in tail covenants to stand seized to the use of himself for life, remainder to another in fee; the whole limitation is void, and his former estate continues.(3)

24. But an estate created by him, which must or may commence in his lifetime, is good. Thus, a remainder after a life estate will be valid, till avoided by the issue.(4)

25. Although a different rule prevailed formerly, it is now settled that the issue in tail is not bound by any contracts of his ancestor in relation to the estate, either in law or equity, nor by a decree to bar the entailment. Nor will equity aid in carrying into effect an incomplete alienation against him, as, for instance, *a fine*. But if he does any act towards performance, equity will enforce the contract against him.(5)

26. An estate tail does not, like estates for life and for years, merge in the fee-simple, when the two become vested in the same person. If it did, a tenant in tail might at any time destroy the entailment by purchasing the reversion in fee. It was otherwise with conditional fees before the statute *de donis*.(6)(a)

27. In England, the mischiefs of entailment in rendering real property unalienable became so severe, that constant attempts were made in Parliament to procure a repeal of the statute "*de donis*," but for a long time without success. Judicial construction, however, at length supplied the place of express legislation. The courts held in the first place, that the issue in tail, having assets, were bound by a warranty of the ancestor; and afterwards, that both the issue and the reversioneer or remainder-man might be barred by a *feigned recovery*. And at length two statutes of Hen. 7 and Hen. 8 declared a *fine* to be a bar of estates tail. But by St. 3 and 4 Wm. 4, c. 74, fine and recovery are abolished, all warranties by tenants in tail are made void against the issue, and the only mode of barring entailments is by an enrolled deed.(7)

28. In the United States, estates tail have in a great measure fallen into disuse, and the law pertaining to them is therefore comparatively unimportant.

29. The people of Massachusetts, at a very early period of the country, adopted the idea of entailment, even to the extent of giving an estate limited to one and the heirs of his body, to the oldest son, in the first instance, and to the other sons only on failure of his issue. But

(1) *Walter v. Bould*, Bulst. 32.

(2) *Sutton v. Stone*, 2 Atk. 160

(3) *Beddingfield's Case*, Cro. Eliz. 895.

(4) *Machell v. Clerk*, 2 Ld. Ray. 782; *Machell v. Clerk*, 7 Mod. 27.

(5) *Jenkins v. Keymes*, 1 Lev. 237; *Wharton v. Wharton*, 2 Vern. 3; *Frank v. Main-*

waring, 2 Beav. 115; *Ross v. Ross*, 2 Cha. C. 171; *Cavendish v. Worsley*, Hob. 203.

(6) 2 Rep. 61 a; see *Woodroffe v. Daniel*, 15 L. J. (N. S.) 356.

(7) *Mildmay's Case*, 6 Rep. 40 b.; Rolls of Parl. 142.

(a) But a life estate so far merges in an estate tail, that the tenant in tail cannot maintain an action for *the freehold*, as such. *Webster v. Gilman*, 1 Story R. 499.

the use of the common recovery in barring entailments became so universal, that, at the time of the revolution, there was rarely an estate tail in the province. In Pennsylvania, estates tail were distinctly recognized in the charter of 1681; and in Virginia a law was passed in 1705, to take away from the courts the power of defeating them.(1)

30. In South Carolina, the statute *de donis* never was in force, but the old doctrine prevails, of fees conditional at common law; and it has been held, that the lien of a judgment or decree against one thus holding lands, after the birth of issue, bars the right of the issue to take "*per formam doni*."(2)

31. In Virginia,(a) Kentucky,(b) Tennessee, North Carolina, Indiana,(c) Georgia, Mississippi, Alabama, Wisconsin and Michigan, entailments are expressly abolished, or estates tail declared to be estates in fee-simple. But, in Alabama and Mississippi, an estate may be granted to a succession of donees *in esse*, and to the heirs of the body of the remainder-man, and, in default of such heirs, to the right heirs of the donor in fee-simple.(3)

32. In Illinois, Missouri and Arkansas, the donee in tail takes a life estate, and his issue a fee-simple.(4)

33. In New Jersey,(d) Ohio, Missouri, Illinois, Arkansas, and Connecticut, estates tail become estates in fee-simple, in the heirs of the original owner. In Connecticut (and probably in the other States men-

(1) *Hawley v. Northampton*, 8 Mass. 3; *Sull. on Land*. T. 73; 4 Kent, 13, 14, n.; *Corbin v. Healy*, 20 Pick. 514.

(2) 4 Griff. 852; *Izard v. Izard*, 1 Bai. Equ. 228; see *Pearse v. Killian*, 1 McMull. 231. *The whole estate* is held to be in the tenant. *The possibility of reverter* is neither inheritable nor devisable; nor would one interest *merge* in the other. 1 Hill's Cha. 276. A conveyance to one, "his heirs and assigns forever, but should he die without lawful issue of his body," then over, gives the grantee a fee-simple absolute at common law. *Edwards v. Edwards*, 2 Strobb. Equ. 101. The words, "have loaned to A during her natural life and after her death, hath given unto the heirs of her body which shall survive her, to be equally divided amongst them," were held to create an estate tail under the laws of South Carolina, in the personal property granted, so as to vest it absolutely in the grantee, and by her marriage in her husband, to whose administrator it be-

longed after their deaths, and not to her heirs. *Watts v. Clardy*, 2 Florida, 369. A testator, after the decease of his mother, gave "the use" of the estate to A "for life," and, after his decease, declared the same to be vested in the male issue of the said A, and in default of such, in the issue female surviving him, and if a general failure at the death of A, then over. Held, the estate devised was a fee conditional at common law; that the will gave A an estate for life, and at his death to his issue male, in their default to his issue female, the issue taking by way of limitation, and that the limitations over, in the event of his leaving no issue, were void either as contingent remainders or executory devises. *Birst v. Davies*, 4 Strobb. Equ. 37.

(3) N. C. Rev. Sts. 258; Ind. Rev. L. 209; 3 Griff. 441-4, 578, 666, 781; Mich. L. 293; *Zollicoffer v. Zollicoffer*, 4 Dev. & B. 441; Wisc. Rev. Sts. 313; Virg. Code, 500.

(4) Illin. Rev. L. 131; Ark. Rev. St. 139; Misso. Sts. 119.

(a) The statute on the subject does not change into a fee a remainder in tail expectant upon another estate tail. 2 Wash. 35-6.

(b) Where the ancestor takes either an estate in fee, defeasible upon his death, without issue, or a fee-tail, (converted by law into a fee-simple,) his alienation bars his issue and heirs who, in either case, cannot claim otherwise than by descent. *Grimes v. Ballard*, 8 B. Mon. 625; *Deboe v. Lower*, 8 B. Mon. 616.

(c) By the Revised Statutes of 1838, (p. 238,) one may be seized of an estate tail, but after the second generation it becomes a fee-simple.

(d) The wife has dower, and the husband curtesy. Rev. C. 774-5. By statute, in New Jersey, all estates tail at common law are changed into an estate for life in the first taker, with remainder in the child or children of the first taker. *Morehouse v. Cotheal*, 1 New Jersey, 480.

tioned) he cannot alienate, and, if he leave no issue, the lands revert. In Connecticut, the statute, which establishes the rule above stated, seems to be merely an affirmation of previous decisions. It is there held, that, if the tenant convey in fee, the grantee takes a base fee, determinable on the tenant's death, by entry of the issue.(1)

34. In Vermont, the constitution provides, that the legislature shall regulate entails in such manner as to prevent *perpetuities*. There is a similar provision in the constitution of Texas. In Vermont, the same rule is established by the Revised Statutes as in Connecticut.(2)

35. In New York, an estate tail may still exist, for the benefit of a remainder limited upon its determination.(3)(a)

36. In Pennsylvania,(b) Maryland,(c) Massachusetts,(d) Maine and

(1) Walk. 300; 1 Swift, 79; Hamilton v. Hempsted, 3 Day, 332; Chappel v. Brewster, Kirb. 175; 4 Conn. 179; Allyn v. Mather, 9, 114; Misso. Rev. Sts. ch. 32, s. 5; Illin. Rev.	Sts. 131; Ark. Rev. Sts. 265. (2) 4 Kent, 16; Verm. Rev. Sts. 310; Tex. Const. art. 17. (3) 1 N. Y. Rev. Sts. 722.
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(a) The statute of New York, of February 23, 1786, abolishing estates tail, and providing that all persons, who then were, or who, but for that statute, would thereafter, by virtue of any devise or conveyance, become seized in fee-tail of any real estate, should be deemed to be seized of the same in fee-simple, has been construed by the courts of New York to include estates tail *in remainder*, and their construction is followed by the courts of the United States. Van Rensselaer v. Kearney, 11 How. U. S. 297.

A testator, by his will, made in 1805, devised the use and improvement of his farm to A during his life, and after his death to B, the eldest son of A, and to the heirs of his body, and their heirs and assigns forever; but, in case B should have no such heirs, then to C, the brother of B, and his heirs; held, B took a vested remainder in tail expectant on the termination of the life estate of A, which, by the statute abolishing entails, was converted into a fee-simple, and that the limitation over to C was cut off. Barlow v. Barlow, 2 Comst. 386.

A, by a will which took effect in 1783, devised lands to trustees during the life of the testator's grandson B., to preserve contingent remainders, in trust to permit the grandson to receive the rents and profits during his life, and after his death to his first, and every other son successively, in tail male. The first son of the grandson, who was born after the will took effect, died in the lifetime of his father without issue. Held, the remainder which vested in such son at his birth, was immediately converted into a remainder in fee-simple. Van Rensselaer v. Poucher, 5 Denio, 35.

Where an estate tail in remainder was limited to the eldest son of the first taker, to whom an intermediate life estate was given, and became vested by the birth of a son prior to the act of 1786, abolishing entails; held, by the operation of that act, the estate tail in remainder was converted into a fee-simple in remainder, which, on the death of the remainder-man without issue in 1809, and before the termination of the intermediate life estate, descended to his father as his heir at law. Wendell v. Crandall, 1 Comst. 491.

(b) An estate tail may be barred by a *common recovery*. So, in Delaware, by *fine and recovery*. 4 Kent, 71 n.; Purd. 278; 4 Griff. 1075.

Whether an entail can be barred by deed of partition between tenants in common, see Tiernan v. Roland, 15 Penn. 429.

A deed from a tenant in tail, purporting to bar the entail, but never recorded, as required by law, and thus incompetent to bar the entail, was held, nevertheless, to be good to convey the grantor's right of possession, and therefore admissible in evidence. George v. Morgan, 4 Harris, 95; Worrall v. The Same, ib.

(c) In Maryland, it is said, *docking* estates tail by common recovery was abolished in 1782. By a statute of 1786, estates tail general, subsequently created, are abolished. But this act does not apply to *special* entailment, which may be barred by deed or recovery, are chargeable with debts only by mortgage, are not devisable, and descend only to issue. 4 Kent, 15-16 n. See Newton v. Griffith, 1 Harr. and G. 111; 3 H. and McH. 244; 1 Harr. J. 465.

Where there was a devise of an estate in fee, with a limitation over, after a dying without issue, it was formerly, in Maryland, converted into an estate tail, and the limitations over operated by way of remainder; but the act of descents now converts that estate tail into an estate in fee. Watkins v. Sears, 3 Gill. 492.

(d) Devise of one undivided half of certain land to A in fee-simple, and the other half to B in fee-tail general. Before the act of 1791, c. 60, the parties made partition by deed,

Delaware, estates tail may be conveyed, and in Rhode Island and Virginia, conveyed or devised, so as to pass a fee-simple. In Massachusetts, Maine and Virginia, they are liable for debts, and a sale for creditors passes a fee-simple. In Massachusetts, a remainder in tail is not thus liable, but a tenant for life and a remainder-man in tail may join in conveying the fee-simple. So in Maine.(1)

37. In Pennsylvania, the purchaser of an estate tail on execution may bar the entailment, by suffering a recovery and vouching the tenant.(2)

38. In New Hampshire, Chancellor Kent says, entailments may still be created, though in practice almost unknown. In this State, as in Pennsylvania and Delaware, they may be barred by a common recovery.(3) By a recent act, they may also be barred by deed.(4)

39. In Pennsylvania, where the tenant in tail dies, the land descends to his heir at common law.(5) In Virginia, if escheatable for defect of blood, the estate descends according to the limitation.(6)(a)

(1) Mass. Rev. St. 405-12-16-63; Purd. Dig. 279; 1 Smith, St. 143-4; 1 Vir. Rev. C. 158; 4 Grif. 1057; Riggs v. Sally, 3 Shepl. 408; Maine Rev. Sts. 372; Dela. Rev. Sts. 271.

(2) Purd. 280. See Robb v. Ankeny, 4 Watts & S. 128.

(3) 4 Kent, 71, n. See Frost v. Cloutman, 7 N. H. 1.

(4) St. 1837, c. 340.

(5) Purd. Dig. 279; Jenks v. Backhouse, 1 Bin. 96.

(6) 1 Vir. Rev. C 159.

each releasing to the other, his heirs and assigns forever, that part which was set off to the other. B conveyed his portion, with warranty, to C, who conveyed it to D, and D to E. After B's death, his heir in tail brings an action against E to recover the land. Held, he was entitled to recover one moiety of it. Buxton v. Uxbridge, 10 Met. 87.

A deed of an estate tail was made, purporting to be in consideration of a sum of money, and of a lease of the land to the grantor for one year, at an apparently nominal rent. Before the lease expired, the grantee made a declaration of trust, *inter alia*, to permit the grantor to have possession for life; and the grantor remained in possession from the time of giving his deed. Held, *prima facie*, the deed was given upon valuable consideration and *bona fide*, and therefore was *prima facie* sufficient to bar the entailment. Nightingale v. Burrell, 15 Pick. 104. By St. 1851, 568, equitable estates tail may be barred in the same manner as legal estates, by a conveyance in fee-simple; and the grantee may demand and enforce a conveyance to him of the outstanding legal title.

(a) By a late English Statute, 3 & 4 Wm. 4, ch. 74, tenant in tail may by deed, duly enrolled, alienate in fee-simple or for any less estate; subject, however, to the rights of any prior tenant, whose estate was created by the same settlement as the estate tail, unless such tenant consent to the alienation. 1 Steph. Comm. 237. See further Riggs v. Sally, 15 Maine, 408; Egerton v. Earl, &c., 7 Eng. L. & Equ. 170; Monypenny v. Dering, 8 Eng. L. & Equ. 42.

CHAPTER IV.

ESTATE FOR LIFE.

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|---|---|
| 1. Definition.
2. How created.
3. Different forms of life estates.
6. <i>Merger</i> —estate <i>pour autre vie</i> .
8. <i>Estovers</i> .
12. <i>Praying in aid</i> .
13. Title deeds. | 16. Payment of incumbrances.
22. Transfer of estate.
23. Forfeiture.
40. Estate <i>pour autre vie</i> .
56. Termination of estate for life; presumption of death. |
|---|---|

1. AN estate for life is a freehold interest in lands, the duration of which is confined to the life or lives of some particular person or persons, or to the happening or not happening of some uncertain event.(1)

2. An estate for life may arise either from the act of parties or from operation of law.(2)

3. A life estate may be created by *act of parties*, either by an express disposition for the life of the grantee or devisee, or of a third person, or both,(a) or by a general disposition, specifying no limit,(b) which in a deed cannot, in general, pass an inheritance for want of the word *heirs*.(3)(c) So an estate limited upon a contingency, as to a woman during her widowhood,(d) or to a person *quamdiu bene se gesserit*, is a life estate, in the hands of the original tenant, or, in the case of widowhood, of her grantee, or a purchaser from the administrator of such grantee; though it may terminate sooner than the owner's life. If given to a woman for her life or widowhood, she holds only during widowhood. The provision is a *limitation*, not a *condition*. But, where one devises to his wife for life, if she remain so long his widow, and, if

(1) 1 Cruise, 76.

(2) Ib.

(3) Ib. 77; Co. Lit. 42 a.

(a) Agreement by a lessor not under seal, that he would not turn out the tenant so long as he paid rent. Held invalid, because constituting a life estate, which can be created only by deed, *Doe v. Brower*, 8 E. 165.

(b) An estate may be so situated, that it may last either for the tenant's own life or for that of another person, according to the happening or not happening of some uncertain event. Thus, a husband, before the birth of issue, has an interest in the wife's lands for her life; liable, however, to be changed into an interest for his life, upon the birth of issue. Lease to A "for the natural life of A and wife, the same being secured for the separate use, for the maintenance of A and wife, and for no other use." After the death of A, the wife may defend against an action of ejectment by the lessor. *Towers v. Craig*, 9 Humph. 467.

(c) A mere life estate may be created, though words of perpetuity be used in the limitation. Thus, where there was a bequest of a leasehold, after limitations for life, to A, his *executors, administrators and assigns*, during the term of his natural life; held, a life estate in A. *Morrall v. Sutton*, 4 Beav. 478, 5, 100.

(d) Such limitation is valid, without limiting over the estate upon her marriage. *Coppage v. Alexander*, 2 B. Monr. 314. See *Sims v. Aughtery*, 4 Strobb. 103; *Slocum v. Slocum*, 21 Edw. Cha. 613. A testator provided in his will, "that the proceeds from the sale of my real estate shall be loaned out and amply secured, so that my wife may get the interest annually, as long as she shall remain my widow, for the support of herself and my daughter; and, if at any time she should marry, then my whole property, principal and interest, to go to my child." Held, the wife was entitled to the income on the whole estate of the testator during widowhood. *Dale v. Dale*, 1 Harris, 446. A devise by a husband to his wife, "during her natural life or widowhood," is valid; and the estate is terminated by the marriage of the widow. *Walsh v. Matthews*, 11 Mis. 131.

she marry, her husband to have no other privilege than that of living on the place for her life, and no longer; this gives the wife an estate for her life, not subject to be incumbered by the husband.(1) So, a conveyance, for so long a time as certain salt-works proposed to be erected shall continue to be used, passes a life estate determinable by the disuse of such works.(2)

4. A lease made by tenant in fee-simple *for term of life*, not mentioning whose life, shall be for the life of the lessee,—a deed being always construed most strongly against the maker. But a lease in this form by tenant in tail will be for the life of the lessor. So a lease without special limitation by a tenant for life; because this estate he may lawfully make, while a conveyance for the lessee's life would be a wrongful act.(3)

5. A, tenant for life, leases to B, on condition that if B die leaving A, the land shall revert to A. All the estate passes under the condition.(4)

5 a. A grant for the life of one not in existence is void; but if for the lives of three persons, one of whom has no existence, it is good for the lives of the others.(5)

6. One holding an estate for the life of another, is called tenant *pour autre vie*. An estate "*pour autre vie*" will *merge* in a remainder for a man's own life—being an inferior interest to the latter, and the lowest species of freehold. But, if lands are conveyed to a person for his own life and that of A. and B, he has one freehold, determinable on his own death and the deaths of A and B, and not two distinct estates; and there is no merger. Lord Coke remarks, that the books are very plentiful with cases on this subject, "whereof you may disport yourselves for a time."(6)

7. There are several *incidents* to an estate for life.

8. Tenant for life is entitled to *estovers*, *estoveria rationabilia*, or allowance of necessary wood from the land.(7)

9. *Estover* is derived from the French word *estoffe*—material.(a) The corresponding Saxon word is *botes*.(8)

10. There are three kinds of *estovers* or *botes*: *house-bote*, which is two-fold, *estoverium ardendi et ædificandi*—of burning and building; *plough-bote*, "*arandi*"—of ploughing; and *hay-bote*, "*claudendi*"—of enclosing or fencing.(9)

11. Where a lessor covenants that the tenant for life shall have thorns for hedges, by the assignment of the lessor's bailiff, the tenant may still cut thorns without such assignment, having an implied right to do so.

(1) Pease v. Owens, 2 Hayw. 234; The People v. Gillis, 24 Wend. 201; Brown v. Brown, 8 N. H. 93; Craig v. Watt, 8 Watts, 498; Coppage v. Alexander, 2 B. Monr. 316; Rosaboom v. Van Vechten, 5 Denio, 414; Lloyd v. Lloyd, 10 Eng. L. & Equ. 139.

(2) Hurd v. Cushing, 7 Pick. 169. See Cook v. Bisbee, 18 Pick. 527.

(3) Co. Lit. 42, a, b; Jackson v. Van Hoesen, 4 Cow. 325; Whittome v. Lamb, 12

Mees. & W. 813.

(4) Co. Lit. 42 a, n. 11.

(5) Doe v. Edwards, 1 Mees. & W. 533.

(6) Abbot, &c. v. Bokenham, Dyer, 10 b; Bowles' case, 11 Rep. 83; 4 Kent, 26; Co. Lit. 41 b.

(7) Co. Lit. 41 b.

(8) Spel. Glos.

(9) Co. Lit. 41 b; Heydon's case, 13 Rep.

68.

(a) Hence, the English word *stuff*.

Otherwise, if the tenant had covenanted that he would not cut without assigment.(1)

11 *a.* A tenant for life, of a farm of 165 acres, is not entitled to fire-bote for the dwelling of a farmer or laborer, in addition to fire-bote for the principal dwelling. A custom to that effect would be unreasonable and invalid.(2)

12. In all real actions, tenant for life may *pray in aid*, or call for the assistance of, the owner in fee to defend his title, because the former is not generally supposed to have the evidences of title.(3)

13. When and how far a tenant for life is entitled to possession of the *title-deeds*, seems to be a point somewhat unsettled. In one case, it was said to be a common practice for the Court of Chancery to take them from him and deposit them in court. And the court will take care of the deeds, where the tenant manifests an indifference on the subject, and parted with the possession of them. But on the other hand it has been doubted, whether Chancery will interfere, either to take the deeds from the tenant or restore them to him. It will refuse to give them to a remainder-man, where there are intermediate remainders.(4)(*a*)

14. In an action at law to recover title deeds, the defence was, that the defendant held under a *cestui que trust*, claiming by a written declaration of trust. The plaintiff contended, that the court would not notice a merely equitable title. Held, the court either could or could not notice such title. If the latter, this was because such title was doubtful, and therefore the plaintiff must go into equity to settle it. If the former, the defendant was entitled to the deeds. In either case, the plaintiff must fail.(5)

15. It will be seen hereafter, (ch. 10,) that if a widow detains the charters of the estate, she thereby forfeits her dower, and that a jointress will be compelled to deliver up title deeds, upon having her jointure confirmed.(6)

16. Tenant for life is not bound to pay the principal of any sum charged upon the inheritance. Hence, if he does pay it, he becomes a creditor of the estate,(*b*) standing in place of the original creditor, and being entitled to the charge for his own benefit, unless he have in some way indicated a contrary intent. But the smallest demonstration is sufficient; and he can claim no interest during his life. The old rule required a tenant for life to bear one-third of the debt; but this

(1) Dyer, 19 b. pl. 11, 5. Shelby, J., dissented. Stukely v. Butler, Hob. 173.

(2) Sarles v. Sarles, 3 Sandf. Ch. 101.

(3) Booth on R. A. 60. See Sohler v. Williams, Curtis' R. 479.

(4) Ivie v. Ivie, 1 Atk. 431; Papillon v.

Voice, 2 P. Wms. 477; Hicks v. Hicks, Dick. 650; Ford v. Peering, 1 Ves. jun. 72. See, as to title deeds, Dryden v. Frost, 3 My. & C. 670.

(5) Atkinson v. Baker, 4 T. R. 229.

(6) See *Detinue of Charters, Jointure*.

(*a*) *Prima facie* the tenant for life is entitled to them; and the remainder-man can call for them only to answer some specific purpose. Shaw v. Shaw, 12 Price, 163. In a late case it has been held, that the owner of the inheritance is entitled to them, though there be an attendant term for 1,000 years. Austin v. Croome, 1 C. & Mar. 653. Where a lessee has, for twenty years after the expiration of his term, had possession of the lease, such possession is deemed adverse, and Chancery will not interfere to have it delivered up. Dean, &c. v. Dorrington, Holt Eq. 59.

(*b*) Held, in Kentucky, that he does not thereby become a creditor of those in remainder. King v. Morris, 2 B. Monr. 104. Charges upon the estate, paid by such tenant, are *prima facie* kept alive; not merged in the fee. Faulkner v. Daniel, 3 Hare, 217.

principle has been pronounced absurd, making no allowance for the different ages in different cases, and overruled.(1)

17. In case of a jointure, where the jointress and the issue claim under one settlement, they shall contribute proportionally to the discharge of a prior incumbrance.(2)

18. Tenant for life is bound to keep down the interest, or, if a dowress, one-third of the interest, upon incumbrances, whether it accrued before or since the commencement of his estate, and though it exhaust the rents and profits.(a) If the incumbrancer neglect to collect the interest from the tenant for life, the reversioner, &c., may file a bill to charge the rents or have the estate sold. But, where the latter for a series of years pays the interest, far exceeding the profits, it is *prima facie* evidence that he meant to discharge the estate, especially if settled ultimately on his family.(3)(b)

(1) *Jones v. Morgan*, 1 Bro. R. 205; *Earl, &c. v. Hobart*, 3 Swanst. 199; *White v. White*, 4 Ves. 33; *Hunt v. Watkins*, 1 Humph. 498; *Wainright v. Hardisty*, 2 Beav. 363; *Bulwer v. Astley*, 1 Phil. 422.

(2) *Carpenter v. Carpenter*, 1 Vern. 440.

(3) *Tracy v. Hereford*, 2 Bro. R. 128; *Penrhyn v. Hughes*, 5 Ves. 99; 4 Kent, 74; 1

Bro. R. 220; *Burges v. Mawbey*, 1 Turn. & R. 167; *Hunt v. Watkins*, 1 Humph. 498; *Williams*, 3 Bland, 245; *Lindsey v. Stevens*, 5 Dana, 108; *Tucker v. Boswell*, 5 Beav. 607; *Glengall v. Barnard*, Ib. 245; *Bull v. Birkbeck*, 2 Y. & Coll. Cha. 447; *Caulfield v. Maguire*, 2 Jones & Lat. 141.

(a) So, an annuity is charged, first upon the life estate, then upon the inheritance. *Cason v. Lawrence*, 3 Edw. 48. So, an *assessment* will be apportioned upon the two estates. *Cairns v. Chabert*, 3 Ib. 312. And if a tenant for life neglect to pay the taxes upon the estate, Chancery will appoint a receiver. *Astreen v. Flanagan*, 3 Edw. 279. The expense of draining land was charged upon a fund absolutely belonging to an infant tenant for life, and not upon the land. *Stanhope v. Stanhope*, 3 Beav. 547.

Tenant for life cannot charge the remainder-man for improvements made by the former. *Caldecott v. Brown*, 2 Hare, 344; *Thurston v. Dickenson*, 2 Rich. Equ. 317.

Where a tenant for life has power to sell in fee, reserving a ground rent, he cannot bind the remainder-man with special covenants, except in pursuance of his power. *Naglee v. Ingersoll*, 7 Barr. 185. But his agreements are evidence of the boundaries and of the conditions of the estate at the time of the grant. Ib.

Where a building is insured, in which there is a life estate, in case of a partial destruction of it, the insurance money is to be applied to repairs. *Brough v. Higgins*, 2 Gratt. 408. The tenant for life is not entitled to receive the principal of the money paid for a loss, but only the interest, deducting the premiums. *Graham v. Roberts*, 8 Ired. Equ. 99.

(b) In case of tenant for life, remainder in fee, of lands mortgaged, the parties contribute to a discharge of the incumbrance, according to the relative value of their respective interests, calculated according to the value of the life estate by the common tables. *Foster v. Hilliard*, 1 Story, 77. Real estate was devised to A for life, remainder to certain minors in fee. A, with consent of the guardians, sold the land, but died before receiving the whole consideration, and the residue was received by his executors. Held, the rights of the parties were fixed at the time of sale, and the executors and the remainder-men should divide the proceeds according to the interests of A and the remainder-men at that time.

Also, that the interest of the tenant for life was to be determined, not by the time of his death, but by the value of his life, as ascertained by the common tables at the time of sale. Thus, although he died within four years from the sale, his interest was to be calculated for about twenty years, that being the estimated duration of his life. Ib. It is held, that there is no general rule for estimating the relative value of a life estate and reversion; but the most convenient course is to sell the whole estate, and divide the proceeds. *Atkins v. Kron*, 8 Ired. Equ. 1. See *Williams*, 3 Bland, 221; *Bristed v. Wilkins*, 3 Hare, 240. The dividends of a sum of stock were ordered, upon petition, to be paid to A for her life, and, after her decease, to B for her life; but an order for the transfer of the fund, after the death of the survivor of them, was refused. *Lowndes' Trust*, in re, 6 Eng. Law and Eq. Rep. 60; *Staples*, 9 ib. 186. A terre-tenant is not bound to go beyond the profits of the land, in keeping down incumbrances. *Jones v. Sherrard*, 2 Dev. & B. Eq. 184. A tenant by the curtesy must pay all the interest accruing during his estate, but not before. *Ibid.*

19. The rule above stated applies only to mortgages and other charges upon the inheritance. With regard to renewal leases, in England, and, so far as they are known, in the United States, the charges of renewal are shared by the tenant for life, in proportion to the benefit which he derives from it under the particular circumstances; and this is referred to a master to settle.(1)

20. In general, where tenant in tail pays off an incumbrance, it is understood to be done in discharge of the estate, because he has the power of making it his own. But such tenant, restrained as to alienation, though having powers of leasing and jointuring, stands in this respect like a tenant for life.(2)

21. If a mortgagee, after a neglect by the tenant for life to pay the interest, purchase the estate for life, and then, after the tenant's death, bring a bill to foreclose; he shall be charged in his account with all the arrears which accrued before such purchase. He would have been bound in this way had he taken possession as mortgagee.(3)

22. Tenant for life, unless expressly restrained, may transfer the whole or any part of his estate to a third person, in any way which shall not injure or endanger the remainder; or he may join with the owner in fee in alienating the entire inheritance.(a) In New Jersey, a statute provides that the assent of the next owner to a conveyance by tenant for life shall appear of record.(4)(b)

23. It is one of the incidents of a tenancy for life, that for certain acts done by the tenant the estate may be forfeited. We shall have occasion, hereafter, to consider this subject in one point of view, under the head of *Waste* (Ch. 18.) There is another ground of forfeiture, which may properly be considered here.

24. At common law, where a tenant for life undertook to convey by feoffment a larger estate than he himself owned, such interference with another's title, operating to divest the remainder or reversion, was punished by forfeiture of the estate for life to the remainder-man or reversioner. This, however, was not the only ground of forfeiture; for where tenant for life of a *rent* levied a fine of such rent, although nothing more passed thereby than his lawful estate, still a forfeiture was incurred.(5) This principle, being founded in the feudal system, according to which such a conveyance was a renunciation of the connection between the lord and his vassal,(c) is for the most part obsolete in American law.(6) It is said by one distinguished commentator, that

(1) 4 Kent, 75. See *Reeves v. Creswick*, 3 Y. & Coll. 715.

(2) *Shrewsbury v. Same*, 1 Ves. jun. 227.

(3) 5 Ves. 99.

(4) 1 Cruise, 81; 1 N. J. Rev. C. 348; King v. Sharp, 6 Humph. 55.

(5) Gilb. Ten. 38-9. See *Dehon v. Redfern*, Dudl. Equ. (S. C.) 115; *Ackland v. Lutley*, 9 Ad. & Ell. 879.

(6) Walk Intro. 277; 4 Kent, 83-4; M'Corry v. King, 3 Humph. 267.

(a) It has been held that a proviso against alienation is void. *Rochford v. Hackman*, 10 Eng. L. & Equ. 64.

(b) In Maine, he may join with the remainder-man in tail, in passing a fee-simple. Me. Rev. St. 372. The provision in Massachusetts Rev. Sts. c. 59, sec. 28, that no conveyance of an estate in fee or for life, nor any lease for more than seven years, "shall be valid and effectual against any other person than the grantor, his heirs, &c., unless it be made by deed recorded," does not dispense with the necessity of a deed, in order to pass an estate for life, even as against the grantor and his heirs. *Stewart v. Clark*, 13 Met. 79.

(c) Tenant for life is sometimes called an *implied trustee*. *Joye v. Gunnels*, 2 Rich. Equ. 259.

scarcely a direct decision upon the subject is to be found in our American books; and another is of opinion, that, as the form and nature of American conveyances is that of a *grant*, which passes nothing more than the grantor is entitled to, the doctrine of forfeiture is not in force, even independently of statute provisions, in the United States.(1) It is remarked by the court in Massachusetts, that at common law, a bargain and sale could not work a forfeiture or discontinuance; to the latter of which livery of seizin or something equivalent is essential. But a bargain and sale, covenant to stand seized, or release, with a *general warranty* annexed, may produce a discontinuance, where the warranty descends upon him who hath a right to the lands.(2)(a)

25. It was held in Pennsylvania, as early as 1798, that a statute, making the registry of a deed equivalent in effect to *livery*, did not give to the recorded deed of a tenant by the curtesy, the operation of *livery* in forfeiting the estate. The deed was a quit-claim in regard to the covenants; but the words used were "grant, bargain, sell, alien, release, enfeoff and confirm." So, in Maine, a deed of release and quit-claim of the fee, is no forfeiture.(3)(b)

26. Whether the doctrine of forfeiture is still in force or not, it is inapplicable where there is no change of possession attending the conveyance. Thus, if the tenant convey to A, even with general warranty, immediately take back a conveyance from him by quit-claim deed, and then mortgage to A, remaining all the time in possession; this works no forfeiture.(4)

27. Forfeiture seems to be unknown in Pennsylvania, Virginia, New York, Connecticut and Massachusetts.

28. In Massachusetts, Michigan, Indiana, New Hampshire, Vermont and New York, it is expressly abolished by statute.(5)(c)

29. In North Carolina, the Revised Statutes provide that a conveyance *by a widow* shall pass no more than her own lawful estate.

30. In Tennessee, a deed of conveyance operates as a *grant*, not a *feoffment*, and passes only the grantor's actual interest. So in Virginia. In Kentucky, a deed, though with warranty, passes only the grantor's estate. But, if he warrant for his heirs, they are barred to the value

(1) 5 Dane, 5, 11; 4 Kent, 106.

(2) Stevens v. Winship, 1 Pick. 327.

(3) M'Kee v. Pfont, 3 Dall. 486; Bell v. Twilight, 34 Maine, 500.

(4) Stevens v. Winship, 1 Pick. 318.

(5) M'Kee v. Pfont, 3 Dal. 486; 1 Swift,

84; 1 N. Y. R. S. 739; Verm. Rev. St. 310; N. H. Rev. St. 242-3; Mass. Rev. St. 405; Mich. Rev. St. 258; 5 Dane, 511; Grout v. Townsend, 2 Hill, 554; 11 Conn. 557; 3 Dana, 291.

(a) In a previous case, in the same State, the English doctrine of forfeiture was incidentally recognized as in force. Grant v. Chase, 17 Mass. 446.

(b) "The obvious purpose of the provision (substituting a deed for a feoffment) was to dispense with actual investiture, without imparting to its substitute the feudal and almost inconceivable effect of displacing lawful estates, and turning them to a mere right." "The object was, to give without the aid of feudal ceremonies the legal seisin for *lawful purposes*." Sarah, &c., 5 Rawle, 113. See Salmon v. Clagett, 3 Bland, 172; Dawson v. Dawson, Rice, 243.

(c) So in Wisconsin. Rev. Sts. ch. 59, s. 4; Ind. Rev. Sts. 232. In New York, it has been decided, that a conveyance in fee made by a tenant by the curtesy, though with covenant, passes only his own interest, the extent of it being proved, and the form of the deed such as passes only a rightful estate. Jackson v. Mancius, 2 Wend. 359. But in Maine, such conveyance has been held to make a forfeiture. French v. Rollins, 8 Shepl. 372. Otherwise by statute. Rev. St. 372.

of the land which descends to them. But in New Jersey, warranty of tenant by the curtesy shall not bind his heirs, claiming under the mother. In Delaware and Alabama, the warranty of a tenant for life is void against the reversioner, &c.(1)

31. In New Jersey, if a dowress or tenant for life, being sole, discontinue or aliene, or suffer any recovery by covin, the alienation shall be void, but the next owner may enter immediately, as if she were dead. If she aliene with her husband, the forfeiture ceases with his life. In Georgia, if a wife transfer her estate in fee for life, she forfeits it.(2)

32. In Ohio, a neglect or refusal to pay the taxes upon land, causes a forfeiture to the reversioner or remainder-man, though the tenant was a mere trustee for minors. The reversioner, &c., may redeem from the purchaser of the land, but the tenant for life cannot.(3)

33. In Kentucky, where the widow has an allowance in slaves in the nature of dower, if she actually or permissively remove a slave from the State, she forfeits her whole dower.(4)

34. The English law of forfeiture being modified or abrogated in this country, as above mentioned, only a few of the most general principles on the subject will be here stated.

35. If there be tenant for life, remainder for life, and the tenant and remainder-man join in a feoffment, it is a forfeiture of both their estates.

36. If husband and wife, tenants for life, make a feoffment, it is a forfeiture during coverture. So, where he is seized in her right, or where he alone conveys. But the forfeiture ceases with his death.

37. By the English law, there are some other acts besides a conveyance, which, on the same principle, cause the forfeiture of an estate for life. Thus, if tenant for life levies a fine, or suffers a common recovery, the reversioner, &c., not being a party, he forfeits his estate.

38. So, if being disseized he brings a writ, and therein claims the fee. So, if being sued in a writ of right, he joins the *mise* on the mere right, which is the privilege of the owner in fee.

39. So, if a stranger brings an action of waste against him, and he pleads in bar "*nul waste faite*," this being an admission that the plaintiff is the party entitled to sue. Or, if he is defaulted or pleads covinously in a real action against him.(5)(a)

40. An estate *pour autre vie*, though falling under the general title of *life estates*, and regarded as real for many purposes, is a freehold interest *sub modo*, partakes of the nature of personal property, and is subject by law to peculiar modes of disposition. This estate has sometimes been called, though improperly, a *descendible freehold*. The heir

(1) 1 N. C. Rev. St. 615; *Miller v. Miller*, Meigs, 484; Aik. 9; *Smith v. Shackelford*, 9 Dana, 475; *Robinson v. Miller*, 1 B. Mon. 94; 1 Ky. St. 110; 1 N. J. Rev. C. 348; Dela. Rev. Sts. 271; Vir. Code, 500.

(2) 1 N. J. Rev. C. 347-8; Hotchk. (Ga.) 436.

(3) Chase's Stat. 2, 1368-9; M'Millan v. Robbins, 5 Ohio, 30.

(4) Anth. Shep. 649; *King v. Mims*, 7 Dana, 272.

(5) Co. Lit. 251 b.; 1 Cruise, 82-3.

(a) In Kentucky, it is said, a tenant for life incurs no forfeiture, unless he claims the fee by some proceeding of record. *Robinson v. Miller*, 1 B. Monr. 91. See *Robinson v. Miller*, 2 Ib. 292. In a late English case it is held, that no forfeiture is incurred by a verbal refusal to pay rent and claim of the fee. *Doe v. Wells*, 10 Ad. & El. 427.

does not take *by descent*, but, if at all, as *special occupant*. Lord Eldon said he found it very difficult to determine under what phrase to describe this interest.(1)

41. At common law, where one was tenant for the life of another, called the *cestui que vie*, and died, living the latter, any person who first entered might hold the land, by right of occupancy, during the *cestui's* life; subject, of course, to the rent reserved, and other liabilities of the former tenant, but not subject to his debts, for the heir might plead "*riens per descent*," though, if it came to the executor or administrator, it would be assets. So slight acts of occupancy would create this title, that it has been thought necessary to decide, that riding over the ground to hunt or hawk doth not make an occupant.

42. This doctrine led to some singular results, where the tenant for life had leased the land. Thus A, tenant for the life of B, leases to C for 5*l.*, and C to D for 3*l.* A dies, leaving D in possession. C shall receive from D the 3*l.*, and D from C the 5*l.*, because D's term is prevented from merging by the intermediate reversion of C, but D has the freehold in reversion expectant on C's term, and the rent incident to it.(2)

43. St. 29 Chas. 2, c. 3, s. 12, provided, that such estate might be devised, and if not, that it should be assets by descent in the hands of the heir, if he entered as special occupant;(a) or, if he did not enter, assets in the hands of the executor or administrator. A subsequent statute, (14 Geo. 2, c. 20, s. 9,) provided for the distribution of such estate as personal property, in default of any devise or special occupancy.(b)

44. These statutes have been adopted or substantially re-enacted in Maryland,(c) Virginia, Kentucky, North Carolina and Indiana.(3)

45. In Massachusetts and Vermont, such estate descends to the heirs, unless devised.(4)

46. In New York, New Jersey, and Wisconsin, it is a chattel real after the tenant's death, though freehold before, and in New York, though limited to heirs.(5)

47. In Ohio there is no statutory provision on the subject; but it is said, the courts would never recognize so absurd a doctrine as to allow

(1) *Doe v. Luxton*, 6 T. R. 289; *Brown v. Elton*, 3 P. Wms. 203; *Ripley v. Waterworth*, 7 Ves. 437, 441.

(2) Co. Lit. 41 b. & n.; *Duke, &c. v. Kinton*, 2 Vern. 719; *Doe v. Luxton*, 6 T. R. 291.

(3) 4 Kent. 27-8; *Anth. Shep.* 428, 490,

655; 1 N. C. Rev. St. 278; *Ind. Rev. St.* 274; 1 Ky. Rev. L. 669; 1 Vir. R. C. 167.

(4) *Mass. Rev. St.* 413-6; *Verm. Rev. St.* 292.

(5) 1 N. Y. Rev. St. 722; 4 Kent; *Wisc. Rev. Sts.* 314.

(a) By a special occupant, is to be understood one who enters by virtue of a limitation in the instrument which created the estate. (But see *infra* (55) that this is not the sole use of the phrase.)

(b) A, the owner of land in fee-simple, conveyed to B, his heirs and assigns, to hold to him and his assigns during the life of C. B died, leaving C his heir. Held, C should hold for life, as special occupant, the words used in the *habendum* clause not operating to vest the estate in B's executors. *Doe v. Steele*, 4 Ad. & El. 663. Demise to A, his heirs, &c., for lives. A devises for the remainder of the term to B and his assigns, who dies intestate. B's administrator takes the property. *Doe v. Lewis*, 9 Mees & W. 662.

(c) Assets in the hands of the executor, &c., unless granted to the deceased and his heirs only. *Md. L.* 1798, ch. 101; *Dorsey Test. L.* 88. In Arkansas, this estate is excepted from the Statute of Descents. *Rev. St.* 331.

a stranger to take possession ; but this estate would pass either to heirs or executors, probably the latter.(1)

48. The English and American statutes seem to contemplate chiefly the case where, in general terms, an estate is limited to one man for the life of another. This estate, however, is often created with special limitations ; in the construction of which there has been no little contradiction and confusion.

49. If an estate be limited to one and *his heirs*, or the *heirs of his body*, for the life of another, no question can arise, because the heirs will hold as special occupants, according to the terms of the grant.(2)

50. But a life estate is not *entailable*, not being an inheritance nor subject to dower.

51. Therefore, in case of an attempted entailment, the heirs of the body or a remainder-man will take, only in case the tenant has not disposed of the land. He has power to grant it away absolutely, after fulfilment of condition by the birth of issue. It was formerly held that he could bar only the issue, not a remainder-man ; but the rule seems to be now fully settled as above stated.

52. It has been intimated that the tenant may even *devise* such estate, so as to bar the heir. But this is doubted.(3)

53. It has been held, that where the estate is limited to executors, administrators and assigns, it passes, after payment of debts, with the personal estate, to residuary legatees.(4)

54. But if limited to "*heirs, executors,*" &c., and not devised, the heir takes as special occupant in preference to the executor.(5)

55. If a wife is tenant *pour autre vie*, the husband shall hold, after her death, as special occupant.(6)(a)

56. An estate for life terminates of course upon the death of the tenant.(b) But such death may sometimes be presumed from circumstances. The common law fixes no period after which this presumption arises. But, by virtue of St. 19, Cha. 2, c. 6,(c) the principle of

(1) Walk. Intro. 275.

(2) 1 Cruise, 84 ; Anth. Shep. 428, (Maryland.)

(3) Low v. Burron, 3 P. Wms. 262 ; Doe v. Luxton, 6 T. R. 292 ; Blake v. Blake, 3 P.

Wms. 10, n. 1 ; 1 Rep. in Ireland, 294.

(4) Ripley v. Waterworth,* 7 Ves. 425.

(5) Atkieson v. Baker, 4 T. R. 229.

(6) 2 Kent, 112.

* This case contains the fullest exposition, to be found in the books, of an estate *pour autre vie* at common law, and as affected by the statutes above named. It was here contended, under the particular form of limitation, on the one hand, that the estate went to the heir, not being validly disposed of by an unattested will ; and, on the other, that the executors took it in trust for the legatees. The court remarked, that they should sooner give it to the executor for his own benefit, than to the heir.

(a) A husband entered on land as tenant *pour autre vie* of his wife, leased it, and died. Held, the lessee and his tenant must attorn to the title under which the husband entered, not to his heirs. Syme v. Sanders, 4 Strobh. 341.

(b) Hence, one entering upon land, under an agreement with the husband of a tenant for life, and holding over after her death, is, with respect to the remainder-man, a mere trespasser. Williams v. Caston, 1 Strobhart, 130.

(c) This act provides, that if the persons for whose lives estates are granted, shall go abroad, and no sufficient proof be made that they are alive ; in any actions for the lands by the lessors or reversioners, the judge shall direct the jury to give their verdict, as if the absent persons were dead. Holman v. Exton, Carth. 246 ; Stat. 6 Anne, ch. 18 : 2 Cox, 373. In Arkansas, absence from the state five years raises a presumption of death. If the party return, he may recover the intermediate profits of the land. Ark. Rev. St. 321-2,

which, though not the act itself, is generally adopted in this country, a continued absence *for seven years* raises a presumption of death, which authorizes the next succeeding owner to enter upon the estate. But if the tenant for life prove to be still living, he shall recover the land with the intermediate rents and profits. Absence for a less period than seven years does not raise a presumption of death. The absence is an absence from the State or Commonwealth. Thus, the rule was applied in a case where a husband emigrated from South Carolina to the western country.(1)

57. Where a husband, twelve years before, sailed for South America, and neither he, nor any of the crew, nor the vessel, were ever heard of afterwards, it was held, in analogy to the statutes relating to bigamy, and to leases determinable on lives, that the death of the husband *must* be presumed, and the wife treated as a *feme sole*.(2)

58. The brother of A, a person deceased, left Oldenburg more than thirty-five years ago. He went to Hamburg and shipped as a sailor for Lisbon, and had never been heard of since. Held, the administrator of A should distribute his property as if the brother were proved to be dead.(3)

58a. A father, seventy years old, and his daughter, thirty-three years old, were on board a steamboat, lost at sea, and both perished, there being nothing to show which survived the other. Held, they must be presumed to have died at the same instant.(4)

58b. Presumption of death does not arise from the fact, that a person who, twenty-two years ago, was in "bad health," would, if now living, be eighty years old; even although, on recent inquiry, his name was not known at the post office of a large city, (his former residence,) nor inserted in its directory, there being no evidence of the sort or degree of bad health, nor of inquiries having been made about him among his friends, nor of his having ever left the place of his former residence.(5)

58c. What is a reasonable search and inquiry for the person upon whose life the continuance of a leasehold estate depends, is a mixed question of law and fact, to be determined upon the particular circumstances of each case. Inquiry of the tenant may in some cases, it seems, be sufficient.(6)

58d. In a suit in equity by certain heirs of a person, having an equitable interest in an estate, against the executor of the person who held the legal title, and who had, in his lifetime, conveyed the estate to *bona fide* purchasers without notice, one of the heirs not having been heard of for seventeen years, and being an infant when last heard of;

(1) Woods v. Woods, 2 Bay, 476; Spurr v. Trimble, 1 Mar. 278; Salle v. Primm, 3 Misso. 529; Newman v. Jenkins, 10 Pick. 515; Miller v. Beates, 3 S. & R. 490; Forsaith v. Clark, 1 Fost. (N. H.) 409; Taylor, 3 Harr. Dig. (suppl.) 715.

(2) King v. Paddock, 18 John. 141.

(3) Loring v. Steineman, 1 Met. 204.

(4) Coy v. Leach, 8 Met. 371.

(5) Matter of Hall, Wallace, Jr. 85.

(6) Clarke v. Cummings, 5 Barb. 339.

536. In England, by a late act, (3 & 4 Wm. 4, ch. 74, s. 91,) after a certain absence of the husband, the wife may be empowered, by order of court, to convey lands. But this can be done only upon her affidavit that she has had no communication with him. Anne, &c., 3 Man. & G. 132. In New Jersey, an heir or devisee may receive the same authority. St. 1848, 43.

the share of such absent heir was divided among the other heirs, upon their executing bonds, payable to the judge and his successors in office, with condition to indemnify the executor against the claim of the absent heir.(1)

59. Under special circumstances, the death of a party may be presumed to have occurred, at some particular part of the time of seven years, during which he was absent; as where one sailed from Demerara during the *hurricane months*. But in general no such presumption arises, but the time must be affirmatively proved.(2)

CHAPTER V.

ESTATE TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.

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| 1. Life estates created by law. | | 3. When it arises. |
| 2. Estate tail after possibility, &c. | | 8. Qualities of the estate. |

1. HAVING treated of estates for life created by *act of party*, we are now to consider those created by *act of law*.

2. Of these, the first in the English law, is called *estate tail after possibility of issue extinct*. This is of little consequence in the United States, and will be very briefly noticed.

3. Where tenements are given to a man and his wife in special tail, and one of them dies without issue, or where they have issue, who die without issue, the surviving man or woman is tenant in tail after possibility of issue extinct, because he can no longer have issue capable of inheriting the estate.

4. So where tenements are given to a man, and to his heirs which he shall beget on the body of his wife; if she die without issue by him, he is tenant in tail after, &c.

5. No one can have the above-described estate except a donee in special tail, because both a tenant in tail general, and the issue of tenant in tail special, may always, by legal possibility, during their life, have issue capable of inheriting.(3)

6. This estate cannot arise without a moral impossibility, caused by act of God, of having issue. Thus, a man and woman will remain tenants in special tail, though they live to be more than a hundred years old. So, if a man and woman, tenants in tail special, are divorced, *causa præcontractus* or *consanguinitatis*, the separation not being by act of God, they become mere joint tenants for life.(4)

7. This tenancy may exist in a remainder.(5)

8. In some particulars, the estate above described resembles an estate tail; in others, an ordinary estate for life. The tenant is a tenant for life, but with many of the privileges of a tenant in tail; or a tenant in tail, but with many of the restrictions of a tenant for life. Thus, such

(1) Norman v. Cunningham, 5 Gratt. 63.

(2) Sillick v. Booth, 1 Y. & Coll. Cha. 117; Spencer v. Roper, 13 Ired. 333.

(3) Lit. ss. 32, 33, 34.

(4) 1 Inst. 28 a.

(5) Bowles' case, 11 Rep. 81 a.

tenant is dispunishable for waste, the law not divesting him of a power which he once possessed. But whether he acquires a property in the timber cut by him, seems to be a point somewhat unsettled. But, on the other hand, by a feoffment, he forfeits his estate; and, if he acquire a fee, simple or qualified, by descent, in the same land, his former interest is merged.

9. If tenant in tail after possibility, &c., grant over his estate, the grantee is a mere tenant for life, with none of the peculiar privileges of the former.(1)

CHAPTER VI.

CURTESY.

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| 1. Origin of the name. | 22. Conditional fees, &c. |
| 2. Definition of the estate. | 25. Money to be converted into land. |
| 3. Curtesy in the United States. | 27. Land converted into money. |
| 4. Requisites. | 29. Wife must have the <i>inheritance</i> . |
| 5. Marriage. | 35. Wild lands. |
| 6. Seizin. | 36. Entry not necessary. |
| 13. Birth of issue. | 37. How barred. |
| 20. Aliens. | 43. Effect of contract upon curtesy. |

1. THE second estate for life, created by act of law, is a *tenancy by the curtesy*. This name has been variously accounted for, upon the grounds that the estate is *peculiar to England*, that the tenant was entitled to attend upon the lord's *court*, and that it has no *moral* foundation. In the time of Glanville an estate existed, somewhat resembling curtesy, being the interest of a husband in lands given with the wife in *marriagehood*. The birth of issue gave him a life estate in the lands.(a) From this interest, curtesy seems to have been derived. By the custom of Normandy, the husband held only during his *widowhood*.(2)

2. Where a wife is seized of lands in fee-simple or fee tail general, or as heir in tail special, and the husband and wife have issue born alive, after the wife's death the husband shall hold the lands for his life, and this estate is a tenancy by the curtesy.(3)(b)

3. Curtesy exists in most of the States as at common law, being

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| (1) 1 Cruise, 103-5, 14; 2 Chit. Black. 98 and n. 6. | Hale's His. of C. L. 1, 219. |
| (2) 1 Cruise, 106-7; 2 Black. Com. 100; Glanville Tr. 193; Bracton, lib. 5, c. 30, s. 7; | (3) Lit. s. 35; Mass. Rev. Sts. 411; Dela. Rev. Sts. 277. |

(a) A tenant by the curtesy initiate, is said to have a life estate in his own right. Foster v. Marshall, 34 Maine, 491.

(b) This estate has been termed *custodiam hæreditatis uxoris*. Co. Lit. 30 a, n. 5. It is a *legal estate*, not a mere *charge* or *incumbrance*, and said to be rather a title by *descent* than by *purchase*. Watson v. Watson, 13 Conn. 83.

It may be sold by the husband. Wells v. Thompson, 13 Ala. 793. His deed of bargain and sale will pass only his title; and the statute of limitations will not begin to run against the heirs of the wife till his death. Meraman v. Caldwell, 8 B. Mon. 32.

generally noticed in the statutes, if at all, merely by a recognition of the common law rule. In a few of the States, the estate is abolished or greatly modified. In Indiana it is abolished. In Georgia, it is provided, both that a husband shall be heir to his wife, and also that the real estate of the wife shall, like her personal estate, vest absolutely in the husband upon the marriage. Of course, curtesy is unknown. In Indiana, the husband inherits to his wife. In South Carolina, the husband takes the same interest in the wife's lands upon her death, that she would take in his lands upon his death. In Vermont, it seems, the husband formerly had curtesy in a fee-simple, only where the issue had died under age and without children: but now, curtesy is as at common law; with the exception, that if the wife leaves issue by a former husband, curtesy does not attach to such lands as descend to them.(1)(a)

4. Four circumstances are necessary to the existence of this estate; viz., *marriage, seizin of the wife, issue and death of the wife*. And it is wholly immaterial in what order these events occur, provided they all at some time take place. Thus, if the wife is disseized after marriage but before the birth of issue; or if the lands come to her after the death of the issue; the husband still has curtesy.(2)

5. A void marriage gives no right to curtesy. It is otherwise with a marriage merely *voidable*, and not actually avoided during the wife's life—because it cannot be avoided afterwards.(3)(b)

6. It is the general rule, that the wife, or the husband in her right, must have been *seized* of the lands. It is said, the husband is bound to strengthen the title of the wife by possession, so as to protect the lands against adverse claims. Of corporeal hereditaments there must be a *seizin in deed*. Thus, if lands descend to a woman, who afterwards marries and has issue, but dies before entry, the husband shall not have curtesy. So, where persons claiming adverse title were in possession.(4)

7. This rule has been changed in Connecticut, Pennsylvania and Tennessee; and a *right to seizin* or *potential seizin*, merely, there being no adverse possession, and whether such seizin were acquired by

(1) Prince's Dig. 225, 251; S. C. Sts. 1791; 1 Vt. L. 142; Me. Rev. Sts. 381; M'Corry v. King, 3 Humph. 267; Verm. L. 359; Verm. Rev. Sts. 291. See Cunningham v. Doe, 1 Cart. 94; Burnside v. Wall, 9 B. Mon. 318.

(2) 1 Cruise, 107; Co. Lit. 30 a; Paine's Case, 8 Rep. 35 b; Menville's Case, 13 Rep. 23; Jackson v. Johnson, 5 Cow. 74.

(3) 1 Cruise, 107.

(4) Co. Lit. 29 a; Mercer v. Selden, 1 How. 37; Adair v. Lott, 3 Hill, 182; Orr v. Hollidays, 9 B. Mon. 59; Neely v. Butler, 11 B. Mon. 48.

(a) In Pennsylvania, it is said, the husband's curtesy, by statute in 1833, is good, though there be no issue of the marriage. 4 Kent, 29 n. So in Wisconsin. (Rev. Sts. 336.) In the same State, if the wife leave issue by a former husband, who may inherit from her, there shall be no curtesy. Ib.

A statute (1838) provided, that on the death of a feme covert intestate, her husband should have one-third of her estate in fee, and be tenant by the curtesy, as at common law of the residue. Held, this statute did not change the common law right as to the two-thirds; and where no children have been born alive of the wife, he takes no estate therein. Cunningham v. Doe, 1 Smith, 34.

(b) See *infra*, ch. 8, *Dower*.

descent, devise or conveyance, is there sufficient to give curtesy.(a) And the rule has been held not applicable to wild lands,(b) whether claimed by inheritance, deed or devise, of which the mere ownership is, in general, equivalent to actual possession, unless they are held adversely to the wife. Nor to incorporeal hereditaments, where no actual seizin is possible. Thus, where a wife seized of a rent dies before it falls due, the husband shall have curtesy. "*Impotentia excusat legem.*"(1)

8. In New York, the husband of a woman who is either heir or devisee, but has never entered, shall not have curtesy. It is said, the requisition of actual seizin is limited to these two cases, and is not applicable where the wife claims under a deed; which, by the statute of uses, transfers actual seizin, without entry. So, if husband and wife recover her lands by suit, this is a sufficient seizin for curtesy. So, with a decree for partition. In Pennsylvania, the husband shall not have curtesy, where the wife has a mere naked seizin as trustee of the freehold, though she also holds a beneficial interest in the reversion.(2)

9. If the lands are leased for years when they descend upon the wife, the possession of the lessee is equivalent to actual seizin of the husband and wife, and he shall have curtesy, although she die before receiving any rent, and although the rent before her death was greatly in arrear. It might be otherwise, if the rent were paid to any other claimant.(3)

10. A woman, before marriage, grants a term for seventy-five years,

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| <p>(1) Guion v. Anderson, 8 Humph. 298; Bush v. Bradley, 4 Day, 298; Jackson v. Sellick, 8 John. 262; Davis v. Mason, 1 Pet. 503; Smoot v. Lecatt, 1 Stew. 590; Kline v. Bebee, 6 Conn. 494; Ellsworth v. Cook, 8 Paige, 643; Barr v. Galloway, 1 M'Lean, 576; Co. Lit. 28 a; Wells v. Thompson, 13</p> | <p>Ala. 793.
(2) Jackson v. Johnson, 5 Cow. 74; Ib. 98; Adair v. Lott, 3 Hill, 82; Ellsworth v. Cook, 8 Paige, 643; Chew v. Commrs., &c., 5 Rawle, 160.
(3) De Gray v. Richardson, 3 Atk. 469; Carter v. Williams, 8 Ired. Equ. 177.</p> |
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(a) On the ground, in Connecticut, that in all other respects, in that State, ownership is held equivalent to actual seizin. Thus, lands descend from, or may be devised by, the owner, though not seized. So, he may maintain trespass. (Two justices dissented.) To have curtesy, adverse possession must have existed through the whole period of marriage. Parker v. Carter, 4 Hare, 400.

(b) Johnson, J., remarks: "It would indeed be idle, to compel an heir or purchaser to find his way through pathless deserts into lands still overrun by the aborigines, in order to break a twig, or turn a sod, or read a deed, before he could acquire a legal freehold. It may be very safely asserted, that had a similar state of things existed in England when the Conqueror introduced this tenure, the necessity of actual seizin would never have found its way across the channel." 1 Pet 507. In Maine, curtesy is allowed in lands under *improvement*. Revised Stat. 393. If the owner of wild and unoccupied land dies intestate, the husband of one of the heirs is to be regarded as in possession as tenant by the curtesy, though he states that he never owned the premises, nor ever went through the ceremony of putting his foot upon the land. Pierce v. Wannett, 10 Ired. 446. In Kentucky, there is no curtesy in wild land, where neither husband nor wife has had actual possession, although he has paid the taxes ever since the marriage, and there has been no adverse claim. Neely v. Butler, 10 B. Mon. 48.

A husband, in right of his wife, became a partner in the ownership of a cotton factory and other mills, and the management of the business thereof, and received a proportionate share of the profits from the time she became interested in them till after her death. Held, there was a sufficient seizin to give the husband curtesy. Buckley v. Buckley, 11 Barb. 43.

Possession of an immediate or remote vendee of the husband is sufficient to give him curtesy. Vanarsdall v. Fauntleroy, 7 B. Mon. 401.

to a trustee, in trust for her use during coverture. The husband has curtesy.(1)

11. So, where lands descend to a woman subject to a devise to executors for payment of debts, and until the debts are paid; although the executors enter and the wife dies before the debts are paid, the husband still shall have curtesy.(2)

12. At common law, where lands come to a woman subject to a life estate, she has no seizin, and therefore there shall be no curtesy. Whether there shall be curtesy in the rent reserved, if any, seems doubtful. In equity, reversions are subject to curtesy.(3)(a)

12 a. The same principle of *estoppel*, which precludes the tenant in an action for *dower* from denying the seizin of the husband, (*infra*, ch. 8,) applies to tenant by the curtesy.

12 b. A *feme sole* claimed land under a location by the proprietors. Having intermarried with A, he entered under the location, and after her death retained possession as tenant by the curtesy. Her heirs conveyed to B, who brings an action of waste against A. Held, A was estopped to allege a defective location.(4)(b)

13. Another requisite to curtesy, is *the birth of issue*; after which, the husband is called tenant by the curtesy *initiate*.(c)

14. The issue must be *born alive*. It was formerly held, that the only admissible proof of this fact was its being heard to cry;(d) and that this proof must come from men, not from women. But other evidence has been since held sufficient, even as early as the reign of Henry 8; "for peradventure it may be born dumb."(5)

15. The issue must also be born during the mother's life. If she die in childbirth, and the child be taken away by the *Cesarean operation*, at the death of the wife the husband has no title, the issue not being born, but the estate descends to the child in the womb, and shall not afterwards be divested from it in favor of the husband. Curtesy ought to *begin* by the birth of the issue, and *be consummated* by the death of the wife.(6)

16. The issue must be such as can inherit the estate. Therefore, if

(1) Lowry v. Steele, 4 Ohio, 171.

(2) 1 Cruise, 108 (cites Guavara's case, 8 Rep. 96 a); Robertson v. Stevens, 1 Ired. Equ. 247; M'Corry v. King, 3 Humph. 267.

(3) Co. Lit. 29 a & n. 7; 1 Cruise, 108-9; Gentry v. Wagstaff, 3 Dev. 270; Stoddard v. Gibbs, 1 Sumn. 263; Tayloe v. Gould, 10 Barb. 388; Mackey v. Proctor, 12 B. Mon.

433; Carter v. Williams, 8 Ired. Equ. 177.

(4) Morgan v. Larned, 10 Met. 50.

(5) Co. Lit. 30 a, 67 a, 29 b & n. 5; Brac. 438 a; Paine's case, 8 Rep. 34 b; Dyer, 25 b; Benl. Rep. 25; 2 Bl. Com. 101.

(6) Co. Lit. 29 b; 8 Rep. 35 a; Marsellis v. Thalhimier, 2 Paige, 35.

(a) Where an intervening life estate is merely *equitable*, it is no bar to curtesy. Adair v. Lott, 3 Hill, 182.

(b) A party may also be estopped, by his own acts, from claiming curtesy. Thus, where a person petitioned a commission, under the act of Congress of 1803, for a confirmation of a British grant, and represented himself as "the only surviving heir and legal representative" of the grantee; such petitioner is estopped from claiming as tenant by the curtesy. Montgomery v. Ives, 13 S. & M. 161.

(c) Anciently, this gave him the right to do *homage*, alone. Co. Lit. 30 a, 67 a. See Mattocks v. Stearns, 9 Verm. 326; Oldham v. Henderson, 5 Dana, 256.

(d) This is one of many instances of the extreme jealousy exhibited by the ancient law to guard the rights of the *heir*. See 8 Rep. 34. Bracton says, though the child were called, baptized and buried as a Christian, this would be insufficient to give curtesy. In Scotland, it is said, the old rule still prevails. Dyer, 25 b, n. 2.

lands are given to the wife and the heirs male of her body, and she has issue a daughter only, the husband shall not have curtesy.(1)

17. But a mere possibility of inheriting is sufficient. Thus, if a woman has issue by a first husband, and afterwards issue by a second husband, and both issue be dead; inasmuch as the latter issue might by possibility inherit, the second husband is tenant by the curtesy.(2)

18. The last-named requisite is of course intimately connected with that of the wife's actual seizin, which has been before considered; because, unless actually seized, her issue cannot inherit the estate from her.(3)

19. The last requisite, is *the death of the wife*, by which the husband's estate becomes *consummate*.(4)(a)

20. By the English law, *an alien* cannot be tenant by the curtesy, because this is an estate created by *act of law*, and the law never casts an estate upon a person, which is liable to be immediately divested. It will be seen hereafter, (see *Dower Alien*,) that in many of the States the common law rule upon this subject has been abolished, and, in some of them, where it still, for the most part, remains unchanged, a special exception has been made in favor of *dower*. The particular case of tenant by the curtesy seems to have been generally, if not wholly, omitted in the statutory provisions.(b)

21. It has already been stated, generally, in what lands a husband shall have curtesy. A few particular illustrations will here be added.

22. Both conditional fees and estate tail are subject to curtesy, even notwithstanding an express proviso or condition to the contrary. And, in both cases, though the estate of the wife comes to an end by her own death, and that of her issue, the husband shall still have his curtesy as against the reversioner or remainder-man. This rule proceeds upon the grounds, that the incident of curtesy is a privilege impliedly annexed to the creation of the estate, and not derived merely from the interest of the wife; and that by the birth of issue the husband gains an initiate title, which cannot afterwards be divested by act of God.(5)

23. Devise to a woman in fee, with a devise over, if she die under age, without issue. The woman marries, has issue which dies, and dies

(1) Co. Lit. 29 b; 8 Rep. 35 b.

(2) 8 Rep. 34 b; Pres. on Est. 516.

(3) Co. Lit. 40 a; 1 Cruise, 110.

(4) 1 Cruise, 110.

(5) 1 Cruise, 112; (Paine's case, 8 Rep. 34;) Co. Lit. 30 a; See *Paine v. Paine*, 11 B. Mon. 138.

(a) See *Presumption of Death*, c. 4.

(b) In England, if an alien be made a denizen, and afterwards have issue, he may be tenant by the curtesy in respect of such issue; though he would not be entitled on account of previous issue. In Massachusetts, if an alien makes the preliminary declaration of his intention to be naturalized before the death of his wife, and completes his naturalization after her death, he is not entitled to curtesy. *Foss v. Crisp*, 20 Pick. 121. In Pennsylvania, an alien can gain no title to real estate as tenant by the curtesy initiate. *Reese v. Waters*, 4 W. & Serg. 145. Where there were several plaintiffs in ejectment, one of whom was a married woman, and her husband an alien; held, the action would lie. *Doe v. Rogers*, 1 Carr. & K. 390.

herself, under age. This is a contingent limitation, not a conditional limitation, and the husband shall have curtesy.(1)

24. As a general rule, however, *cessante statu primitivo, cessat derivativus*; and the case above mentioned is to be regarded as an *exception* from this principle. With regard to curtesy as well as dower, if the primitive estate terminates by force of a *condition*, instead of a *limitation*, the derivative interest is also defeated. The distinction is, that by a condition the old paramount title is re-assumed; while a limitation merely shifts the estate from one person to another.(2) In other words, where the fee in its original creation is only to continue to a certain period, the husband or wife shall have curtesy or dower after the expiration of such period; but where the estate is first given in fee or in tail, and by subsequent words made determinable upon a certain event, if that event happen, the curtesy or dower ceases.(3)

25. In equity, there shall be curtesy in money directed or agreed to be laid out in land.(a)

26. Devise of £300 to the testator's daughter A, to be laid out by the executrix in land, and settled to the use of A and her children. If she died without issue, the lands to be equally divided between her brothers and sisters. The money not having been applied as directed, the plaintiff, being the husband of A, brings a bill in equity, praying that the land might be purchased and settled on him for life as tenant by the curtesy, or the interest paid to him for life. Held, inasmuch as A would have been tenant in tail of the land, the plaintiff, as tenant by the curtesy, should have the interest for life.(4)

27. So, at law, where the land of one deceased is sold for payment of debts, the husband of a devisee, who takes subject to such sale, shall have curtesy in the proceeds.

28. A testator, whose personal estate was insufficient for payment of debts, devises the residue of his estate after such payment to his daughters; if the residue exceed \$1,000 in value to each, the overplus to be divided, &c. The estate, consisting of wild land, was sold, and bought by the executor. The sale was declared voidable in the probate court after the death of a married daughter, but her heirs afterwards elected to affirm it. Held, the husband of such daughter, on releasing his title to the land, should have a share of the proceeds, being the interest already accrued, with the present value of what would accrue during his life.(5)(b)

28 a. There is no tenancy by the curtesy, in an estate held in trust for the benefit of a married woman, as if she were a *feme sole*, and so that the same shall not be in the power, or subject to the debt, contract,

(1) *Buckworth v. Thirkell*, 3 B. & P. 652, 3 B. & P. 654.

n. a.* See *Moody v. King*, 2 Bing. 447.

(2) 4 Kent, 32-3, and n.

(3) Co. Lit. 241, a. n. 170; *Doe v. Hutton*,

(4) *Sweetapple v. Bindon*, 2 Vern. 536.

(5) *Houghton v. Hapgood*, 13 Pick. 154.

* It is said by Lord Alvanley, "this case occasioned some noise in the profession at the time it was decided." 3 B. & P. 653.

(a) See *Follett v. Tyrer*, 14 Sim. 125.

(b) If the wife's lands be sold in partition after her death, the husband, as tenant by the curtesy, shall have the use of the proceeds for life, upon giving security for re-payment at his death. *Clapper v. Livergood*, 5 Watts, 113.

or engagements of her husband, with the remainder to her heirs or appointees.(1) So a husband, who has conveyed land to another in trust for his wife, is not entitled, on her death, to a tenancy by the curtesy in the trust estate.(2)

29. Only *estates of inheritance* are subject to curtesy, which is indeed merely a continuation of the inheritance. It is said to come out of the inheritance and not out of the freehold, and cannot exist unless, at the very moment when the husband takes, the inheritance descends upon the children, if living; nor where the estate is to be determined by express limitation or condition upon the wife's death.(3)

30. Devise to A and her assigns for life. If she should marry, and die leaving issue male, then to such issue and his heirs male forever. A married, had issue, and died leaving her husband. Held, as A never had an inheritance, the husband could not have curtesy, and this was manifestly the intent of the testator.(4)

31. If the issue take as purchasers, the husband shall not have curtesy,—as where there was a devise to the wife and her heirs; but if she died leaving issue, then to such issue and their heirs. So, in case of a trust for the wife during her life, then to her children; the husband takes nothing.(5)

32. Devise to A and her heirs. If she died before her husband, he to have £20 a year for life; the remainder to go to the children. A dies before her husband. Held, he should not have curtesy.(6)

33. A woman, tenant in tail, conveys by lease and release to trustees, for the use of herself till marriage, remainder to her intended husband for life, remainder to herself for life, remainder to the issue in tail. Held, the husband could not claim after her death, either under the settlement, because this interfered with the estate of the issue in tail, or as tenant by the curtesy, because upon the marriage he took an estate for the life of the wife, and she had no inheritance in possession.(7)

34. Nor shall there be curtesy where the issue take as purchasers, though the ultimate remainder or reversion in fee is in the wife. Thus, in *Boothby v. Vernon*, (*supra*, s. 30,) the wife was heir to the testator, and therefore seized of the reversion in fee.

35. The question is not known to have been ever directly raised, whether a husband shall have curtesy in *wild lands*. From what has been said (*supra*, s. 7) as to seizin, there would seem to be no doubt upon the point. In one case in Massachusetts,(8) curtesy was allowed in such lands, though no question was made upon the subject. On principle, the same considerations would seem applicable to curtesy and dower. It will be seen that a husband, not tenant by the curtesy initiate, has no right to clear wild lands of the wife during her life.(a)

36. Curtesy being an estate vested immediately by law in the husband upon the wife's death, and he having had an initiate title during

(1) *Stokes v. McKibbin*, 1 Harris, 267.

(2) *Rigler v. Cloud*, 2 Harris, 361.

(3) *Sumner v. Partridge*, 2 Atk. 47; *Boothby v. Vernon*, 9 Mod. 151; *Simmons v. Gooding*, 5 Ired. Eq. 382; *Janney v. Sprigg*, 7 Gill. 197.

(4) *Boothby v. Vernon*, 9 Mod. 147.

(5) *Barker v. Barker*, 2 Sim. 249; *Green v. Otter*, 3 B. Monr. 105.

(6) *Sumner v. Partridge*, 2 Atk. 47.

(7) *Doe v. Rivers*, 7 T. R. 276.

(8) *Houghton v. Hapgood*, 13 Pick. 154.

her life; no entry is necessary to complete his ownership. When once vested, the estate becomes liable for his debts, and cannot be divested by his disclaimer. It may be taken on execution, and a voluntary settlement of it upon a wife will be void against creditors.(1)

37. It will be seen hereafter, that a woman may be barred of dower by other provisions for her benefit. But, it seems, no such principle is adopted in regard to curtesy.

38. By marriage articles, a woman granted to her intended husband the interest of her money and the rents of her estate in fee-simple for her life, to maintain the house and educate their children until they were of age or married. Held, the husband should have curtesy, as if no such articles had been made, it being a mere executory contract as to the manner in which the general funds should be applied, of which their estates consisted.(2)

39. At common law, a husband does not lose his curtesy by leaving his wife and living in adultery with another woman.(3) St. Westm. 2, c. 34, provides a forfeiture only in case of dower. Nor does he lose curtesy by a divorce for adultery, which is only *a mensa*, &c. A divorce *a vinculo*, granted upon the ground that the marriage was void, of course destroys the right of curtesy.

40. In some of the United States, the principle above stated has been changed by statute.

41. In Indiana, a husband loses curtesy by leaving his wife and living in adultery. But a reconciliation restores his right to curtesy. In Maryland, curtesy is lost by a conviction of bigamy.(3)

42. In treating of *dower*, and the circumstances which operate as a bar thereof, some remarks will be made upon the distinctions between the English and American law of *divorce*.(a) These are for the most part equally applicable to curtesy. The general principle of American law seems to be, that where a marriage is dissolved by divorce, all the rights of the respective parties, growing out of such marriage, come to an end; and, of course, that the husband loses his right to curtesy.(b) Such is the express provision of the statutes in North Carolina and Pennsylvania, and such is stated to be the law in Connecticut.(4) This principle is undoubtedly applicable in all the States, independently of any statutory provision, in cases where a divorce is decreed for causes

(1) *Steadman v. Palling*, 3 Atk. 423; *Watson v. Watson*, 13 Conn. 83; *Vanduzer v. Vanduzer*, 6 Paige, 366; *Wickes v. Clarke*, 8, 161.

(2) *Sidney v. Sidney*, 3 P. Wms. 276;

Smoot v. Lecatt, 1 Stew. 590; *Wells v. Thompson*, 13 Ala. 793.

(3) *Ind. Rev. L.* 211; *Md. L.* 580.

(4) 1 N. C. Rev. St. 241; *Purd.* 214; 1 *Swift*, 25. See *Starr v. Pease*, 8 Conn. 541; *Wheeler v. Hotchkiss*, 10 Ib. 226.

(a) See *Dower—Divorce*.

(b) In Massachusetts it has been held, that a divorce *a vinculo* has the same effect upon the title of the respective parties to the wife's lands, as a dissolution of the marriage by the death of either. *Barber v. Root*, 10 Mass. 260; acc. *Mattocks v. Stearns*, 9 Verm. 326. By Stat. 1789, ch. 65, sec. 5, upon divorce *a mensa*, for cruelty of the husband, if there were no issue living at the time, the wife was restored to all her lands, &c. And this provision was held to include all lands of hers, owned before or acquired since the marriage, though alienated by the husband; unless she had done something to divest her title. *Kriger v. Day*, 2 Pick. 316. The husband cannot convey any greater interest in the real estate of his wife than he possesses. And where his right to such estate was during coverture, it is terminated by a divorce *a vinculo*, granted for his misconduct. *Howey v. Goings*, 13 Ill. 95.

which render the marriage void *ab initio*. But, inasmuch as divorces are granted in this country for causes *arising after marriage*, a distinction is made in several of the States, as to the effect upon property, of divorces granted for causes arising after marriage, and those granted for causes arising before marriage, which render the marriage void. In Maine and Rhode Island, if the divorce is granted for consanguinity, affinity, or impotence, and in Rhode Island for idiocy or lunacy, all the wife's real estate is restored to her. So if granted for the husband's adultery, or, if there be no issue, for his cruelty, desertion, or neglect to support her, in Maine; in Rhode Island, for his gross misbehavior. On the other hand, in case of divorce for her cruelty, in Maine, the court may restore her lands; while upon a divorce for her adultery, or, in Rhode Island, her cruelty, desertion, or misbehavior, the husband shall have curtesy, subject in Rhode Island to an allowance by the court to the wife.(1) In New York, Illinois and Michigan, if the divorce is for the husband's adultery, the wife's lands are restored to her; and in New York, Illinois and Massachusetts, if for her adultery, he has curtesy, subject in Massachusetts to an allowance to the wife.(2) In New Hampshire, the court *may* restore the wife's lands upon divorce. In Vermont, they are restored to her except in case of her adultery, when the husband holds them for her life, and afterwards has curtesy.(3) In Ohio, it is said the husband loses his curtesy by divorce for his adultery, and also, it seems, for *aggression* on the part of the wife; though in the latter case he may hold the land during her life.(4) In Delaware, in case of aggression by the husband, her real estate is restored to her. In case of her aggression, it may be, in the discretion of the court. In Indiana and Alabama, the disposal of property is at the discretion of the court. But neither party shall be obliged to part with real estate.(5) In Missouri, the guilty party loses all rights acquired under the marriage. In Arkansas, if the wife obtain a divorce, all property which came to the husband by marriage goes to her and her heirs.(6) In Wisconsin, the wife's real estate is restored to her upon divorce, except for her adultery.

43. The general rule of law upon this subject will be controlled by any special contract inconsistent therewith.

44. Indenture between A, B, his wife, and a trustee, reciting that A had before marriage agreed that B's real estate should be "satisfactorily secured to her sole and separate use," and, on the part of A and B, conveying her real estate, upon the trusts, that the income should be paid her during coverture, and if she should survive A, the estate reconveyed to her; but if he should survive her, the income to be paid him for life, and at his death the estate conveyed to her heirs. A and B were subsequently divorced for his adultery, which, by the general rule of law, would have restored the real estate to her. Held,

(1) 1 Smith St. 427-8-9; R. I. L. 369.

(2) 2 N. Y. Rev. St. 146; Mass. Ib. 483.
See *Kruger v. Day*, 2 Pick. 316; Illin. Rev. L. 238; Mich. L. 140.

(3) N. H. L. 337; Verm. Rev. St. 325-6.

(4) Walk. Intr. 230, 328; Swan. 29.

(5) Ind. Rev. L. 214; Alab. L. 256.

(6) Misso. St. 226; Ark. Rev. St. 335;
Wisc. Rev. Sts. 396; Dela. Rev. Sts. 238.

this rule of law was controlled by the contract, and that 'A, if he should survive B, would be entitled to the income for his life.(1)(a)

CHAPTER VII.

LIFE ESTATE OF THE HUSBAND IN LANDS OF THE WIFE.

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| <ol style="list-style-type: none"> 1. Description of estate. 2. Description and incidents. 4. Statute law as to conveyance, &c. 6. Liability to creditors. 7. Rents and profits. | <ol style="list-style-type: none"> 5. Contract by husband. 9. Conveyances by husband and wife, and statutory law relating thereto. 25. Separate trust estate of the wife. |
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1. It has already been remarked, that by marriage, seizin, and the birth of issue, a husband becomes, during the life of the wife, tenant by the curtesy initiate. Intimately connected with such incipient title, is the estate which a husband has in his wife's lands, independently of the birth of issue. It has been remarked, that the case of a tenant by the curtesy may be said to be a continuance of this relation in that appropriate manner.(2)

2. Where a wife has an inheritance in lands, the husband has a freehold interest *jure uxoris*, or the husband and wife are seized in her right.(b) The husband's interest is a life estate, being of indeterminate duration. It is a title to the rents and profits during coverture, which, according to Lord Coke, he shall receive as "governor of the family." The estate remains entire to the wife or her heirs, upon dissolution of

(1) *Babcock v. Smith*, 22 Pick. 61.

(2) *Barber v. Root*, 10 Mass. 263.

(a) The heir of a mother cannot recover against one who entered under the father, while the latter is tenant by the curtesy. *Grout v. Townsend*, 2 Hill, 554. It has been held in Kentucky, that where the husband is tenant by the curtesy initiate at the time of a divorce, and thus forfeits his title to the wife's lands during her life, he has no remaining right which the law will notice, although, after her death, his right might possibly revive. *Oldham v. Henderson*, 5 Dana, 256. Upon the termination of an estate by the curtesy, the heir may bring ejectment. *Foster v. Dugan*, 8 Ohio, 87.

(b) "The husband, by marriage, acquires no right in the inheritance of the wife;—he is only entitled to the possession and the pendency of the profits during coverture." Per *Wilde, J.*, 2 Pick. 519. But, in a later case, the same judge remarks, that they are seized *in fee in her right*. *Melvin v. Proprietors, &c.*, 16 Pick. 165. It has been held, that where a right of entry arises from an *ouster* of the wife's title, the demise may be laid either in the husband's name alone, or in their joint names. *Woodward v. Brown*, 13 Pet. 1; *Ingraham v. Baldwin*, 12 Barb. 9.

A declaration by husband and wife, that they are "well seized and possessed," is sufficient. *Kelsey v. Hamner*, 18 Conn. 311.

Upon a mortgage to husband and wife, the consideration moving from him, and the condition being to support them and the survivor of them for life, the husband may sue alone. *Blake v. Freeman*, 1 Shepl. 130. But, in general, they must join in a suit for her land. *Bratton v. Mitchell*, 7 Watts, 113; *Atkinson v. Rittenhouse*, 5 Barr. 103; a disseizin of the inheritance of the wife being a disseizin of the entire joint estate. *Guion v. Anderson*, 8 Humph. 298.

The rents and profits of real estate, held in actual possession by a co-parcener with the wife, belong absolutely to the husband; and he may maintain an action for them without joining the wife. *Dold v. Geiger*, 2 Gratt. 98. See *Jones v. Sherrard*, 2 Dev. & B. 184; *Dejarnette v. Allen*, 5 Gratt. 499; *Riddick v. Walsh*, 15 Mis. 519; *Miss. Sts.* 1846, 152.

the marriage. Upon the wife's death, the husband becomes a tenant at sufferance. Like other tenants for life, he is entitled to emblements. He has no right to commit *waste*; which, although the wife can maintain no action at law against him, yet a court of chancery will undoubtedly restrain by injunction. So, also, the wife may bring a bill in equity by her next friend, to protect her property or secure a support from it. If the husband and wife join in a bill to recover her property, he may release the suit. But the wife may institute a new one, by her next friend, against the husband and the former defendant jointly. (1)(a)

3. The husband's interest is assignable, and subject to be taken on execution. (b) The *land* is liable to the wife's debts; the *profits*, to those of the husband. With reference to the right of *assignment*, if he

(1) Polyblank *v.* Hawkins, Doug. 329; son *v.* Cairns, 20 John. 301; Dewall *v.* Co. Lit. 351 a; 2 Kent, 110; Barber *v.* Covenhoven, 5 Paige, 581; Jackson *v.* Leed, Root, 10 Mass. 260; Co. Lit. 351; Jack- 19 Wend. 339.

(a) The proceeds of the sale of a wife's real estate cannot properly be paid over, to either her guardian or husband, without leave of court. Daniel *v.* Daniel, 2 Rich. Eq. 115.

(b) In North Carolina, a recent statute provides, that the husband cannot sell or lease the wife's lands, without her consent, expressed upon private examination, as in case of conveyances in which she joins. Also, that the land shall not be taken on execution against him. N. C. Sts. 1848-9, 90. Similar acts have been passed in Virginia, Kentucky, Mississippi, Georgia, Vermont, Pennsylvania and Maryland. Verm. Sts. 1847, 26; 1850, 13; Virg. Sts. 1853, 323; Ky. Sts. 1846, 43; Ga. Sts. 1849-50, 63; Penns. Sts. 1850, No. 342, s. 20; Md. Sts. 1853, 323; Miss. Sts. 1846, 152.

The levy of an execution against a husband upon his wife's land, during his life, passes his interest, though the return does not state whether he is entitled to curtesy. Litchfield *v.* Cudworth, 15 Pick. 23. So, an extent upon all his interest, &c., in her land, passes all his interest, however acquired, though the return does not describe the land as held in her right. *Ib.* In Massachusetts, a husband's interest in land of the wife may be levied on, either by taking the rents and profits for a certain time, or the whole estate, at an appraisal founded on the probable duration of his life. *Ib.* But, where the amount of the execution is less than the value of the estate, it seems, the former mode of levy is the proper, if not the only, legal one. *Ib.*

An execution was extended upon land held by the debtor in right of his wife, as upon an estate in fee-simple, but no entry was made, and husband and wife continued to occupy till she died, leaving no children. Held, the proceeding was no disseizin of her, and her heirs might maintain a writ of entry, declaring upon their own seizin, without an actual entry. Larcom *v.* Cheever, 16 Pick. 260.

The husband having erected buildings during the wife's life; held, neither he, after her death, nor the creditor, could make a claim for *betterments*, as against the heirs. *Ib.* See Mattocks *v.* Stearns, 9 Verm. 326; Canby *v.* Porter, 12 Ohio, 79; McComike *v.* Sawyer, 12 N. H. 397. Where an execution against a tenant by the curtesy initiate is extended upon his land, as if he owned the fee, the creditor acquires a freehold for the life of the debtor. Mechanics, &c. *v.* Williams, 17 Pick. 438. In Maryland, the husband's interest is not liable to his creditors, living the wife. Md. St. 1841-2, ch. 161. In Connecticut, during the life of her or her issue. Conn. St. 1845, 36. Such interest passes to the sheriff under insolvency proceedings; and a purchaser from the sheriff becomes a tenant for life, liable to an action of waste by the husband and wife. Dejaratte *v.* Allen, 2 Gratt. 499.

Where a husband has possession of his wife's real estate, equity will not enjoin the sale of his life estate, for the payment of meritorious judgments against him; nor make a provision for her therefrom. Mitchell *v.* Sevier, 9 Humph. 146.

Where a debtor had a fee-simple in an undivided half of certain premises, and curtesy in the remainder, and the creditor levied upon a portion of the premises by metes and bounds, treating it as an estate by the curtesy; held, the levy was void, and passed no title, as against a creditor of the same debtor, who acquired title to the land by a subsequent valid levy. Howe *v.* Blanden, 21 Verm. 315.

Where property is conveyed absolutely to a married woman, by a stranger, the statute of frauds has no application, in a contest between the wife and the creditors of the husband; it is therefore unimportant, whether the instrument is, or is not, *recorded*. Newman *v.* James, 12 Ala. 29.

is tenant by the curtesy, or after the birth of issue, he may transfer the estate for his own life; otherwise, only for the joint lives of himself and the wife. It is said that he may even convey the entire inheritance; that is, so as to vest in the purchaser a wrongful fee, liable to be defeated by the entry or action of the wife after his death.(1)

3 *a.* Where the wife was a tenant in common, and the husband and the other tenant made partition, it was held, that the husband's release destroyed her tenancy in common, at least during the husband's life.(2) But the law will not permit a husband to hold, or to put in the possession of another, to be held adversely, any property placed in his possession belonging to his wife, during her coverture;(3) and possession of the lands of a wife, under authority of her husband, is not adverse to the right of the wife, or her heirs, but consistent with it.(4)

4. In Kentucky and Wisconsin, it is provided, that a wife, after the husband's death, may enter and sue for her lands lost by his default. Also, that in case of suit against them, which the husband will not defend, she may make defence at any time before judgment, and that no conveyance or other act of the husband shall affect the title of her or her heirs, or others having title by her death. In Kentucky and Virginia, if her land is lost by a judgment against him by default, she may, in a suit against the tenant, put him to proof of his title.(5)

5. In New Jersey, a statute provides for an entry by the wife, her heirs, or other owner of the estate, notwithstanding any feoffment, fine, &c., by the husband.(6) In Connecticut, the husband's separate conveyance of the wife's inheritance is *ipso facto* void. In Ohio and South Carolina, it will pass his estate, and, in Ohio, may, as *an agreement*, bind him to procure her conveyance, or make compensation.(*a*) The statute of limitation does not run against the wife till the husband's death.(7)

6. An assignee of the husband's estate, by levy of an execution, is liable to an action of trespass by husband and wife for *waste*. The husband's ability to commit waste without subjecting himself to an action, is a mere *power*, or exemption from suit, resulting from the conjugal relation; not a *right*, nor transferable. The effect of a levy on the husband's interest, is the same as that of a conveyance by him, which would pass the freehold, leaving the reversion in fee in the wife. The husband's joining in the suit is merely made necessary by the general rule of pleading.(8)

(1) See *Larcom v. Cheever*, 16 Pick. 260; 2 Kent. 112; *Eldridge v. Preble*, 34 Maine, 148; *Coffin v. Morrill*, ib. 352; *M'Claim v. Gregg*, 2 Marsh. 457; *Evans v. Kingsberry*, 2 Rand. 120; 1 Prest. Abstr. 334, 435, 436; *Oldham v. Henderson*, 5 Dana, 256.

(2) *Trask v. Patterson*, 29 Maine, 499.

(3) *Meraman v. Caldwell*, 8 B. Mon. 32.

(4) *Vanarsdall v. Fauntleroy*, 7 B. Mon. 401.

(5) 1 Ky. Rev. L. 581-2; 1 Virg. Rev. C. 171; Wis. Rev. Sts. 584.

(6) N. J. Rev. C. 263.

(7) Anth. Shep. 160; *Brown v. Spand*, 4 Con. S. C. 12; *Newcomb v. Smith*, Wright, 208; *Reynolds v. Clark*, ib. 656; *Williams v. Pope*, ib. 406.

(8) *Babb v. Perley*, 1 Greenl. 6.

(*a*) It seems, at common law, alienation by the husband of the wife's land was a *discontinuance*. But this rule was changed by St. Hen. 8, ch. 28. (See *Detheridge v. Woodruff*, 3 Mon. 245.) This statute is part of the common law of Massachusetts. *Bruce v. Wood*, 1 Met. 542.

7. The rents and profits of the wife's lands belong absolutely to the husband, and, upon his death, do not pass to the wife.

8. On the other hand, no contract of his binds her, if she survive him. Thus, a purchaser from him of trees on the land cannot cut them after his death.(1)

8 a. A *feme covert* was entitled to real estate for her separate use, and her husband entered into a contract for the sale of the property. Before the contract was completed, the wife died, having devised the estate to her husband. Held, on a claim filed by the husband surviving to enforce the contract, that a decree to that effect could not be made in the absence of the wife's heir.(2)(a)

8 b. A testator left a legacy to a married woman, to be invested by his executors in real estate, which should be conveyed to her for her sole and separate use, and to her heirs and assigns forever, but not be liable for the debts of her husband. Land was purchased and conveyed to the wife accordingly, but, the legacy proving less than the purchase-money, the husband and wife jointly made up the balance. The estate was afterwards sold on a judgment against the husband. Held, the purchaser was entitled to hold it only until he was paid the portion of the purchase-money advanced by the husband and wife.(3)

8 c. A judgment creditor has no lien on the wife's real estate for money laid out on it in repairs by the husband.(4) So the estate held in trust for a married woman, or the interest and income thereof, cannot be charged with an order, drawn by her husband, for repairs done upon other real estate of the wife, not included in the trust deed.(5)

8 d. When lands of the wife have been sold by an agent, the money received therefor, in his hands, belongs to the husband, and, after his death, may be received by his administrator. The widow cannot recover such money from the agent, either in law or equity.(6)

8 e. A husband, after the death of his wife, may maintain an action to recover for use and occupation of the wife's real estate, by the permission of the plaintiff and his wife during coverture.(7)

9. It will be seen hereafter, that the deed of a married woman is in general void. But, by statute 3 & 4 Wm. 4, ch. 74, a wife may convey, with the husband's consent, and with a private acknowledgment, and it is the settled rule in all the States, founded in most of them upon express statutes, that the joint deed of husband and wife will pass the whole estate of both. Unless the husband join, the deed is void. Parol evidence of his assent is inadmissible.(8)(b)

(1) Clapp v. Stoughton, 10 Pick. 463; Plow. 219.

(2) Harris v. Mott, 7 Eng. L. & Equ. 245.

(3) Lichty v. Hager, 1 Harr. 565.

(4) Ib.

(5) L'Amoureux v. Van Rensselaer, 1 Barb. Ch. 34.

(6) Crosby v. Otis, 32 Maine, 256.

(7) Jones v. Patterson, 11 Barb. 572.

(8) Watts v. Wadelle, 1 M'L. 203; Taylor, 3 Harr. Dig. (Suppl.) 715; Trimmer v. Heagg, 4, 484; Scott v. Purcell, 7 Blackf. 66. See Ward v. Amory, Curtis, 419; Ky. Sts. 1846, 43.

(a) But a deed by the husband alone passes his own interest, though made without the wife's knowledge or assent. Rangeley v. Spring, 8 Shepl. 130.

An alien husband may join with his wife in the conveyance of her real estate. Kottman v. Ayer, 1 Strobb. 552.

(b) A conveyance by husband and wife to a third person, for the purpose of having the land

10. In some of the States, where such conveyance is authorized by express statutes, it seems that, prior to the enactment of such statutes, the practice had become a common one. But the court in South Carolina said, they would not sustain a *vulgar error* in direct opposition to the law of the land.(1) In that State, however, an act was passed, to give effect to prior deeds of this nature.

11. In nearly all the States, except those of New England,(a) and in Rhode Island, to render such deed effectual, the wife must undergo an examination, for the purpose of ascertaining whether she acts voluntarily, or by undue influence of the husband. It is essential that the examination be made *apart* from the husband, except in Georgia, where this requisition seems to be omitted.(2)(b)

12. In Virginia, it has been held that the private examination or something equivalent is necessary to pass merely equitable rights.(3)

13. In Illinois, if the examining magistrate does not personally know the woman, her identity must be proved by one witness. In the same State, she is capable of conveying, if over eighteen years of age. In Missouri, the identity is to be proved by two witnesses.

14. It has been sometimes held, that the wife's conveyance may be effectual, although some statutory requisitions merely formal are not complied with. Thus in Ohio, where the magistrate's certificate stated only the substance of the transaction, this was held sufficient. And a statute of Pennsylvania declares valid all deeds made prior to September 1, 1836, though the certificate be defective. A similar statute exists in South Carolina.(4)(c)

14 a. Acknowledgment, that the wife executed the deed, without "fear, threat or compulsion of her husband," but not saying "freely." There was no evidence of force or compulsion. Held sufficient.(5)

(1) 4 Con. S. C. 15; *Boal v. Mix*, 17 Wend. 119; *Gillett v. Stanley*, 1 Hill, 121.

(2) 1 Vir. Rev. L. 158; 1 N. C. R. S. 227; Mich. L. 158; Anth. Shep. 55, 234, 281, 389, 539, 548, 593; Prince's Dig. 160; Alab. L. 93; *Whiting v. Stevens*, 4 Conn. 44; Ind. Rev. L. 271; 1 Ind. R. 379; Illin. Rev. L. 133-4; Misso. St. 122; 1 Ky. Rev. L. 440; Dela. St. 1829, 89; 4 Griff. 756, 660; *Elliott v. Piersoll*, 1 M'Lean, 13; *Howell v. Ashmore*, 2 N. J. 261.

(3) *Countz v. Geiger*, 1 Call, 167; see *Bryan v. Stump, &c.*, 8 Gratt., 241.

(4) Walk. Intr. 326; *Purd. Dig.* 205; *Beckwith v. Lamb*, 13 Ired. 400.

(5) *Meriam v. Harsen*, 2 Edw. Ch. 70.

conveyed to the husband, and thus transferring it to him, will be sustained, where no fraud has been practiced upon the wife. *Shepperson v. Shepperson*, 2 Gratt. 501.

The separate deed of a married woman to a third person has been held good consideration for a note to her, in the absence of fraud or mistake. *Sanbord v. French*, 2 Fost. (N. H.) 246.

(a) In Indiana, no peculiar acknowledgment is required, Rev. Sts. 232.

(b) The acknowledgment of the deed of a married woman is held absolutely necessary to its validity, even between the parties; while, in other cases, it is necessary only in reference to third persons, claiming adversely to the grantee. *Hepburn v. Dubois*, 12 Pet. 345. It is not sufficient, that the husband, after signing himself, by her direction, and in her presence, signs her name, though both afterwards acknowledge the deed. *Linslee v. Brown*, 13 Conn. 192. In Delaware it is provided by Statute, (Rev. Sts. 269,) that the private examination of the wife shall be effectual, though the deed is not recorded.

(c) In New York it is an ancient usage for femes covert to convey their lands. But acknowledgment has always been held necessary. Hence, such conveyance made in New Jersey, in 1760, without acknowledgment, was held void. *Constantine v. Van Winkle*, 2 Hill, 240. It has been held in Ohio, that a law, giving effect to the deed of a feme covert, which was invalid at the time of its execution, is unconstitutional and void. *Good v. Zercher*, 12 Ohio, 364. In New Hampshire, where a husband is under guardianship, the wife may validly join with the guardian in a deed. Rev. Sts. 297.

15. But *substantial* deviations from the form prescribed will render the deed invalid. Thus, where a statute requires the wife to renounce her right to lands, in the manner required in a case of *dower*, and to renounce all her estate, interest and inheritance; a renunciation of *all her interest and estate*, and also *all her right and claim of dower*, will not pass her land.(a) So, in case of a conveyance by a husband, in his own name, of his wife's land, she merely signing and sealing the deed "in token of her relinquishment of all her right in the bargained premises;" held, her interest did not pass, and, after his death, she might maintain a writ of entry for the land, on her own seizin. And no amendment will be allowed in the defective acknowledgment of a wife, upon parol evidence. So, it must appear *by the certificate*, that the acknowledgment was legal.(1)

15 a. Deed by husband and wife of her land. The acknowledgment was as follows: "Then the above-named Ansell Churchill, (meaning the grantor,) personally appearing, acknowledged the above written instrument to be his voluntary act and deed, and the said Lillis (wife) being examined separately and apart from her husband, also acknowledged the same before me," &c.; signed by the justice. Held, only the life estate of the husband passed.(1)

15 b. It has been held in Pennsylvania, that the act of 1770, requires both husband and wife to join in a conveyance of real estate, to which she was entitled in fee. Its directions are imperative. Such a deed, executed by her alone, is void, and parol evidence that she executed the deed with the assent, and by the direction of her husband, is inadmissible.(2) But a conveyance of the wife's land by deed, in which she and her husband join, passes her title, though not to a purchaser for a valuable consideration.(3)

16. In conformity with the principles above stated, a usage or statute, authorizing a married woman to convey her land, being a departure from the common law, will be strictly limited to *an actual transfer* of the property. Thus, a mere *agreement* by her to convey, though made for valuable consideration, and with consent of the husband, is void, even in Chancery.(b) So, in general, she is not bound, nor her heirs,

(1) Churchill v. Monroe, 1 R. I. 209; Fisk, 9 S. & M. 144; Jordan v. Corey, 2 Cart. Brown v. Sparel, 4 Con. S. C. 12; Bruce v. 385; Elwood v. Klock, 13 Barb. 50. Wood, 1 Met. 542; Elliott v. Piersoll, 1 (2) Trimmer v. Heaggy, 4 Harr. 484. M'L. 13; Raymond v. Holden, 2 Cush. 264; (3) Goundie v. Northampton, &c., 7 Barr, McDaniel v. Priest, 12 Miss. 544; James v. 233.

(a) The converse of the same rule applies to a release of dower. A, a widow administratrix, in conjunction with B, her co-administrator, executed a deed, pursuant to and reciting a contract by her deceased husband, and the decree of the court upon it ordering the conveyance. The deed purported to convey all the estate of the husband in his lifetime, and of them the said A and B, since his decease, and she signed and sealed the same without adding a description of her office. Held, her dower did not pass. Shurts v. Thomas, 8 Barr, 359.

(b) So, also, mere knowledge of, or verbal assent to the husband's deed, will not bind her. So, she is not bound by a *power of attorney* to convey. Sumner v. Conant, 10 Verm. 9.

A husband and wife cannot be restrained, by injunction, from bringing ejectment for land belonging to the wife, on the ground that she, when an infant, gave a bond of conveyance, with security, for the land, conditioned to convey when she became of age. Brawner v. Franklin, 4 Gill, 463.

* But where a female infant gave such bond, and the purchase-money was paid to her husband, after his marriage; held, he could be restrained, by injunction, from recovering the land at law, during his lifetime. Ib.

by the covenants in the deed, though expressed in her name as well as the husband's, or by estoppel. A statute of Delaware provides, that the wife shall be bound by no warranty, except a special warranty against herself, her heirs, and those claiming under her; and a statute of Kentucky, that the wife's deed shall not pass her estate, but "shall be as effectual for every other purpose, as if she were unmarried." (1)(a)

17. But though an agreement by the wife to convey cannot be enforced, an agreement by the husband, though merely parol, and made directly with the wife, in consideration of her conveying her land, will be enforced even against his heirs.

18. A husband agreed, in consideration of such conveyance, to purchase and build on other lands, and convey them to the wife. He did buy and build upon the land, but died without conveying. The husband was very poor at the time of marriage, but the property agreed to be conveyed to the wife greatly exceeded in value the land which the wife parted with. The agreement was enforced against the heirs. (2)

19. On the other hand, where it was verbally agreed between husband and wife, that he should purchase land in her name, build a house upon it, and be reimbursed the expense from the sale of other land belonging to her; and the husband fulfilled his part of the contract, but the wife died before a conveyance of her land; it was decreed in Chancery, that the guardian of her infant heirs should convey with the husband, and the proceeds of sale be applied according to the contract. (3)

20. A statute requiring private examination of the wife, does not apply to a conveyance made by an executrix under a devise to sell,

- (1) *Wadleigh v. Glines*, 6 N. H. 17; *Domick v. Michael*, 4 Sandf. 374; *Dela. St.* 1829, 89; *Whitbeck v. Cook*, 15 John. 483; 1 Ky. Rev. L. 440; *Colcord v. Swan*, 7 Mass. 291; *Dut. Dig.* 15; *Illin. Rev. L.* 134; *Misso. St.* 122; *Butler v. Buckingham*, 5 Day, 492; *Watrous v. Chalker*, 7 Conn. 228; *Ex parte Thomes*, 3 Greenl. 50; *Lane v. McKeen*, 3 Shepl. 304; *Rangeley v. Spring*, 8. 130; *Aldridge v. Burlison*, 3 Blackf. 201; *Verm. Rev. St.* 311; *Horseley v. Horseley*, 4 Harring. 517; *Den v. Demarest*, 1 N. J. 525. (2) *Gosden v. Tucker*, 6 Mun. 1. (3) *Livingston v. Livingston*, 2 John. Ch. 537.

But if husband and wife make a deed, ineffectual against her, under which the grantee enters and occupies; and after her death her heir brings a suit for the land; the grantee is estopped to deny his title. *Drane v. Gregory*, 3 B. Mon. 619.

Though in general an estoppel must be *mutual*; yet, where a conveyance was made by husband and wife, and possession taken under their deed, of land claimed by the wife, though the deed be ineffectual, from defect in the acknowledgment, to pass the title of the wife, the grantees are estopped to assert an outstanding title in a third person, in a contest with the heirs of the wife, after the death of the husband. *Gill v. Fautleroy*, 8 B. Mon. 177. So, on the other hand, such deed is binding upon all except the wife and those claiming under her. *Lewis v. Cook*, 13 Ired. 193.

(a) In New York, the wife is estopped from denying any essential fact, admitted in the deed. So, all who claim under her. *Constantine v. Van Winkle*, 2 Hill, 240. In Michigan, she is not bound by the covenants. *Rev. St.* 258. In Maine, neither by covenants nor estoppel. *Rev. St.* 372. In Ohio, whether she is bound by the covenants, *qu.* *Hill v. West*, 8 Ohio, 222. It has been held in Massachusetts, that she is estopped by covenant of warranty to deny her title at the time of conveyance. *Nash v. Spofford*, 10 Met. 192. See *Raymond v. Holden*, 2 Cush. 264.

Where a husband conveyed his wife's land, she not legally executing the deed, and took a conveyance of other land in exchange, the wife not objecting, and declaring herself pleased with the exchange; her heirs are not estopped in equity to claim the land, it not appearing that she was acquainted with her title, and there being no evidence of fraud on her part. *McClure v. Douthitt*, 6 Barr, 414.

nor need the husband join in the deed. Such statute does not apply to a deed of the wife's separate trust property.(1)

21. Where the husband and wife join in conveying her land, a note for the price, given to her alone, survives to her upon the death of the husband.(2)

22. Husband and wife may join in a mortgage of the wife's land, as well as an absolute deed. But the wife's interest shall be thereby incumbered, only to the amount of the mortgage debt. Hence, if the husband's right of redemption be taken by his creditors and sold, the wife may redeem the land by paying the mortgage debt only, without the additional sum for which the equity was purchased.(3)

23. Where such mortgage is made for the husband's debt, the wife, though not personally bound, is a mere surety, and the mortgage will be discharged by any such new credit given to the principal, as would discharge a common surety.(4)

24. Where a feme covert purchases real estate, and for a part of the consideration gives back a mortgage, in which the husband does not join; upon a bill for foreclosure, the mortgage shall constitute an equitable lien upon the land, as against one who purchased with notice of, and expressly subject to, the mortgage.(5)

24 a. Where a wife owned a dower interest in four-sixths of certain real estate, of which her former husband died seized, and owned in fee the remaining two-sixths, and the husband and wife united in a sale, and out of the proceeds of such sale the sum of \$3,000 was paid, without the husband's assent, upon a mortgage which incumbered the wife's separate estate; held, the husband had a claim upon such separate estate to that extent. But another sum of \$2,000, out of such proceeds, appearing to have been paid upon the same mortgage, with the husband's unqualified assent; held, such payment was a valid appropriation of that sum to the wife's separate use, and, in respect to it, the husband had no claim upon the separate estate.(6)

25. It will be seen,(a) that where an estate is limited to the *separate*

(1) Tyree v. Williams, 3 Bibb, 368; Brundige v. Poor, 2 Gill & J. 1.

(2) Dean v. Richmond, 5 Pick. 461.

(3) Peabody v. Patten, 2 Pick. 517.

(4) Gahn v. Niemcewicz, 11 Wend. 312.

(5) Hatch v. Morris, 3 Edw. 313.

(6) Martin v. Martin, 1 Comst. 473.

(a) See ch. 22, *Trust*. A deed to a wife and her heirs, does not of itself vest in her a *separate estate*, in the technical sense. Hall v. Sayre, 10 B. Mon. 46.

In New York, since the act of April 7, 1848, for the more effectual protection of the property of married women, the husband during coverture has no interest in the wife's lands which he can use or transfer, or which his creditors can reach. Upon the death of the wife after issue born, leaving her husband, it descends to her heirs, charged with his rights as tenant by the curtesy; and, if there has been no issue, the estate becomes perfect and absolute in her heirs. Hurd v. Cass, 9 Barb. 366. A similar act exists in Pennsylvania. Sts. 1848, No. 372, p. 536.

A wife's separate estate is an equitable estate merely, and where the legal title is vested in some other person for her benefit, to the exclusion of her husband. Albany v. Bay, 4 Comst. 9.

The legal estate which a wife has in reversion in lands, where the husband has disposed of his life estate as tenant by the curtesy, is not a separate estate. Ib.

In South Carolina, a court of equity will not sustain the sale by a *feme covert* of her separate estate, although there is no restriction on such sale in the deed of settlement, unless it were the voluntary act of the wife, and under such circumstances that the court, on her examination, if applied to, would have ordered it. Calhoun v. Calhoun, 2 Strobb. Eq. 231.

use of a married woman, the husband shall not be entitled to curtesy in such estate. Upon the same principle, an estate thus limited shall be owned, in equity, by the wife alone, to all intents and purposes as if she were a *feme sole*, subject to her disposition, and entirely free from the control of the husband. No actual conveyance to trustees for her separate use is necessary, but a mere ante-nuptial agreement between husband and wife will have the same effect. Under these circumstances, the wife may convey the estate even to the husband, provided no undue influence be used on his part; and it has been settled in New York, though against the opinion of the Chancellor, that her conveyance will be valid without the assent of the trustees, unless such assent were expressly required in the instrument by which the trust was created.(1) This subject will be more fully considered hereafter.(a)

(1) Jacques v. Trustees, &c., 17 John. 548; Bradish v. Gibbs, 3 John. Cha. 540; See also Demarest v. Wyncoop, 3 Ib. 144; Smith v. Paythress, 2 Flori. 92; Cruger v. Cruger, 5 Barb. 225; Ladd v. Ladd, 8 How. U. S. 10; Strong v. Skinner, 4 Barb. 546; Wright v. Miller, Ib. 600; Watson v. Bonney, 2 Sandf. 405; Cherry v. Clements, 10 Humph. 552; Boarman v. Groves, 23 Miss. 280; Martin v. Martin, 1 Comst. 473; Clarke v. Windham, 12 Ala. 798; Jasper v. Howard, Ib. 652; Moore v. Jones, 13, 296; Goodman v. Goodman, 8 Ired. Equ. 313; Hatton v. Weir, 19 Ala. 127; Cuthbert v. Wolfe, Ib. 373; Barron v. Barron, 24, Verm. 375.

A court of equity has no power either to make or confirm the sale of a *feme covert's* separate estate, which, by the deed creating it, is expressly prohibited from being sold. Ib.

A married woman who has a separate estate cannot charge or dispose of it, unless in pursuance of a power of appointment expressly given. The mode prescribed must be strictly pursued; and no alienation or charge is valid, unless she has been examined by the court. Ib.

(a) See *Conveyance, Devise, Powers*. The separate estate of a *feme covert* in the hands of trustees, is in equity chargeable with debts contracted for the benefit of the estate. So, this estate is chargeable where a portion of it has been converted into other property, according to the provisions of the trust deed, and a debt is contracted for the benefit of such substituted property. Dyett v. N. A. Coal Co., 20 Wend. 570. So the separate estate of a *feme covert* is bound for any debt contracted by her. But she is not personally liable. Nor, where the property is held in trust for her and her children, can she bind their interest. American, &c. v. Dyett, 7 Paige, 9; Gardner v. Gardner, Ib. 112.

The separate estate of a married woman is not liable at common law for her debts contracted before marriage; and the only ground on which it can be reached in equity, is that of appointment; that is, some act of hers, after marriage, indicating an intention to charge the property. Vanderheyden v. Mallory, 1 Comst. 452.

A *feme covert*, in disposing of her separate estate, is strictly limited by the terms of the instrument under which she claims. Wallace v. Coston, 9 Watts, 137. In New Hampshire, if a *feme covert* is entitled to hold lands in her own right, and to her separate use, she may dispose of them, and they shall descend, as if she were sole. Rev. St. 296. So, the wife of one not a citizen, residing in the State six months successively, may acquire and hold lands. Ib. In Maine, by a recent statute, a *feme covert* may hold property in her own right, but cannot take it from the husband. The property belonging to her before, continues hers after marriage, not subject to his debts. She may, however, release the control of it to him, so long as it may be for their mutual benefit. Sts. 1844, 104-5. The statute is prospective merely, and the interest which a husband had acquired in the real estate of his wife, by a marriage prior to that act, is not affected by it. McLellan v. Nelson, 27 Maine, 129; Eldridge v. Preble, 34 Ib. 148.

CHAPTER VIII.

DOWER. NATURE AND REQUISITES OF DOWER.

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| <ul style="list-style-type: none"> 1. Definition of dower. 2-11. Dower in the United States. 10. Origin and history of dower. 12. Dower favored. 17. Requisites of dower. 18. Marriage. 19. Void and voidable marriage. 22. Marriage—how proved. 23. Marriage and divorce in England. 26. Marriage and divorce in U. States. | <ul style="list-style-type: none"> 31. Elopement, &c. 38. Seizin of husband. 42. Reversions and remainders. 50. <i>Dos de dote</i>. 61. Instantaneous seizin. 66. Whether husband's seizin may be denied. 68. Death of the husband. 69. Presumption of death. |
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1. THE third estate for life, created by *act of law*, is *Dower*. *Dower* is a technical term, and applicable only to real property.(1)(a) The common law description of this estate is as follows. When a man is seized during coverture of an inheritance in lands and tenements, which by possibility any issue of his wife might inherit,(b) such wife shall hold after his death one-third part of these lands and tenements for her natural life,(c) as an estate in dower. In pursuing this subject, it will be seen that the foregoing definition is inapplicable in many of the United States.(d)

2. In several of them, as will appear under the title of *Descent*, the widow in certain cases *inherits* the estate of her husband.(e)

(1) Brackett *v.* Leighton, 7 Greenl. 285. See Caillanet *v.* Bernard, 7 S. & M. 316.

(a) A testator, by his will, left his property, real and personal, in the possession of his wife during her widowhood, for the education and maintenance of his children, but, in the event of her marriage, he provided that she should "have her dower under the law, the balance to remain in common stock for the children." Held, the manifest intent of the testator, in case his widow married again, was, that she should have such portion of his real and personal estate, as the law entitled her to have, where the husband dies intestate, and that the word "*dower*" should be so construed. Paine *v.* Gupton, 11 Humph. 402.

Dower arises by *operation of law*, not by *contract*. Lawrence *v.* Miller, 1 Sandf. 516. The *statute of frauds* has therefore no application to dower. Davis *v.* Tingle, 8 B. Mon. 539. In Iowa, by statute, a husband has dower like a widow. Iowa Code, ch. 83, sec. 142.

(b) A petition for dower, alleging that the husband died seized of land, and that his estate was one of inheritance, sufficiently shows the character of the husband's title, as being a freehold of inheritance. Lecompte *v.* Wash, 9 Mis. 551.

(c) The estate ceases on her death, and a sale then made of her interest passes nothing. Holmes *v.* McGee, 12 Sm. & M. 411.

(d) Spangler *v.* Stanier, 1 Md Ch. 36. The common law definition is applied in Delaware to all cases arising subsequent to the year 1816. Dela. Rev. Sts. 290. See Heimer-shits *v.* Bernhard, 1 Harr. 518; Riddick *v.* Walsh, 15 Mis. 519. The common law description of dower has been recently rendered obsolete, even in England. By St. 3 & 4 Wm. 4, c. 105, dower is allowed in equitable inheritances and mere rights of entry without seizin. On the other hand, there is no dower in land conveyed by the husband, or devised, or exempted from dower by will; and it is subject to all incumbrances, debts and partial dispositions made by the husband. A devise of land to the widow is a bar of dower; but not a bequest of personal property, unless so expressed. In England, anciently, by virtue of local and peculiar customs, the right of dower was often varied from the common law rule. Thus, by the custom of *Gavelkind*, the widow had half of all the lands held by that tenure; forfeitable by a second marriage, or the birth of a bastard child. In some boroughs, the wife had for her dower *all* the tenements that were her husband's. Dower *ad ostium ecclesiæ*, was where a man, coming to the church door to be married, endowed his wife of so much of his land. Dower *ex assensu patris* was the same, except that the land bestowed was the property of the husband's father, and given with his consent. The two last named kinds of dower did not bind the wife, but she might still waive them and claim dower at common law. Co. Lit. 33 b; Robin. Gavelk. 159; Lit. 166, 39; Brac. lib. 2, c. 39.

(e) In several States recent statutes have made provision for securing *homesteads* to the

3. In Pennsylvania(*a*) and Indiana,(1) if an intestate leave a widow, and no lawful issue, the former shall have one-half of the real estate, including the mansion-house; or, in Pennsylvania, the rents and profits thereof, if a division is improper, for her life in Pennsylvania, but, it seems, absolutely in Indiana, in lieu of dower.

4. In Massachusetts, she takes for life, if there are no issue. In Delaware, if there is no child, or lawful issue of a child, the widow takes one-half of the land for life. If no kindred, she takes the whole. So in Wisconsin, for life, if no issue. In New Hampshire, where there is no lineal descendant, and no provision by will or waiver thereof, and the husband dies testate, she receives, in addition to dower, one-third of what remains after payment of debts. If intestate, one-half. If in either case she so elect, she may take, including her dower, what remains after payment of debts, &c., not exceeding what the husband received from her or in her right. These provisions do not apply, in case of an ante-nuptial settlement.(2)

5. In South Carolina, Illinois,(*b*) Missouri,(*c*) Georgia,(*d*) she has the same right as in Delaware, (it seems, in fee,) for want of lineal descendants, in lieu of dower.(3)

6. In South Carolina, if an intestate leave no father, mother, brother or sister of the whole blood, or their children, or brother or sister of

(1) *Purd. Dig.* 402; *Anth. Shep.* 300, 303; *Sts.* 278; *N. H. Rev. St.* 329-30; *Wisc. Rev. Sts.* 338; *Mass. Sts.* 1854, 72.

(2) *Dela. St.* 1829, 316; 1843, 489; *Rev.* (3) *Anth. Shep.* 586; *Illin. Rev. L.* 625; *Misso. St.* 228; *Anth. Shep.* 608.

widows of the owners. Thus, in Vermont, a homestead passes to the owner's widow and children, and it cannot be conveyed or mortgaged, except to secure the purchase-money, but by joint deed of husband and wife. *Verm. St.* 1849, 15. Similar statutes exist in New Jersey, (*St.* 1852, 222-4.) Massachusetts, (*St.* 1851, 844.) Wisconsin, (*St.* 1853.) New Hampshire, (*St.* 1851, 474.) Michigan, (*Sts.* 1850, 135; 1848, 124.) Ohio, (*Sts.* 1850, 29.) Iowa, (*Rev. Sts.*, ch. 81, sec. 1245.) In Pennsylvania, the widow or children may retain \$300 in real or personal estate subject only to a lien for the purchase-money. *Pen. St.* 1851, 613. So she may retain any property which the law exempts from execution. *St.* 1846, 477.

(*a*) In Pennsylvania, the widow shall have the real or personal estate, not exceeding \$300. *Sts.* 1851, 613. In Indiana, dower is abolished. *Rev. Sts.* 232.

(*b*) The widow takes one-half of the real, and all the personal estate, belonging to the husband at his death, subject to debts, and also her dower. *Summers v. Babb*, 13 *Illin.* 483; *Tyson v. Postlethwaite*, *Ib.* 727.

(*c*) The word used is *descendant*. In this State a statute provides, that when a husband dies, leaving a child by a former marriage, and a second wife, but no child by her, the widow may elect to take the personal estate brought to her husband by her marriage, in lieu of dower. Held, where she so elects, such estate is still liable for debts, before the real estate. *Chinn v. Stout*, 10 *Mis.* 709.

In the same State, a statute gives dower in *leaseholds*. And the assignment of dower, in leasehold estates, is governed by the same rules which prevail in estates of inheritance. *Rankin v. Oliphant*, 9 *Mis.* 239.

Where a husband dies seized of a leasehold estate, which is sold by his administrator, in an action by his widow against the purchasers, for her dower, she will be entitled to damages from the death of her husband; and where improvements are placed upon the land by the purchasers, they are to be taken into consideration in assessing damages after the time when they are placed upon the land. *Ib.*

In such case, no demand is necessary to entitle her to damages, and the purchaser cannot therefore plead *tout temp prist*. *Ib.*

(*d*) In this State, the same code of laws (*Prince*, 233,) contains these provisions, and also another, making the wife sole heir to her husband, where he leaves no issue. (*Ib.* 253.) It is difficult to see how both rules can be in force.

the half blood, or lineal ancestor, the widow shall have two-thirds of the real estate, in lieu of dower.(1)

7. In Georgia, where there are children, the widow may, at her election, have dower, or an equal share of both real and personal estate (subject to debts).(2)(a)

8. In Missouri, if the husband leave a child or descendant by another marriage, the widow may take, in lieu of dower, the personal property that came to him by her marriage, subject to debts. If the husband leave no child or descendant, she may take her dower at common law free from debts, or the personal property above named, subject to them. But her election must be written, acknowledged and filed within six months from the granting of administration. Dower in personalty can be had only in property belonging to the husband *at his death*.(3)

8 a. In Arkansas, a widow is entitled to dower in lands, slaves, and other personal property; to one-third of the personal property absolutely; to one-third of the proceeds thereof, in case the administrator sells it without allotting her dower; to dower in the increase of slaves, accruing between the death of her husband and the time of the allotment of her dower; also, to one-third of the rents of land and hire of slaves; and she may hold the mansion and farm attached, free of rent, until her dower is assigned. In Alabama, a wife having a separate estate takes only so much for dower as will give her in the whole a child's portion.(4)

9. Where the statute law provides a substitute for the right of dower, it is not to be regarded as creating a new interest, but as declaratory or in affirmance of the common law.(5)

10. It is said, that the idea of dower is derived from the Germans, and was familiar to the Saxons when they became established in England. Dower then consisted of one moiety of the husband's property, held for life, and liable to forfeiture upon breach of chastity, or a second marriage. Afterwards, by the charter of Hen. 1, the condition of forfeiture was dispensed with, except where there was issue. In the reign of Hen. 2, a wife was endowed by her husband *at the time of marriage* of one-third of the lands which he then held. By the charter of 1217 and 1224, dower was established as one-third part of all lands held by the husband during his life, unless a smaller portion had been assigned *at the church door*.(6)(b)

11. The only kind of dower known in practice in this country is that estate, which, according to the above definition, (sec. 1,) the law confers upon a wife after her husband's death; or dower at common law. The statute laws of Vermont, Connecticut, New Hampshire, Michigan and Maine, refer to provisions made for the wife before marriage, under the name of dower, undoubtedly intending thereby a *jointure*, which will be considered hereafter.(7)

(1) Anth. Shep. 587-9.

(2) Anth. Shep. 607.

(3) Misso. St. 228; *McLaughlin v. McLaughlin*, Bennett, (Mis.) 242.

(4) *Menifee v. Menifee*, 3 Eng. 9; Ala. Sts.

(5) *Brown v. Adams*, 2 Whart. 192.

(6) 1 Cruise, 118. See 2 Bl. Com. 102; *Doe v. Gwinnell*, 1 Ad. & El. N. S. 682.

(7) Mass. Rev. St. 409; Iowa Sts. 1852, 97; Anth. Shep. 21, 100; Mich. L. 30; 1 Smith's St. 158; *McMahan v. Kimball*, 3 Blackf. 6.

(a) See *ante*, p. 94.

(b) Dower *ad ostium ecclesiae*, and dower *ex assensu patris*, are both expressly abolished by stat. 3 & 4 Wm. 4, ch. 105, sec. 13; 1 Steph. Comm. 253.

12. While, as has been already remarked, (ch. 6, s. 1,) *curtesy* is an estate of mere positive institution, dower is held to have a strong moral as well as legal foundation. The wife, by marriage, loses most of her rights of property, and would in general be wholly destitute after the husband's death, were not some provision made for her from his real estate. It is said, moreover, that in ancient times the personal estates of the richest were very inconsiderable, and the husband could not give his wife anything during his life, or after his death, both trusts and devises being then unknown.(1)

13. For these reasons, a dowress is in the care of the law and a favorite of the law.(2) *Magna Charta*(3) provides, that a widow shall forthwith, and without any difficulty, have her marriage and her inheritance; nor shall she give anything for her dower or her marriage, or her inheritance, which her husband and she held at the day of his death. At common law, a dowress enjoyed the privilege of exemption from tolls and taxes.(4)(a) It is said, there be three things favored in law—life, liberty and dower;(5) that dower is a legal, an equitable and a moral right, favored in a high degree by law, and next to life and liberty held sacred.(6)

14. As a mark of peculiar favor to the tenant in dower, although damages were not generally allowed in real actions, they were given to her. Particular relief was also provided for her *quarantine* (a term hereafter to be explained. See chap. 11.) By the statute of Merton, (20 Hen. 3, c. 1,) deforcers of dower were to be *in mercy*, or fined at the pleasure of the king. Where to a suit for dower the defendant pleaded a false plea, the widow recovered damages from the husband's death, though she had been always in receipt of one-half the profits; and the rules of pleading are construed liberally in her favor.(7)

15. The celebrated *Ordinance* for government of the North West Territory expressly secures the right of dower.

16. It is said, however, that the object of dower is not to enrich the widow, to the detriment of creditors and impoverishment of the rest of a man's family, but to give an equal third part in value, for the sustenance of the wife and the nurture and education of younger children. Nor does the law give her any preference over heirs and devisees.(8)

17. There are three circumstances necessary to give a title to dower: viz., *marriage*, *seizin*, and *death of the husband*.

18. The *marriage* must be had between parties legally capable of contracting it, and duly celebrated. "*Ubi nullum matrimonium, ibi nullum dos*.(9)(b)

(1) Banks v. Sutton, 2 P. Wms. 702; Curtis v. Curtis, 2 Bro. Ch. 620-30-34; Moody v. King, 2 Bing. 451-2; Co. Lit. 30 b, n. 8; see Ga. St. 1845, 80.

(2) 1 Story on Eq. 583; Lasher v. Lasher, 13 Barb. 106.

(3) Magn. Char. sec. 8; 6 Conn. 462.

(4) 2 Bl. Com. 138.

(5) Co. Lit. 124 b.

(6) Kennedy v. Nedrow, 1 Dal. 417.

(7) Curtis v. Curtis, 2 Bro. Cha. 620; Co. Lit. 32 b, 33 a; Smith v. Paysenger, 4 Con. S. C. 59; McDonald v. Aten, 1 McCook (Ohio), 293.

(8) Heyward v. Cuthbert, 2 Con. S. C. 628; 7 J. J. Mar. 637.

(9) Co. Lit. 33 a; 1 Cruise, 121.

(a) In Tennessee, (Stat. 1835-6, p. 58,) land held in dower is expressly made taxable.

(b) Long continued cohabitation and general reputation are *prima facie* evidence of the marriage. Young v. Foster, 14 N. H. 114; see Conert v. Hertzog, 4 Barr. 145.

So, long cohabitation, continued until the death of the alleged husband, the woman's

19. A marriage may be either *void* or *voidable*; and the consideration, whether it is the one or the other, will materially affect the widow's claim of dower. In general, if the marriage were void, there shall be no dower. Thus, the second wife of a man who has a former wife living has no dower, though the first wife dies before the husband.(a)

20. But, although the marriage were contracted before the age of consent, which at common law is fourteen in men and twelve in women,(b) and therefore voidable by either party—according to the maxim "*consensus, non concubitus facit matrimonium*;"—yet, if at the death of the husband the wife have passed the age of nine years, she shall have her dower. The marriage is accounted "*legitimum matrimonium quoad dotem*," though for other purposes only "*sponsalia de futuro*." And, if at the time of marriage the wife is under nine years of age, and before she reaches that age the husband parts with the land; she shall still have dower, if she live till nine.(1)

21. A *voidable* marriage can be avoided only during the life of the parties, and by *divorce*. Hence, if in case of such marriage the husband die before any divorce is obtained, his widow shall have dower.(2)

22. In England, the fact of marriage is ordinarily tried, not by jury, but by a certificate of the bishop, the sentence of the Ecclesiastical Court being held conclusive upon this question. Under special circumstances, however, this mode of trial is not adopted; and, in the United States, this fact, like others, is tried by jury.(3)

23. The English law, on the subject of marriage and divorce, is materially different from that which generally prevails in the United States. In England, there are said to be two classes of disabilities or impediments to marriage—*civil* and *canonical*. Of the former class, are prior marriage, want of age, moral ability or will; and probably a neglect of the particular mode of celebration prescribed by law. Of the latter, are consanguinity, affinity and corporeal infirmity. Civil disabilities render the contract void *ab initio*, without divorce; canonical disabilities render it only voidable by *divorce*.

(1) Dyer, 369 a, 368 b; Co. Lit. 33 a, n. 10; Higgins v. Breen, 9 Mis. 497; Donnelly v. Donnelly, 8 B. Mon. 113.

(2) Co. Lit. 33 b.

(3) Robins v. Crutchley, 2 Wil. 122; Ilderton v. Ilderton, 2 H. Bl. 156; 4 Dane, 673.

being received and treated as his wife, and their bringing up and educating a family of children as their own. Carter v. Parker, 28 Maine, 509. The presumption arising from cohabitation may be rebutted, by evidence of a permanent separation without apparent cause, and another marriage of one party. Weatherford v. Weatherford, 20 Ala. 548. Even reputation has been held sufficient proof of marriage. Trimble v. Trimble, 2 Carter, 76.

An administrator's deed warranted the title, "excepting only the widow's right of dower." Held, the purchaser was not estopped to deny the marriage of the intestate, nor the legitimacy of his children, in a suit by them for the land. Stevenson v. McReary, 12 S. & M. 9.

(a) A man, having a wife in Maryland, left her and married again in Kentucky. Subsequently his first wife died, and he continued to live and cohabit with the Kentucky wife for several years, and recognize her as such until his death. Held, the court would presume a marriage in fact after the death of the Maryland wife, and give dower to the last wife. Donnelly v. Donnelly, 8 B. Mon. 113.

Where a man who has a wife living fraudulently marries another woman, who believes herself to be his lawful wife, obtains her property and earnings, and invests in lands more than the value of her dower, if she had been entitled thereto; his heirs cannot in equity deprive her of the dower estate after it has been allotted to her. Ib.

(b) In Arkansas, a marriage is void if the husband is under seventeen, or the wife under fourteen years of age. Ark. Rev. St. 535.

24. In England, a divorce *a vinculo matrimonii* is granted only for causes which existed at the time of marriage, or *canonical* disabilities. Hence, the marriage being avoided as originally unlawful, dower is as effectually barred, as if the marriage had been absolutely void.

25. *Adultery*, being a cause arising after marriage, is there a ground for divorce *a mensa et thoro*. Contrary to some ancient opinions, this has been settled not to be a bar of dower, being merely a *separation of the parties*, and not a *dissolution of the marriage*. The same is true of a divorce *a mensa* for any other cause than adultery.(1)

26. In the United States, the statute law often allows a divorce, for causes which in England render the marriage void *ab initio*. Thus, in New Hampshire, New Jersey, Ohio, Indiana, Illinois, Missouri and Alabama, on account of a prior marriage. Whether such provisions have the effect to convert *void* into *voidable* marriages, so that dower will not be barred without divorce, may perhaps be a questionable point. In Pennsylvania, on the other hand, a marriage within the prohibited degrees, which is a *canonical* disability, is declared *void to all intents and purposes*.(a) So in New Hampshire. But still it is to be dissolved by divorce, and, after the death of either party, its validity cannot be disputed. In the same State—Pennsylvania—where there is a divorce and separation, or decree that the marriage is null and void; all the duties, rights and claims, accruing to either party in pursuance of the marriage, shall cease. In this sweeping clause, dower is of course included. In New Jersey, Alabama and Mississippi, a marriage contracted while a former husband or wife is living, is declared to be “invalid from the beginning, and absolutely void,” but is still dissolved by divorce. In Arkansas, New York and Massachusetts, a process is provided for declaring void a marriage which was void at its inception, by a *decree of nullity*; though, in Massachusetts, such decree is declared to be unnecessary. In Kentucky, the same process is applied to a marriage within the prohibited degrees. In Vermont, consanguinity or a prior marriage renders the marriage *absolutely void*. A process is provided for annulling a doubtful marriage, for non-age, idiocy, &c., force or fraud, or impotency. In Delaware, a marriage may be annulled, in case of unlawful consanguinity or affinity, where one of the parties is white, and the other a negro or mulatto; in case of a former husband or wife living; or of insanity. In Maine, where one of the parties was insane, the marriage is void, and may be so decreed.(2)

(1) Rolle Abr. Dower, 13; Co. Lit. 33 b; Rev. L. 232-3; Misso. St. 225; N. H. L. Lady Stowell's case, Godb. 145; Dame, &c. 336; Alab. L. 252; 1 N. J. L. 667; Purd. v. Weeks, Noy, 108. 213; Vern. Rev. St. 322; Dela. Rev. St.

(2) Walk. 229; Ind. Rev. L. 213; Ill. 238; Keyes v. Keyes, 34 Maine, 553.

(a) In North Carolina, where the parties are nearer than *first cousins*. N. C. St. 1842, 142. In Wisconsin, in case of consanguinity, &c., or a former marriage, the marriage is *per se* void. Rev. Sts. 393. It may be declared null from the time of such declaration, for want of age or understanding, force or fraud, if there have been no subsequent voluntary cohabitation. Ib. In case of infancy or insanity, cohabitation after the impediment is removed renders the marriage valid. In the former case, the other party cannot avoid the marriage; nor in the latter, if he had knowledge of the insanity. Ib. 394. In New Hampshire, the marriage of one incapable of contracting is void. True v. Ramsey, 1 Fost. 52.

27. It may be laid down as the general rule of American law, that divorce *a vinculo* bars dower.(a)

28. But this rule is not universally adopted.

29. In New York,(b) Connecticut, Ohio, Michigan, it seems, and Illinois,(1) dower is not barred by divorce for the fault of the husband ;

(1) N. Y. Rev. St. 741; Illin. Rev. L. 238; Mich. L. 138; Dela. St. 1832, 149; Swan, 291; Ark. Rev. St. 337.

(a) The grounds of divorce are various in the different States. The plan of the present work does not require a complete statement of the law upon this subject; and therefore some later statutes may have escaped notice. The universal tendency is, however, to extend and not *restrict* the grounds of divorce; and it may be assumed, that the causes stated are still recognized, whatever additional ones may have been sanctioned by recent legislation.

In Maine, by recent statutes, (1847, 8; 1849, 104,) a divorce *a vinculo* may be granted in all cases, if there be no collusion, where the court think it reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society. In Virginia, the cause was formerly in the discretion of the Legislature, which alone granted divorces. But, by a late act, the causes specified are natural and incurable impotency at the time of marriage; bigamy; or any cause for which the marriage would be annulled by the ecclesiastical law. In South Carolina, it is said, divorces are never granted. In North Carolina, for any "just and reasonable cause." So, formerly, in Indiana. But, by a late act, for drunkenness, neglect to provide for the wife, or any crime punishable by hard labor in the penitentiary. The statute of Indiana, relating to dower in case of divorce, does not give dower in land alienated by the husband before its enactment. *Comly v. Strader*, 1 Smith, 75; *McCafferty v. McCafferty*, 8 Blackf. 218. In Georgia, *legal grounds*, and adultery. In New Hampshire, Ohio, Illinois, Missouri, Arkansas, former marriage, desertion, (so in Rhode Island, R. I. L. 1851, 796,) adultery, impotence, cruelty, drunkenness. In Tennessee, the four first-named causes. In Pennsylvania, New Hampshire, Mississippi and Alabama, the five first-named causes; in Alabama, abandonment by husband or wife for three years, or by the husband for any period, in connection with adultery. But, in Alabama, no divorce is granted, in case of adultery by both parties; and a divorce must be sanctioned by two-thirds of the Legislature. In Delaware, adultery of the wife, or impotence. In Massachusetts, impotence, desertion for five years, adultery; the party guilty of which cannot marry again. In Kentucky, adultery, desertion, cruelty. In Kentucky, Massachusetts and New Hampshire, forming connection with certain religionists, inconsistent with the marriage rights. In Connecticut, adultery, absence and *fraudulent contract*, meaning some cause which makes the marriage void *ab initio*. In Ohio, New Hampshire and Massachusetts, imprisonment. In Vermont, adultery, imprisonment three years, intolerable severity, three years' desertion, seven years' absence, and a neglect to support the wife. In Ohio, fraudulent contract, gross neglect of duty. In Missouri and Kentucky, conviction of crime. In Arkansas, infamous crime. In Alabama and Mississippi, consanguinity. In Michigan and New York, (it seems,) adultery only. In Tennessee, pregnancy with a child of color at the time of marriage. In Alabama, pregnancy, without notice to the husband, at the time of marriage. In Tennessee, the wife of one adjudged insane, becomes a *feme sole*, but cannot marry again. In Pennsylvania, lunacy of the wife is ground of divorce, on application of her friends. In New Hampshire, treatment endangering health or reason. In the same State, the cause must continue to exist, except in case of adultery. In Maryland, a divorce is granted for impotency at the marriage, any cause which makes the marriage void *ab initio*, adultery, abandonment for five years. Alab. L. 252-5; Clay, 169, 70, 71, 72; 4 Griff. 671; Walk. 230, 326, 228; Swan, 291; 4 Kent, 53; Mass. Rev. St. 480, 484; St. 1841, 189; 1850, 336. See St. 1843, 264; Brett v. Brett, 5 Met. 233; 2 N. Y. Rev. St. 140; Conn. St. 162; Dutt. 8; Ind. Rev. L. 213; Rev. St. 242; St. 1836, 69; 1 N. C. Rev. St. 239; 3 Griff. 363, 446, 4, 865, 799; Purd. 212; Penn. St. 1843, 235; Illin. Rev. L. 233; Misso. St. 226; N. H. L. 336; Rev. St. 293; N. H. St. 1849, c. 740; Dela. Rev. Sts. 238; 1 Ky. Rev. L. 122-4; 2, 1157; Mich. L. 138; Mich. St. 1843, 7; Tenn. St. 1835-6, 166; 1839-40, 90; 4 Shepl. 479; Me. St. 1844, 105; Md. L. 1841-2, ch. 262; Miss. L. 1840, 125; Verm. Rev. St. 324. In Iowa, a divorce granted by the territorial legislature, if it does not appear to have been for causes over which the district courts had jurisdiction, is good; and is a bar to dower in the same manner as if granted by the court. *Levin v. Sleanor*, 2 Greene, 604. In Wisconsin, imprisonment for life *per se* dissolves the marriage. Grounds of divorce are adultery, impotence, imprisonment for three years, desertion, cruelty, intoxication of the wife, drunkenness, neglect to support, conduct rendering a residence with the husband unsafe or improper. Wisc. Rev. Sts. 394-5.

(b) But see *Wait v. Wait*, 4 Barb. 192.

but it is barred, as also in Arkansas and Delaware, by a divorce for the wife's own fault, or, in Illinois, on the ground that the marriage was originally void.(a) Ordinarily, the distinction made in favor of the wife, where the divorce is granted for the fault of the husband, is, that a provision is made for her, distinct from dower, either under that name or in some other mode. But dower, as such, is barred. In Massachusetts,(1) where a man and woman are divorced for the cause of adultery committed by him, or on account of his being sentenced to confinement to hard labor, the wife has her dower. In Maine, where the divorce is for the husband's fault.(b) So in Connecticut, unless some part of the husband's estate has been assigned to her. In Kentucky (by the Revised Laws) and Alabama, neither party can, by divorce, be divested of a title to real estate; but, in Kentucky, by a late statute, a divorce for the husband's fault gives the wife the same rights as if he were dead. In Wisconsin, where a divorce is had for imprisonment or adultery by the husband, the wife has dower. In New Hampshire, where the wife of one not a citizen, by residence in the State, gains the right of acquiring and holding real estate, and is divorced; she retains such property, unless it appear from other evidence than the divorce, that she was guilty of misconduct.(2)

30. In Connecticut, a sum in gross paid to the wife upon divorce, is called *dower*.

31. Although, in England, a divorce for adultery does not bar dower, yet, by statute, Westminster II. c. 34, if a wife willingly leaves her husband and continues with an adulterer, she shall be barred of her dower, if she be convicted thereupon,(c) except her husband willingly, and without coercion of the church, reconcile her and suffer her to dwell with him.(d) The burden of proof is upon the party making this defence to a suit for dower.(3)

(1) Mass. Rev. St. 483, 617. See Smith v. Smith, 13 Mass. 231.

(2) 1 Ky. Rev. L. 124; Ky. St. 1836-7, 324; Alab. L. 256; N. H. Rev. St. 296; Me. lb. 608; Conn. St. 188; Wis. Rev. St. 397.

(3) Co. Litt. 32 b; Cochrane v. Libby, 5

Shepl. 39. Where the wife married again within three years after the husband's leaving home, but after it was reputed in the family that he was dead; held, not sufficient proof of adultery to bar dower. lb.

(a) In Ohio, in case of *aggression* by the wife, dower is barred in lands owned at or after the filing of the petition. Swan, 291. In Indiana, there shall be a fair division of property, but no title to land shall be divested. Except in case of adultery by the wife, illegality in the marriage, or allowance of alimony expressly in lieu of dower; dower is not barred. Rev. St. 244. Where, before the statute of 1843, the husband conveyed away his land, and a divorce was decreed for misconduct; held, the wife should not have dower. Comly v. Strader, 1 Cart. 134. Where in a case of cruelty alimony was allowed upon divorce in lieu of dower; held, dower should be decreed. Russell v. Russell. lb. 510. There is no dower in case of divorce for the misconduct of both parties. Cunningham v. Cunningham, 2 Cart. 233. In Michigan, upon a divorce for adultery of the husband, the wife has dower. Rev. St. 340.

(b) A husband sold land in 1823, in which his wife did not release her dower. In 1842, the wife obtained a divorce on the ground of desertion, under the statute of 1828, which provides, that a wife obtaining a divorce for that cause shall have dower as if her husband was dead. Held, she was not entitled to dower in the land sold; as the statute could not, constitutionally, have a retrospective effect. Given v. Marr, 27 Maine, 212.

(c) In England, the ecclesiastical court alone has jurisdiction of adultery. Perhaps, therefore, conviction may there be requisite to bar dower. But in the United States the fact must be tried collaterally, if at all, in the suit for dower.

(d) All which (says Lord Coke) is comprehended shortly in two hexameters.

Sponte virum mulier fugiens, et adultera facta,

Dote sua caret, nisi sponsi sponte retracta.

See Lecompte v. Wash, 9 Mis. 551.

32. The same consequence follows, though the wife were originally taken away against her will, if she afterwards willingly remain with the adulterer. So if she be with him criminally, without remaining; or once remain with him, and he then detain her against her will; or if he turn her away. So, if with her husband's consent she goes away with another man, who afterward has criminal connection with her; or if she refuses to accompany her husband, on account of objections from her parents, and reports of his marriage to another woman; or refuses to return to him, having been driven away by cruelty. It is sufficient that she is in an open state of adultery, whether she live in the same house with, or be formally married to, the adulterer or not. And it has been held immaterial with whom the adultery is committed, or whether it be before or after she leaves. But merely *living in adultery*, without *elopement*, which means a *freedom from the husband's control*, is no bar of dower. The circumstances of the elopement are immaterial.(1)

33. A man by deed granted his wife to another,(a) with whom she eloped and lived adulterously, and after her first husband's death intermarried. Held, the deed was void as a grant or a license; that no averment was admissible, "*quod non fuit adulterium*," and that the wife was barred of dower, notwithstanding a purgation of adultery in the ecclesiastical court. But where the friends of a husband removed him from his wife, published that he was dead, and persuaded her to marry another, and release all her rights under the first marriage; held, she did not leave her husband *sponte*, and therefore was not barred of her dower.(2)

34. In Connecticut, a woman has dower if living with her husband at his death, or absent by his consent or default, or inevitable accident. And where the husband was a naturalized foreigner, and his wife had always lived abroad, she was barred of her dower upon the principle above stated. In Maryland, conviction of bigamy bars dower.(3)

35. In England, the reconciliation, which will avoid the effect of elopement, must be, not by coercion of the church, (a proceeding unknown to our laws,) but *voluntary* on the part of the husband. And the better opinion seems to be, that *cohabitation* subsequent to the elopement—as, for instance, the parties sleeping together at several times and places, although they do not permanently occupy the same house—is sufficient proof of reconciliation.(4)

36. Reconciliation has a retrospective effect upon the rights of the wife. Thus, if the husband purchase and aliene lands during the elopement, she shall still have her dower therein.(5)

37. The old English statute upon this subject has been generally adopted in this country, and in the states of Virginia, North Carolina, Delaware, New Jersey, Illinois, Missouri(b) and Indiana, expressly or

(1) *Hetherington v. Graham*, 6 Bing. 135; *Stegall v. Stegall*, 2 Brock. 256; *Bell v. Neely*, 1 Bui. 312; *Cogswell v. Tibbetts*, 3 N. H. 41; *Walters v. Jordan*, 13 Ired. 361.

(2) Co. Lit. 32 a, n. 10; *Green v. Harvey*, 1 Rolle's Abr. 680.

(3) Dut. 53; *Sistare v. Sistare*, 2 Root, 468; Md. L. 579.

(4) *Haworth v. Herbert*, Dyer, 106.

(5) Co. Lit. 33 a, n. 8.

(a) "*Concessio mirabilis et inaudita*."—Coke.

(b) The English statute was never in force in this State, until the act of 1825. *Lecompte v. Wash*, 9 Mis. 551.

substantially re-enacted. But, in New York, by the Revised Statutes, there must be a divorce for misconduct, or a conviction of adultery, upon a bill in Chancery by the husband, to bar dower.(1)(a)

38. To give a title to dower, either at law or in equity, the husband must have been *seized* of the lands.(b)

39. But a *seizin in law* is sufficient; upon the ground that the husband alone has power to obtain actual possession during coverture, and therefore a different rule would enable him at pleasure to debar his wife from her dower.(2)

40. Conveyance, by an absolute deed, but with a verbal agreement to reconvey, upon repayment of certain money loaned. The grantee never entered, nor claimed possession. Held, his wife was entitled to dower, a *seizin in law* being sufficient for that purpose.(3)

41. So, where an heir dies before entry upon the land descended to him, or where a stranger enters by *abatement*; the widow of the heir shall still have dower. But if the heir married after the abatement, and died without taking possession; his widow shall not have dower,

(1) Stearns, 310; 1 Swift, 86; 4 Dane, 672-6; 4 Kent, 52; 1 Virg. Rev. C. 171; Code, 474; 1 N. J. R. C. 400; * 1 N. C. Rev. St. 615; Ind. Rev. L. 211; Ill. do. 238; Misso. St. 229; * Dela. St. 1829, 165; Rev. St. 291; Foy v. Foy, 13 Ired. 90; Walters v. Jordan, ib. 361.
(2) Co. Lit. 31 a; Perk. 366; Dennis v. Dennis, 7 Blackf. 572.
(3) Atwood v. Atwood, 22 Pick. 283.

* In this statute the old term "ravisher" is used.

(a) So, also, though before 1830, when the Revised Code was enacted, the wife long lived in open adultery, separate from the husband; although, if he had died prior to 1830, she would have been barred of dower under the act of 1787. Reynolds v. Reynolds, 24 Wend. 193. So, where the parties were married in 1810, the wife immediately deserted her husband, and ever afterwards lived in adultery; and the husband died since the Revised Statutes took effect. Cooper v. Whitney, 3 Hill, 95. In Ohio, a divorce in another State, for wilful abandonment of the wife by the husband does not bar dower in lands lying in Ohio. Mansfield v. McIntyre, 1 Wile. 27. In Alabama, a husband and wife having separated, the husband went to another state, married again, and had children. The woman also became mother of illegitimate children. Forty years after the first marriage, the husband conveyed in trust for the second wife and children. Upon his death, the first wife applies for dower. Held, it should not be allowed. Ford v. Ford, 4 Ala. N. S. 142.

(b) The phrase *beneficial* *seizin* is sometimes used. Oldham v. Sale, 1 B. Monr. 77. See Northcut v. Whipp, 12 B. Mon. 65. The owner of the inheritance in land is "possessed" of it for the purpose of dower and curtesy. Weir v. Tate, 4 Ired. Eq. 264.

Where a deed had been delivered to the husband, but abstracted from him before registration; held, there could be no dower at law, but the widow must resort to a court of equity. Tyson v. Harrington, 6 Ired. Equ. 329; acc. Thomas v. Thomas, 10 Ired. 123. In a declaration in dower, it is unnecessary to aver the *possession* of the husband. But, by the general rules of pleading, it is necessary to show his *seizin*, which may be done by implication from the form of the declaration. Foxworth v. White, 5 Strobb. 113. In Tennessee, the widow is not dowable of lands which her deceased husband had conveyed by mortgage, for he did not die *seized and possessed* of them. Melver v. Cherry, 8 Humph. 713. On a petition for dower, although the widow will not be held to strict proof of title in the husband, to make out a *prima facie* right, yet, upon a plea of *non seizin*, she must either show title in the husband, actual possession, or that the defendant holds under the husband. Gentry v. Woodson, 10 Mis. 224.

It has been held, that, although the husband were not seized during coverture, yet, if he had conveyed the land with an agreement, that the rights of those claiming under him after his death should be saved; his widow shall have dower. Thus, a grantor gave an absolute deed of real estate, and took from the grantee, at the same time, an acknowledgment that he held the land charged with the settlement of the just debts of the grantor. Held, the widow of the grantor, who had intermarried with him since the deed, was entitled to dower. Doe v. Bernard, 9 S. & M. 319.

because during the coverture he had no seizin in law.(1) So the widow of an heir has no right of dower, in land sold by the executor under a power in the will of the ancestor.(2)

42. So, where the husband had only a remainder or reversion expectant upon a freehold, there shall be no dower.(3)(a)

43. If a man leases for life, reserving rent to him and his heirs, and then marries and dies, his widow shall be endowed neither of the reversion nor the rent; because he had no seizin of the former, and only a particular estate, not an inheritance, in the latter. The same rule applies, where the particular estate terminates during coverture, either by limitation or forfeiture, but the husband does not actually enter. But if the life estate cease for a time, though afterwards re-instated, the widow of the reversioner has dower, on account of the temporary seizin. Thus, if a lessee for life surrender to the reversioner on condition, and enter for condition broken, the widow of the latter shall be endowed.(4)

44. A conveys to B in fee, and B, at the same time, reconveys to A and his wife, for their lives and that of the survivor. B conveys to C, subject to his deed to A. A and his wife and C jointly occupy the land. A dies, then C, then A's wife. C's wife remains on the land, and dower is assigned her; C's administrator having previously sold the land under a license from court to D, E, a purchaser from D, brings suit for the land against the widow, and recovers.(5)

45. It has been held in Pennsylvania, that there is no dower in a remainder expectant upon a life estate, which the husband has aliened before his death. Whether without such alienation there would be, *qu.*(6)

46. But where the lease is for years and not for life, the widow is entitled to a third of the reversion, and a third of the rent, if any. And this, notwithstanding a release from the wife to the lessee; which amounts only to a confirmation of the lessee's title. If no rent is reserved, her judgment for a third of the reversion will be with a *cessat executio* during the term; or dower will be assigned, with a proviso that the tenant for years shall not be disturbed.(7)(b)

47. Devise to executors for payment of debts, then to the testator's son in tail. The son marries and dies before the debts are paid. Held, as the estate of the executors was only a chattel interest, the son had

(1) Lit. 448; Perk. 371; Ib. 367; Dunham v. Osborne, 1 Paige, 635; Sherwood v. Vanderburgh, 2 Hill, 303.

(2) Weir v. Tate, 4 Ired. Eq. 264.

(3) Blow v. Maynard, 2 Leigh, 30; Robison v. Codman, 1 Sumner, 130; Eldredge v. Forestal, 7 Mass. 253; Dunham v. Osborne, 1 Paige, 634; Otis v. Parshley, 10 N. H. 403; Arnold v. Arnold, 8 B. Mon. 202; Weir v.

Tate, 4 Ired. Eq. 264; Green v. Putnam, 1 Barb. 500.

(4) Co. Lit. 32 a; Perk. sec. 366, *et seq.*; Co. Lit. 131 a, n. 4.

(5) Fisk v. Eastman, 5 N. H. 240.

(6) Shoemaker v. Walker, 2 S. & R. 554.

(7) Co. Lit. 32 b; Wheatley v. Best, Cro. El. 564; Williams v. Cox, 3 Ed. 178; Weir v. Tate, 4 Ired. Equ. 264.

(a) But when land is conveyed, reserving an estate therein during the lives of the grantor and his wife, the wife not being party to the deed; the estate descends, upon the decease of the husband, to his personal representatives, and the wife is entitled to dower therein. Gorham v. Daniels, 23 Vt. 600.

(b) Where a rent is reserved, the judgment for dower will be general, but the execution special; and the sheriff shall not oust the tenant, but merely enter and demand seizin for the widow.

a seizin, which entitled his widow to dower after payment of the debts.(1)

48. By a Massachusetts colony law of 1641, the wife was allowed dower of a reversion or remainder. But this has been construed to mean, a reversion, &c., upon an estate less than freehold.(2) A statute of Maine provides for dower in estates in possession, remainder and reversion. In Connecticut, it is said, a reversion after a freehold is subject to dower.(3)

49. To entitle the widow to dower, the husband must have had the freehold and inheritance in him *simul et semel*. Thus, if A have an estate for life, remainder to B for life, remainder to A in fee, and A die, living B, A's widow shall not be endowed. The same rule has been adopted, though the intervening estate is a mere possibility. Thus, where A is a tenant for life, remainder to B and his heirs for A's life, remainder to the heirs male of A's body, A's wife shall not have dower. And the prevailing modern doctrine is, that the interposition of a mere contingent estate between the husband's particular estate and his inheritance—notwithstanding a union *sub modo*—is sufficient to deprive the wife of her dower. Thus, where an estate is limited to A and B for their lives, and after their deaths to the heirs of B, the wife of B shall not have dower. The learning upon this subject is said to be abstruse and unprofitable.(4)

50. Upon the principle above stated is founded the rule, that a widow is not dowable of lands assigned to another woman in dower—“*dos de dote peti non debet*.” When dower is assigned, the assignment relates back to the owner's death, and the heir is regarded as never having been seized of this portion of the land. Thus, it is no bar to a suit for dower, that the widow of an earlier owner has recovered her dower in the same land; although the plaintiff may recover only one-third of the remaining two-thirds, subject to a contingent right of dower in the other third, when the former right of dower ceases.(5)

51. A grandfather dies seized of land, from which his widow is endowed. Then the father dies, leaving a widow. The widow of the father shall have dower only in two-thirds of the land, the other third being in the father's hands a reversion expectant upon a freehold, viz., the dower of the grandfather's widow.(6)

52. But in New York it has been held, that in such case the heir's widow shall have dower, in the land assigned to the widow of the ancestor, after the death of the latter.(7)(a)

53. If the grandfather conveyed to the father before his death, the

(1) 8 Rep. 96 a; *Hitchins v. Hitchins*, 2 Vern. 404.

(2) 4 Dane, 664.

(3) 1 Smith's St. 170; *Reeve Dom. R.* 57.

(4) *Moore v. Esty*, 5 N. H. 492; *Duncomb v. Duncomb*, 3 Lev. 437; 4 Kent, 40, n.

(5) 4 Dane, 664; *Windham v. Portland*, 4 Mass. 388; *Manning v. Laboree*, 33 Maine, 343. But see ch. 12.

(6) Co. Lit. 31 a, b; *Reynolds v. Reynolds*, 5 Paige, 161; *Safford v. Safford*, 7 Paige, 259.

(7) *Bear v. Snyder*, 11 Wead. 592.

(a) It would seem, that in making this decision, the court overlooked the distinction (laid down in the books which they cite, and noticed in secs. 51, 53) between the case where the son holds *by purchase*, and that in which he holds *by descent*. The point really decided is, that the heir is *seized* of the reversion expectant upon the widow's dower, which is a departure from the common law rule. The decision seems directly contradictory to 5 Paige, 161. (*Supra*, n. 6.)

widow of the father would have dower in the whole, subject to the dower of the grandfather's widow; because, before the death of the latter, the father was actually seized.(1)

54. Judge Reeve supposes a case, where, upon this principle, the widows of the grantor and of four successive purchasers, respectively, claim dower in the same land.(2)

55. The same principle applies, where the land has been sold on execution. A owns land, which is sold on execution against him to B. B dies, and then A. B's widow has dower in the land, subject to the dower of A's widow.(3)

56. The above-stated rule is not applicable, unless dower has been actually assigned to the first widow.(4)

57. It is said that the widow of a devisee may recover dower in the whole land devised, the widow of the testator having never made any claim.(5)(a)

58. Upon the question, whether a *release* by the widow first entitled gives the other dower *in the whole land*; where two widows were entitled to dower in the same land, and the one having the prior right recovered judgment for her dower, but, without having it set off, conveyed it to the tenant; in a suit by the other widow for her dower, held, she could claim it in only two-thirds of the land. But to an action of dower, a prior right of dower, which has been released to the tenant without being enforced, has been held no defence.(6)(b)

59. It is said, that if the widow of a grantee sue the grantee's heir for her dower in the whole land, pending a suit against him by the widow of the grantor for her dower; the former suit shall await the judgment in the latter.(7)(c)

60. It has been said, that an *instantaneous* seizin is sufficient to give dower; and a case is mentioned, where a father and son were hanged in one cart, and, as the son appeared to survive the father by struggling the longest, the son's widow was endowed.(8)

61. A purchaser of land mortgaged it on the same day to creditors of the vendor. Held, his wife should have dower.(9)

62. But there is an instantaneous seizin of another description, which will not entitle the widow to dower. This is where the same act, which gives the husband an estate, also passes it out of him, or where he is a

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| <p>(1) Co. Lit. 31 a, b; Geer v. Hamblin, 1 Greenl. 54, n.
 (2) Reeve's Dom. Rel. 58.
 (3) Dunham v. Osborn, 1 Paige, 635.
 (4) Elwood v. Klock, 13 Barb. 50.
 (5) 1 Cruise, 153; Hilchins v. Hilchins, 2 Vern. 403.
 (6) Leavitt v. Lamprey, 13 Pick. 382. (But</p> | <p>see <i>infra</i>, 63.) Atwood v. Atwood, 22 Pick. 283; Elwood v. Klock, 13 Barb. 50.
 (7) Lit 54.
 (8) 2 Bl. Com. 132; Broughton v. Randall, Cro. Eliz. 502; Stanwood v. Dunning, 2 Shepl. 290.
 (9) McClure v. Harris, 12 B. Mon. 261.</p> |
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(a) Mr. Cruise thus states the law. But the case (2 Vern. 403) which he cites, was one where the title of the former widow was disputed on the ground of a devise to her in satisfaction of dower.

(b) Devise to the testator's wife of her thirds of the land occupied by him, and of the whole tract to his son, who occupied with him. Held, the son took the whole, subject to her dower; and, if not assigned in the son's life, his widow should have dower in the whole. Robinson v. Miller, 2 B. Monr. 287.

(c) But Lord Coke says, "this shaft came never out of Littleton's quiver of choice arrows"

mere instrument to pass the estate. Thus, where land is conveyed to A to the use of B, A has but an instantaneous seizin, and his widow shall not have dower. So, where A conveys to B, and B at the same time mortgages back to A, or according to a previous agreement mortgages to C; the widow of B shall have dower only in the equity of redemption. Otherwise, where the reconveyance is subsequent in time to the original deed; or where the mortgage, made with the deed, having never been recorded, is surrendered to the mortgagor, who gives a new note and mortgage, in which the wife does not join.(1)

62 *a*. A had given his note to B, for a tract of land. By agreement, B conveyed the land to C, who, therefor at the same time, conveyed a farm to A, and A at the same time gave a mortgage of the farm to B, as security for said note. Held, the instantaneous seizin of A did not entitle his wife to dower.(2)

62 *b*. And where the conveyance and mortgage are acknowledged and recorded at the same time, although the mortgage is not made to the vendor, it will be presumed to have been executed for the purchase-money, at the same time with the conveyance. Such case is not within the statute of New York, (1 Rev. Sts. 740,) declaring that a widow shall be dowable of lands mortgaged by the husband before marriage, as against all persons except the mortgagee and those holding under him.(3)

63. So, where it was a condition of a sale of land to the husband, that he should give back a mortgage of the land to secure the price, and a deed was made, the day after the conveyance, and signed by the wife, but she refused privately to acknowledge it; held, she could not have dower. But where a vendor of land, having a lien for the price, brings a suit for it, recovers judgment, and sells the land upon execution; the lien is extinguished, and the widow of the first vendee shall have dower against the execution purchaser.(4)(*a*)

64. In Virginia, where the husband, receiving a deed of land, gave a deed of trust to secure the price, and the land was afterwards sold to raise the price, it was left a doubtful point whether the widow should have dower.(5)

65. Where a man before marriage makes a conveyance of lands, which is never acknowledged or legally recorded, his widow shall not have dower.(6) But where the defendant was a purchaser under a judgment entered on the same day with the marriage; but there was no evidence which, in fact, was first, the marriage or the entry of the judgment; the plaintiff recovered her dower.(7)

65 *a*. In an action of dower, proof of the conveyance of the premises to the husband, by deed of warranty, and of his conveying the same to

(1) Co. Lit. 31 b; 1 N. Y. R. S. 740; Ark. Rev. St. 337; *Holbrook v. Finney*, 4 Mass. 566; *Clark v. Munroe*, 14, 351; 1 Bay, 312; 2 McCord, 54; *Ancots v. Catherick*, Cro. Jac. 615; *Stanwood v. Dunning*, 14 Maine, 290; *McCauley v. Grimes*, 2 Gill & J. 318; *Billiam v. Moore*, 4 Leigh, 30; *Mayburry v. Brien*, 15 Pet. 21; *Sherwood v. Vandenburgh*, 2 Hill, 30; *Hobbs v. Harney*, 4 Shepl. 80; *Bullard v. Bowers*, 10 N. H. 500; *Nottingham v. Calvert*, 1 Smith, 399.

(2) *Gammon v. Freeman*, 31 Maine, 243.

(3) *Cunningham v. Knight*, 1 Barb. 399.

(4) *Bogue v. Rutledge*, 1 Bay, 312; *McArthur v. Porter*, 1 Ohio, 102.

(5) *Moore v. Gilliam*, 5 Munf. 346.

(6) *Blood v. Blood*, 23 Pick. 80.

(7) *Ingram v. Morris*, 4 Harring. 111.

another person during the coverture, *prima facie* is sufficient to prove the seizin of the husband, (1) more especially with the additional proof of *possession* by the husband and his grantee. (2)(a)

66. It has been laid down, that where a widow demands dower from one claiming under her husband, he cannot dispute the husband's seizin. (3)(b) But this rule has been criticised, and the cases which have been supposed to establish it examined, by the court in New Hampshire and elsewhere; and the conclusion is, that, although there may be cases, where the tenant is technically and absolutely *estopped* to deny the seizin of the husband, under whom he claims; yet, in general, the husband's conveyance is only *prima facie* evidence of such a seizin as entitles the widow to dower, and the defendant may contest this point. Thus, the tenant may defend, upon the ground that the husband had only a remainder after a freehold, (4) or a leasehold interest, though he conveyed in fee.

67. It seems, the demandant in the suit for dower need only prove that the husband was the reputed and ostensible owner; the tenant must then show a better title. Thus, A took possession of vacant land

(1) Carter v. Parker, 28 Maine, 509.

(2) Wall v. Hill, 7 Dana, 174.

(3) Bancroft v. White, 1 Caines, 185; see Elliott v. Stuart, 3 Shepl. 160; 2 Hill, 302; Stevenson v. McReary, 12 S. & M. 9; Finn v. Sleight, 8 Barb. 401.

(4) Moore v. Esty, 5 N. H. 492; Otis v. Parshley, 10, 403; acc. Sparrow v. Kingman, 1 Comst. 242; Kingman v. Sparrow, 12 Barb. 201; Gammon v. Freeman, 31 Maine, 243. See Bell v. Twilight, 2 Foster, (N. H.), 500; Crittenden v. Woodruff, 6 Eng. 82.

(a) The demandant cannot rely, except as secondary evidence, upon recitals in the deed, under which the defendant claims, acknowledging her right to dower. Jewell v. Harrington, 19 Wend. 471.

In an action of dower, the husband's seizin is established by proof of a deed to him; of a deed from him with covenants of general warranty; and of a similar deed from his grantee to the tenant, though his deed was executed, soon after a judgment in his favor upon a writ of entry on his own seizin, and before he had paid to the tenant in that action the amount assessed by the jury for betterments; provided the value of the betterments was actually paid within the time prescribed by statute. The covenants of warranty estop the tenant from denying the husband's seizin. Thorndike v. Spear, 31 Maine, 91.

(b) Thus, where two grantors conveyed land by deed of warranty, without any designation of the manner in which it was held by them, one died, and his widow brought her action of dower, claiming to be endowed of one-half of the premises; held, the grantee was estopped by his deed, from showing that the living grantor was seized in severalty of a much greater proportion, and the deceased of a much less proportion, than an undivided moiety. Stimpson v. Thomaston Bank, 28 Maine, 259.

So, in a suit for dower against one who entered under a deed from the husband's grantee, the defendant has been held estopped to deny the husband's title, or to aver, that, after the purchase of the land, an action being brought against him by the true owner, he bought a true and permanent title. Browne v. Potter, 17 Wend. 164; see Norwood v. Marrow, 4 Dev. & B. 442. So, one is estopped who holds under a deed from the widow, as executrix of the husband, conveying the land subject to dower. Smith v. Ingalls, 1 Shepl. 284. So, where the husband was in possession, and an execution levied upon the land, under which the tenant claims title; this is sufficient proof of seizin in the husband. Cochrane v. Libby, 5 Shepl. 39; see Osterhout v. Shoemaker, 3 Hill, 513.

Where, to a suit for dower, the defence is set up, that the defendant was not seized, and the plaintiff prevails; this judgment is conclusive in her favor, upon a subsequent bill in equity for mesne profits. Tellman v. Bowen, 8 Gill. & J. 383. But dower will not be allowed against a purchaser from the husband upon a doubtful right. Alsberry v. Hawkins, 9 Dana, 181; see Davis v. Logan, ib. 186.

Upon a similar principle to that above stated, acceptance of dower estops a widow from disputing her husband's title. Perry v. Calhoun, 8 Humph. 551. So, where the widow remains in possession of the land, she is estopped to deny the husband's title; even though she surrenders to one claiming under an execution prior to the husband's deed, and then resumes possession under him. Grady v. Baily, 13 Ired. 221.

owned by the State, made improvements, and occupied fifteen years. The State granted the land to B, son of A, after A's death, reserving to the wife of A a life estate, in the same manner she would have been entitled to dower, if A had died seized in his own right. The wife of A brings an action for her dower. Held, A's possession was evidence of seizin, and threw the burden of disproving it upon B; that A was seized against everybody but the State, as a mortgagor is seized against all but the mortgagee; and that B had nothing to set up against the claim of dower except his grant, which expressly saved the right of dower. Judgment for the plaintiff.(1)

68. The last circumstance requisite to dower, is *the death of the husband*. This renders *absolute* and *consummate*, an interest before *contingent*, *inchoate* and *initiate*.(2) Whether it must be a *natural* death, seems to have been an unsettled point. In England, the prevailing opinion is, that a mere *civil* death is insufficient. Mr. Dane remarks, that this question is not known ever to have been started in this country, or the existence of any such thing as a civil death contended for; although Quakers and others have been banished, and many criminals are imprisoned for life: but that in New York it has been decided that they are dead in law. In South Carolina, a husband banished has been held *civiliter mortuus*.(3)(a)

69. A natural death, however, may be presumed from circumstances, or proved, *prima facie*, by reputation in the family, and, in such case, the widow unquestionably has the same right to dower, as if the death of the husband were positively proved. The English statute (19 Cha. 2, c. 6) provides merely for the taking effect of remainders and reversions, expectant upon life estates. But the principle of the statute has been extended to most other cases; more especially to those, where the title to land is concerned, and the property would therefore remain unimpaired, if the party should prove to be alive. Thus, where a husband had been more than seven years absent from the State, and it was reported that he was drowned; held, a second marriage by his wife was valid, and entitled her to dower or a distributive share from the second husband's estate.(4)

70. A and B cohabited as man and wife. They separated in 1781, and in 1783 B, the wife, removed from the State, and was never afterwards heard of. In 1781 A married again, lived with his second wife thirty-eight years, and died leaving children by her. Held, though the second marriage was void at its inception, yet a valid subsequent

(1) *Smith v. Paysenger*, 4 Con. S. C. 62; *Knight v. Mains*, 3 Fairf. 41; *Reid v. Stevenson*, 3 Rich. 66.

(2) *Moore v. City, &c.*, 4 Sandf. 456; *Rid-dick v. Walsh*, 15 Mis. 519.

(3) 3 Mas. 368; *Sutliff v. Forgey*, 1 Cow. 89; Co. Lit. 33 b, 132 b.; *Jenk. Cent. Ca.*

4; 1 Cruise, 124; 4 Dane, 677. See *Gregory v. Paul*, 15 Mass. 33; *Wright v. Wright*, 2 Desaus. 244.

(4) *Woods v. Woods*, 2 Bay, 476; *Cochrane v. Libby*, 5 Shepl. 39. See *Miller v. Bates*, 3 S. and R. 490.

(a) Under the Kentucky statute of 1802, the wife of one *convicted of felony* is not entitled to dower, as in case of his decease. *Wooldridge v. Lucas*, 7 B. Mon. 49.

The estate is not forfeited, but the wife's right to alimony, and the right of the children to support, and of the creditors, are recognized; and the right of the offender, after his release from imprisonment, to what has not been disposed of for either of these purposes, is complete. Nor does his estate descend to his heirs, but remains in the convict. 1b.

marriage might be presumed, from the cohabitation and good character of the parties, and the wife was allowed dower.(1)(a)

71. A party claiming under the heirs of the husband cannot deny his death.(2)

CHAPTER IX.

DOWER. WHAT PERSONS MAY BE ENDOWED, AND IN WHAT THINGS.

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| 1. Aliens. | 25. Mill and fishery. |
| 7. Dower—in what things. | 26. Annuities. |
| 8. Things incorporeal. | 27. Lands held by improvement, &c. |
| 9. Mines and quarries. | 28. Lands contracted for. |
| 12. Wild lands. | 31. Slaves. |
| 13. State of cultivation—what. | 32. Estates tail, &c. |
| 14. Improvement or depreciation by heir or purchaser. | 35. Estates <i>pour autre vie</i> . |
| 21. Increase or diminution of value from extrinsic causes. | 36. Estates for years. |
| 23. Land appropriated to public use. | 37. Uses, &c. |
| | 38. Wrongful estates. |

1. WITH respect to the persons who may take an estate in dower, the only personal disability seems to be that of *aliens*. At common law, an alien cannot *hold* real estate, acquired in any mode: and cannot even *take* it by *act of law*. An alien woman therefore cannot be endowed. A statute of Hen. 5 made an exception in favor of aliens married to Englishmen under a license of the king. And if naturalized, an alien, in general, shall have dower in all the lands of which the husband was seized during coverture.(3) Decided otherwise in New York (4)

2. The rights and powers of aliens, as to real estate, will be considered hereafter.(b) In those States where they are authorized to hold lands, of course they are entitled to dower. But in some of the other States, a special exception from the common law rule has been made in favor of alien women and the widows of aliens.

3. In Massachusetts, Connecticut, Maine, Arkansas, Wisconsin, Indiana, Michigan,(5) alien women are dowable; except, in Massachusetts

(1) Jackson *v.* Claw, 18 John. 346.

(2) Hitchcock *v.* Carpenter, 9 John. 344.

(3) 1 Cruise, 125; 2 Chit. Black. 103, n. 23; Buchanan *v.* Deshon, 1 Harr. & G. 289; Alsberry *v.* Hawkins, 9 Dana, 177.

(4) Priest *v.* Cummings, 16 Wend. 617.

(5) Mass. Rev. St. 411; Conn. Sts. 1848, 47; Me. Ib. 392; Mich. Ib. 265; Ark. Ib. 337; Wisc. Ib. 335; Ind. Ib., *Descent*, sec. 43.

(a) In Vermont, where a husband has absconded, his wife may obtain authority to dispose of real estate.

(b) See *Alien*. The common law rule is recognized in Kentucky. Thus, where a woman emigrated with her husband to Texas, where he died, and she returned upon a visit; held, she had expatriated herself, and was not entitled to dower. 9 Dana, 177.

The *domicil* of the husband does not affect the right of dower. Thus, the wife of one domiciled in Georgia may claim dower, in all lands in South Carolina of which he was seized at any time during coverture. Lamar *v.* Scott, 3 Strobb. 562.

In Wisconsin, a widow out of the State may claim dower. Rev. Sts. 335.

and Maine, of land conveyed or levied on before February 23, 1813. They are dowable, also, in New Jersey, and, if residents, in Maryland.(1)

4. In Maine, the alien widow of a citizen is said to be dowable, without the exception above stated.(2)

5. In New York, the widows of aliens, who at their death were capable of holding lands, if such widows are inhabitants of the State, shall have dower.(3)(a)

6. In New York, the alien widow of a citizen, who was an inhabitant of the State when the act of 1802 was passed, enabling aliens to hold lands, is entitled to dower.(4)(b)

7. With respect to *the things in which dower shall be had*, the first and most comprehensive rule, is that which has been already stated in giving the definition of dower; viz., that the widow shall be endowed of all lands and tenements, in which her husband had an estate of inheritance at any time during coverture, and of which any issue, that she might have had, might, by possibility, have been heir.(5) The last clause of this definition, in consequence of the peculiarities of American law as to *entailments*, seems to be, in this country, obsolete and superfluous. It is accordingly omitted in American statutes, which define dower, where any such exist.

8. Dower shall be had not only in lands themselves, but also in all *incorporeal hereditaments* that savor of the realty,(c) because it is incident to the estates to which they are appendant. It is said, that in the United States, dower is principally confined to houses, lands and mills.(6)

9. There shall be dower in *mines* or *quarries*, if they have been opened before the husband's death; otherwise, not.(d) But it matters not whether they have been wrought by the husband or by his lessee, or whether he owned the land itself, or merely the whole stratum of the mine or quarry, upon the land of another.(7)

(1) *Buchanan v. Deshon*, 1 Harr. & G. 289; 4 Kent. 36.

(2) 1 Smith's St. 170. Whether now in force, *qu.*

(3) 1 N. Y. Rev. St. 740. (See *Mick v. Mick*, 10 Wend. 379.)

(4) *Priest v. Cummings*, 16 Wend. 617.

(5) 2 Chit. Pl. 104; *Brower v. Van Ars-*
dale, 6 Dana, 204

(6) 1 Cruise, 127; 4 Kent, 40; *Buckeridge v. Ingram*, 2 Ves jun. 664; 4 Dane, 670.

(7) *Stoughton v. Leigh*, 1 Taun. 402. (See *The King v. Dunsford*, 2 Adol. & El. 568-93; *Coates v. Cheever*, 1 Cow. 460-80;) *Quar-*
rington v. Arthur, 10 M. & W. 335.

(a) In the same State, an alien *feme covert* may be naturalized; but her naturalization has not, under the general act of Congress, a retro-active operation, so as to entitle her to lands of which her husband was seized during coverture, and which he had obtained before her naturalization. *Priest v. Cummings*, 20 Wend. 338. Nor can an alien widow have dower, though at the time of the marriage the husband was an alien, and held the land under the enabling act of 1825. *Connolly v. Smith*, 21 Wend. 59. By a late act, the widow of an alien has dower, whether herself an alien or not. St. 1845, §4; *Currin v. Finn*, 3 Denio, 220.

(b) In Kentucky, a widow, who was an alien at the husband's death, has no dower. *Alsherry v. Hawkins*, 9 Dana, 177. In Alabama, where the widow of one, who conveyed his land while a non-resident, claims dower in such land, lying in the State, the claim will be barred, unless made within twelve months from his death. Clay, 174. The wife of an alien, though herself an American citizen, is not dowable of his lands. *Congregational Church v. Morris*, 8 Ala 182.

(c) Not in railroad shares. *Johns v. Johns*, 1 McCook, (Ohio,) 350.

(d) Because to open them would be *waste*. If in any State, according to the established law, it would not be *waste*, it would seem to follow that dower should be allowed in a mine, though unopened. (See *infra*, 12, as to wild lands.)

10. A husband died seized of a tract of land of four acres, consisting of a slate quarry mostly below, but partly above, the surface of the ground. One quarter of an acre of the quarry had been dug over, and the practice was, to take a section of ten or twelve feet square on the top, go down to a certain depth, and then recommence on the top. Held, the whole quarry must be regarded as opened, and therefore subject to dower.(1)

11. Tenant in dower of coal lands may take coal to any extent from a mine already opened, or sink new shafts into the same veins of coal, or dig into a new seam through one already opened above it.(2)(a)

12. The peculiar situation of the land in this country, as being to a very great extent wild and uncleared, has given rise to a question of dower, which seems unknown to the English law, viz., whether a widow shall have dower in *wild lands*. This question seems to be involved in another, viz.: whether, if endowed of such lands, the widow could clear them, without committing *waste*. The latter question will be noticed hereafter, in connection with the subject of waste. (See ch. 18, sec. 10.) It is sufficient to say here, that the former has been differently settled in different States. In Massachusetts, Maine and New Hampshire, there shall be no dower in wild lands, because the clearing of them would be waste, and forfeit the estate. And there shall be no dower in such lands, whether the husband died seized of them, or whether they were conveyed by him, and subsequently cleared by the purchaser. But the reason of the rule furnishes an exception to it. A widow shall be endowed of a wood lot or other lands contiguous to and used with a farm or dwelling-house, as for fuel, fencing, repairs, pasturing, &c., though not cleared; because she would be entitled to *estovers*, for the use of the house or cultivated land assigned to her, and at the same time could not lawfully take them as incident thereto, without a special assignment.(3)(b) But it has been said in New

(1) Billings v. Taylor, 10 Pick. 460.

(2) Crouch v. Puryear, 1 Rand. 258.

(3) Conner v. Sheperd, 15 Mass. 164;

Webb v. Townsend, 1 Pick. 21; White v. Willis, 7, 143; Mass. Rev. St. 460; N. H. L. 190; Rev. St. 329; Me. Rev. St. 391.

(a) In North Carolina it has been held, that the widow has no authority to make turpentine, unless done by the husband. But in the ordinary mode of making it, she may use trees *boxed* or tended for turpentine in his lifetime, and may also box new ones, as the others become unfit for use, not increasing the amount beyond that obtained at the time when dower was assigned. Carr v. Carr, 4 Dev. & B 179. Where commissioners divided an estate into eight parts, and assigned a third of each division to the widow, and one lot consisted chiefly of wood and the others of arable lands; held, the widow was not bound to use each parcel, as if the husband had left only the lot to which it belonged; but might take from the wood lot fuel and timber for the use of the cultivated lands. Childs v. Smith, 1 Md. Ch. 483.

(b) Where the husband, during coverture, was seized of a five-acre lot, "partially improved," and "partly covered with bushes and unfenced," at the time of his conveyance thereof; held, the widow was entitled to dower in the whole lot. Stevens v. Owen, 25 Maine, 94. Dower cannot be claimed in land covered with growing wood and timber, though used by the husband in raising wood, &c., for profit, unless it be assigned in connection with buildings or cultivated land. And if it is, the widow can cut only enough to supply the dower estate, in the way of actual use and consumption, or in connection with the proper occupation and enjoyment of such estate. White v. Cutler, 17 Pick. 248. After the assignment of dower in a dwelling-house and the land connected with it, it being partly woodland, the whole having been occupied by the husband as one farm, the widow leased the dower estate, removed from the land, and boarded in another family, where she was supplied with food. The house, having become untenable, was taken down by consent

Hampshire, that *perhaps* the widow might, without waste, cut *ordinary fuel*. In Rhode Island dower is allowed in woodland. In Michigan and Ohio, in wild lands. Commissioners estimate the annual growth, and assign one-third thereof, either by the number of cords or quantity of land.(1) In those states where either statutes or judicial decisions authorize a tenant in dower to cut trees and timber, it would seem to be necessarily implied, whether so expressly declared or not, that a widow is dowable of wild lands.

13. A *state of cultivation* is the converse to a *state of nature*, and exists where lands have been wrought with a view to a crop, till they are abandoned for every purpose of agriculture, and designedly permitted to revert to a condition like the original one. It is not material, in regard to the question of dower, whether the lands have yielded an *income* or not. At common law, the income or annual value had no bearing upon the title to dower; and although a statute, after allowing to the widow one-third of the husband's lands, adds that she shall have so much as will yield one-third of the income which he derived from them, this is not to be regarded as any limitation of the right, but only as a secondary guide to the sheriff in making the assignment. So, dower shall be assigned in land, which, when owned by the husband during coverture, was wood and pasture, situated a mile from the homestead, and divided from it by land of strangers, but used by him as a pasture appurtenant to the homestead; though subsequently it has become wholly woodland. But not in woodland, which the husband sold from the homestead, retaining till his death, as part of the farm, an abundant supply of wood for fuel, fencing and repairs.(2)

14. Intimately connected with the subject just considered, is the question of a widow's right to dower in *improvements*, made upon the land since the husband was in possession of it. These may be made either by the heir, after the husband's death and before assignment of dower, or by one who purchased the land from the husband in his lifetime.

15. Where improvements are made by the heir, the widow shall be allowed the benefit of them.(a) The reason is said to be, that it is the folly of the heir not to assign dower before making the improvements. Another reason is, that, as will be seen hereafter, the assignment of dower *relates back* to the death of the husband, the heir is regarded as never having been seized of this portion of the lands;(b) and, upon

(1) 2 N. H. 56; R. I. St. 1840, 2022; see 15 Mass. 167; Shattuck v. Gragg, 23 Campbell, 2 Dougl. 141; Allen v. McCoy, 6 Pick. 88; Kuhn v. Kaler, 2 Shepl. 409; Ohio, 418. Mosher v. Mosher, 3, 371.

(2) Johnson v. Perley, 2 N. H. 56; (but

of all parties. Held, neither the widow nor lessee could cut wood for fuel; and if they did, the reversioner might take it. Ib. A tenant in dower cannot cut wood for fuel, unless the house was on the land at the time when dower was assigned. Fuller v. Wason, 7 N. H. 341. And she can use it only in such house. If otherwise, she is guilty of waste. Ib.

(a) Otherwise, it seems, in Wisconsin. Rev. Sts. 336.

(b) This is the English doctrine. It seems to be somewhat shaken in the United States. (See *Descent*.) Also, ch. 12, sec. 33. It is said, the claim of dower, in reference to those whose title originates concurrently with that of the widow, is governed by the law in force at the death of the husband. But, as against parties having specific rights in the property prior to the husband's death, by the law in force when such rights were acquired. Kennerly v. Missouri, &c., 11 Mis. 204.

general principles, the improvements belong to the owner of the soil. Judge Story regards the latter as the true reason of the rule.^(a) In a late case it has been held, that in a suit against the heir, the widow shall have dower according to the increased value, independently of his labor and expenditures.⁽¹⁾

16. On the other hand, it is said, that if the value of the land is impaired in the hands of the heir, dower shall still be assigned according to the value at the time of assignment. Whether such depreciation may not be taken into account, in estimating the damages awarded to the widow, *quære*.⁽²⁾

17. Where improvements have been made by one who purchased the land from the husband without any release of dower, it is the general rule, that dower shall be estimated according to the value of the land at the time of transfer, whether the improvements be made before or after the husband's death, with or without notice of the widow's right of dower. So, where an old building is torn down by the purchaser and replaced by a new one, the widow is not entitled to dower in the latter. She must seek compensation in a court of equity. The reason of the rule is said to be, that such purchaser, in a suit upon the husband's warranty, could recover only the value of the land without the improvements. Chancellor Kent remarks, that this reason has been ably criticised and questioned in this country,^(b) but the rule itself is founded in justice and sound policy.⁽³⁾

18. In Maryland, where the husband has aliened the land, if a compensa-

(1) *Powell v. M. & B. Manuf. Co.*, 3 Mas. 347; *Gore v. Brazier*, 3 Mass. 544; *Humphrey v. Phinney*, 2 John. 484; *Taylor v. Broderick*, 1 Dana, 347; *Thompson v. Morrow*, 5 S. & R. 289; *Ayer v. Spring*, 10 Mass. 80; *Co. Litt.* 32 a, and n. 8; *Russell v. Gee*, 2 Const. S. C. 254; *Wilson v. Oatman*, 2 Blackf. 223; *Tod v. Baylor*, 4 Leigh. 498; *Mahoney v. Young*, 3 Dana, 588; *Woolridge v. Wilkins*, 3 How. Miss. 360; *Lawson v. Morton*, 6 Dana, 471; *Manning v. Laboree*, 33 Maine, 343.

(2) *Co. Litt.* 32 a; 3 Mas. 368.

(3) 3 Mas. 370; 10 Wend. 480; *Waters v. Gooch*, 6 J. J. Mar. 591; 4 Kent, 65; *Hobbs v. Harney*, 4 Shepl. 80; *Beavers v. Smith*, 11 Ala. 20. In a late case in England, dower by custom was allowed in improvements made by a purchaser. Lord Denman goes into a learned and extended discussion of the subject. *Doe v. Gwinnell*, 1 Ad. & El. (N. S.) 682; *Summers v. Babb*, 13 Illin. 483; *Barney v. Frowner*, 9 Ala. 901; *Wisc. Rev. Sts.* 333-4.

(a) Land was assigned for dower by commissioners of the Probate Court, with the assent of the heir and widow, and the report of the commissioners was subsequently accepted. Held, after the assignment, the widow might enter, and cut and carry away the growing crops sown by the heir previous to the assignment, though such entry was made before acceptance of the report. *Parker v. Parker*, 17 Pick. 236.

(b) Particularly by Judge Story (in 3 Mas. 369-70,) and Ch. J. Tilghman (in 5 S. & R. 289.) For, supposing the husband conveyed without warranty, the widow (it seems) would still have no dower in improvements. The former learned judge also criticises another reason which has been sometimes assigned, namely, that the husband was not the owner of the improvements, and dower is allowed only in what the husband owned. For the same reason would prevent dower in improvements made by the heir, which is always allowed. The rule may have originated in the policy of promoting the prosperity of the country by encouraging improvements in agriculture and building; and in an anxiety to promote alienations and subinfeudations, and thus to disentangle inheritances from some of their numerous burdens.

A purchaser at a Chancery sale, supposing his title good, made improvements for manufacturing purposes. A widow afterwards filed a bill for dower, and her right was established. Decreed, that she should receive an annual sum in lieu of dower, equivalent to her interest without the improvements. *Lewis v. James*, 8 Humph. 537. It seems, the sum ascertained to be due to a widow, for her proportion of back rents collected by her husband's grantee, is not properly chargeable as a lien on the estate, *Johnson v. Elliott*, 12 Ala. 112.

tion in money is made to the widow for her dower, the value of the land at the husband's death is the criterion, unless the increased value has arisen from the labor and money of the purchaser.(1) In Pennsylvania and Ohio,(2) dower is said to be estimated according to the value of the land at the time of application for dower, without the improvements. In New Hampshire a statute provides, that where the husband has parted with his title to the land, the widow shall be endowed of so much as will yield one-third of the income derived from it at the time of alienation.(3) The same rule is adopted in Maine.(4)

19. Where the husband conveyed the land by way of mortgage, but remained in possession and improved, and the mortgage was afterwards foreclosed; the dower shall be of the improved value, because the alienation is regarded by the law as made at the time of foreclosure.(5) So, if the husband, having mortgaged, make improvements, and then convey the land, the widow shall have dower of the value at the time of the latter conveyance. But where the husband merely gave a bond for the land, and a deed was given after his death; held, the deed had relation to the bond, and dower should not be allowed in improvements made by the purchaser.(6)

20. If a purchaser from the husband, instead of making improvements, impair the value of the property, by neglect or waste, as by tearing down buildings, it is held that the wife has no remedy against him, her title being merely initiate at that time.(7)

21. Where, since the conveyance made by the husband, the land has risen in value from extrinsic causes, such as the increase of commerce or population in the neighborhood, it seems to be an unsettled point, whether the widow shall be endowed of the original or the increased value. The former standard has been approved in New York and Virginia, and the latter in Massachusetts, Maine, Pennsylvania, Kentucky, (it seems,) Illinois, Maryland and Ohio.(8) Judge Story suggests a distinction, between the case where an erection upon a part of the land itself increases the value of the remainder, and an increase of value arising from causes unconnected with such erection; and also between erections which in themselves raise the value of the land, and those which increase it by the business carried on and the capital employed in them, such as manufactories. His conclusion is, that dower is to be allowed according to the value of the land at the time of assignment, excluding all the increased value from the improvements actually made upon the premises by the alienee; leaving to the dowress the full benefit of any increase of value, arising from circumstances unconnected with those improvements.(9) On the other hand, the court in New York hold, that both at common law and by a fair con-

(1) *Bowie v. Berry*, 1 Md. Ch. 452.

(2) *Thompson v. Morrow*, 5 S. & R. 289; *Purd. Dig.* 221, n.; *Walk. Intro.* 327; *Dunseth v. Bank, &c.*, 6 Ohio, 77; *Shirtz v. Shirtz*, 5 Watts, 255.

(3) N. H. L. 1829, p. 510.

(4) *Carter v. Parker*, 28 Maine, 509.

(5) *Hale v. James*, 6 John. Cha. 258.

(6) 3 Mass. 459; *Wilson v. Oatman*, 2 Blackf. 224.

(7) 3 Mas. 367; *M'Clanahan v. Porter*, 10 Mis. 746.

(8) 4 Kent. 66-7; *Thompson v. Morrow*, 5 S. & R. 289; 3 Mass. 375; *Dorchester v. Coventry*, 11 John. 510; *Walker v. Schuyler*, 10 Wend. 480; *Tod v. Baylor*, 4 Leigh, 498; *Dunseth v. Bank, &c.*, 6 Ohio, 76; *Mosher v. Mosher*, 3 Shepl. 371; *Summers v. Babb*, 13 Illin. 483; *Bowie v. Berry*, 1 Md. Ch. 452; see *Barney v. Frownar*, 9 Ala. 901.

(9) 3 Mas. 375.

struction of the statutes of the State, the widow shall have her dower according to the value at the time of alienation, whether it has since increased or diminished.(1)

22. In Virginia, it has been held, that the widow cannot claim one-third of the *proceeds* of land sold by the husband.(2)

23. In England, Magna Charta provides that a widow shall not be dowable of a *castle* or *fortress*.(3) No case probably has occurred, or will occur, in this country, for the application of this particular rule. But an *analogous principle* has been adopted, in one instance, in Ohio.

24. Several owners of land in Cincinnati, of whom A was one, mutually agreed to appropriate their land to public use for a street and a market-house. The city council carried the appropriation into effect by erecting the house; but A never conveyed the land on which it stood. Held, A's widow could not have dower in the market-house, for the same reason that in England a woman was not dowable in a castle: it could yield nothing to her support by a direct participation in the possession, without such an interference with the public right to control the whole subject, as to render its enjoyment inconvenient and unsafe, if not impossible.(4)

25. There shall be dower from the profits of a mill or fishery, but not the right of using for hydraulic purposes part of the surplus waters of the Erie Canal, under a grant from the commissioners.(5)

26. In Virginia, dower is allowed upon annuities as well as rents, charged upon or issuing out of real estate.(6)

27. In Pennsylvania, in lands held by improvement or warrant and survey, but not in those held by warrant merely.(7)(a)

28. In Illinois and Virginia, in lands merely contracted for, where the title may be completed, although, in Virginia, the contract were parol. So, in Virginia, in lands *possessed* by the husband. In Alabama, in lands contracted and paid for. In Kentucky, in lands contracted for by bond. But only where the husband holds the contract at his death; not where he has assigned it.(8) In Maryland, a statute of 1818 gave dower in equitable estates. Held, not applicable to lands of which the husband held leases, with covenants to convey in fee, when requested; such leases not operating by way of lease and release, but passing a legal title.(9) Nor is dower allowed in an equitable estate which the husband disposes of in his lifetime.(10) Nor an equity of redemption, where the mortgage was made previous to the statute.(11) In Tennessee, where the legal title is vested as security for the purchase-money, the widow of the equitable owner cannot have dower,

(1) 11 John. 510; Shaw v. White, 13, 179; Hale v. James, 6 John. Cha. 258.

(2) Fitzhugh v. Foote, 8 Call, 13.

(3) 1 Cruise, 129.

(4) Gwynne v. Cincinnati, 1 Ohio, 459.

(5) Co. Lit. 32 a; Kingman v. Sparrow, 12 Barb. 201.

(6) Anth. Shep. 477.

(7) Purd. Dig. 221.

(8) Illin. Rev. L. 627; Rowton v. Rowton, 1 Hen. & M. 91; Dean v. Mitchell, 4 J. J. Mar. 451; Stephens v. Smith, 1b. 66; Hamilton v. Hughes, 6 Ib. 582; Lewis v. Moorman, 7 Port. 522; Virg. Code, 474.

(9) Spangler v. Stanier, 1 Md. Ch. 36.

(10) Bowie v. Berry, 1 Md. Ch. 452.

(11) Hopkins v. Frey, 2 Gill. 359.

(a) Where the husband had purchased from a reserve of Indian lands under the Creek treaty, with the approbation of the President, held, his wife should have dower. Parks v. Brooks, 16 Ala. 529.

without payment of this sum; but she may require a sale for this purpose, and have dower in a third of the surplus.(1)

29. In Kentucky it is held, that, as there cannot be two cotemporary rights of dower in the same land, the widow of an *obligor* is not entitled to dower. But if, instead of requiring specific performance, the obligee sues and recovers damages for a breach of the bond, after the obligor's death, the widow of the latter is restored to her dower.(2)(a)

30. In Ohio, dower shall be had in all lands in which the husband was interested by bond, article, lease, or other evidence of claim. So, in land which he purchased without deed, paying a part of the price, and afterwards making improvements. But only in such estates of this description, as the husband owned at his death.(3) He must have had a legal estate during the coverture, or an equitable interest at his death.(4)

31. In Virginia, Kentucky, Arkansas(b) and Missouri, dower is expressly allowed in *slaves*. But, in the three first States the right is confined to such slaves as were in possession of the husband at his death.(5) And, in Kentucky, it has been held, that there shall be no dower in slaves emancipated by the will of the husband, even though the widow renounce the provisions of the will in her favor.(6)

32. It has been seen, that in general all *estates of inheritance* are subject to dower. Thus there is dower in *base* or *qualified* fees. So also in *estates tail*.(7) And liability to dower has even been mentioned as the distinguishing criterion of an estate tail (8) With respect to qualified and conditional fees, substantially the same remarks will apply to curtesy and to dower.(c) (See ch. 6, s. 24.)

(1) Thompson v. Cochran, 7 Humph. 72.

(2) Dean v. Mitchell, 4 J. J. Mar. 451.

(3) 2 Chase Sts. 1314; Smiley v. Wright, 2 Ohio, 507; Derush v. Brown, 8. 412.

(4) Miller v. Wilson, 15 Ohio, 108; Rands v. Kendall, 15 Ohio, 671.

(5) Anth. Shep. 483, 648; Smiley v. Smiley, 1 Da. a, 94; Misso. St. 1836, 61; 1840-1,

71; Ark. Rev. St. 339. See Sanders v. Sanders, 12 B. Mon. 40.

(6) Lee v. Lee, 1 Dana, 48; Brewer v. Van Arsdale, 6, 204; Graham v. Sam, 7 B. Mon. 403.

(7) 1 Cruise, 127; Buckeridge v. Ingram, 2 Ves. jun. 664; 4 Kent, 40.

(8) Low v. Burrow, 3 P. Wms. 263.

(a) Upon a sale of land, part of the price was paid, a note given for the balance, and a bond to convey upon full payment. The vendee took possession and died; the vendor brought a bill for sale of the land, and it was sold, the vendor having previously married and died. Held, the widow of the vendor was not entitled to dower. Kintner v. McRea, 2 Cart. 453.

(b) In this State, if there are no children, the widow is endowed with half the land and half the slaves of which the husband died seized, and half the personal estate, absolutely, in her own right. Ark. Rev. Sts. 339. Removal of slaves from the State is a forfeiture of dower. Ib. 342. See Cook v. Cook, 7 Eng 381.

(c) One having possession under a *pre-emption* right has no higher estate than a tenant for years, and not one subject to dower. Davenport v. Farrar, 1 Scam. 316.

By section 4 of the act concerning conveyances, (Rev. Code, 1825,) in Missouri, the conveyance of an estate to one and the heirs of her body, vested in her a life estate, remainder in fee in her heirs. not subject to dower or curtesy. Burris v. Page, 12 Mis. 358.

A widow is dowable of a fee-simple, determinable by executory devise on her husband's dying without issue living at the time of his death. Evans v. Evans, 9 Barr. 190.

A, for a consideration paid by B, conveyed land to C in trust for the use of B, his heirs and assigns for ever, and to permit the said B to have and possess the same, &c., and in trust to convey the same to such person, &c., as the said B shall, &c., direct and appoint. Held, B took, under the statute of uses, at least a qualified or determinable fee, and, in the absence of any appointment, his widow was entitled to dower. Peay v. Peay, 2 Rich. Equ. 409.

33. Devise to A and his heirs forever, (charged with an annuity,) and, if A should have no issue, upon his death, to the heir at law, subject to legacies to be given by A to the younger branches of the family. A dies without issue. A's widow has dower.(1)

34. In the case of an estate tail, it has been seen that curtesy does not cease, with a determination of the estate, from or in connection with which it arises.(2) But there are several instances where such determination puts an end to the curtesy of the husband and to the dower of the wife: 1. Where there is an eviction by paramount title; 2. An entry for breach of condition; 3. Where a qualified or base fee terminates by its own limitation; 4. Where a fee terminates by the happening of an event on which it is made determinable. Or, in general, the estate is terminated, by every subsisting claim or incumbrance in law or equity, existing before the inception of the title, and which would have defeated the husband's seizin.(3) It has been said, that the reason why estates tail are subject to dower, is, because they may in certain ways be enlarged into estates in fee-simple. But this has lately been declared an erroneous opinion; since dower was allowed both in conditional fees when first introduced, and also in estates tail after the statute *de donis*, and before the introduction of the common recovery for the purpose of barring them. In case of escheat for want of heirs, the widow still has dower.(4)

35. An estate *pour autre vie* is not subject to dower. Thus, where one purchases the life estate of a tenant by the curtesy initiate, sold upon execution, the widow of such purchaser has no dower.(5)

36. In Massachusetts, estates for years, where the term was limited for a hundred years or more, and fifty years remain unexpired, are subject to dower, the dowress paying one-third of the rent, if any.(6) In Missouri, there is dower in leaseholds for more than twenty years. In Maryland, a lease for ninety-nine years, renewable forever, is not subject to dower.(7)

37. The subject of dower in uses and trusts, equities of redemption, and equitable estates generally,(a) rents, commons, joint tenancies, &c., will be considered hereafter, under those respective titles.

38. There shall be no dower in a *wrongful* estate. Thus, where a man has a title to land, and a *right of action* to assert it, but no *right of entry*, and he enters and dies; although his heir is *remitted* to the rightful estate, the widow shall not have dower.(8)

39. But the wife of a disseizor shall have dower, till the disseizin be defeated.(9) So, the widow of a man, against whom judgment existed at the time of the marriage, is entitled to dower, in the land of which he was seized during coverture, subject to the judgments.(10)

40. An ancient English statute (Westminster 2, c. 4) provides, that

(1) *Moody v. King*, 2 Bingh. 447.

(2) Ch. 6.

(3) Co. Lit. 241 a; *Edward Seymour's case*, 10 Rep. 97 b; 4 Dane, 667; 4 Kent, 49; *Davenport v. Farrar*, 1 Scam. 316.

(4) 2 Bing. 452; 4 Kent, 48.

(5) *Gillis v. Brown*, 5 Cow. 388.

(6) Mass. Rev. St. 411.

(7) *Missou. St.* 228; *Spangler v. Stanler*, 1 Md. Ch. 36

(8) 1 Cruise, 128.

(9) 4 Dane, 668.

(10) *Robbins v. Robbins*, 8 Blackf. 174.

(a) See *Coster v. Clarke*, 3 Edw. 47; *Lyon v. Lyon*, 8 Ired. Equ. 201.

where the husband gave up his land to an adverse claimant collusively, by default, the wife may claim dower and compel the tenant to prove his title. Similar acts have been passed in New York, Missouri, Ohio and Kentucky.(1)

CHAPTER X.

DOWER. HOW BARRED.

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| <ol style="list-style-type: none"> 1. Inchoate right. 2. Crime of husband. 3. <i>Detinue of charters</i>. 5. Transfer by the husband. 8. <i>Exchange</i> of lands. 9. Equitable and implied bars of dower. 12. Partition. 13. Deed of wife, in England. 14. Fine, &c. " " 15. Deed of husband alone, and sale of land for debts. 29. Deed of husband and wife. | <ol style="list-style-type: none"> 44. Wife's release can operate only as such. 45. Devise or legacy, when a bar. 53. When an implied bar, in law or equity. 64. Legacy to widow, how regarded. 66. Apportionment of legacy. 67. Disposal of legacy, when renounced. 68. American law as to devises in bar of dower. 71. Election between a devise and dower. 75. Time of election. 76. Mode of election. |
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1. THE *inchoate* right of a wife to dower attaches at the instant of the marriage. Such right, however, may be barred or defeated by several circumstances, some of which have already been incidentally noticed,(a) but which will now be considered more at length.

2. Anciently, in England, an attainder of treason or felony against the husband was a bar of dower. The principle was variously modified by the successive statutes of 1 Edw. 6, c. 12, 5 and 6 Edw. 6, c. 11. In the United States, forfeiture of estates for crime is, for the most part, abolished. And where lands have been confiscated by express legislation for adherence to the public enemy, dower has still been allowed. In New Jersey it is expressly provided by statute, that the right of dower shall not be affected by the crime of the husband.(2)(b)

3. Another circumstance, which by the English law bars or defeats dower, is *detinue of charters*; by which is meant, a detention or keeping back, by the widow, of the charters or title deeds of the estate from the heir. This circumstance is of rare occurrence in the United States, and it is not known that any case upon the subject is to be found in the American Reports.(3)

(1) 1 N. Y. Rev. St. 742; Misso. St. 228; Sewall v. Lee, 9 Mass. 363; Wells v. Martin, Walk. Intro. 325; 1 Ky. Rev. L. 581. 2 Bay, 20; 1 N. J. Rev. C. 263.

(2) Palmer v. Horton, 1 John. Cas. 27; (3) Stearns, 310.

(a) See *Adultery, Divorce, Elopement*.

(b) In England, at common law, a woman loses dower by being attainted of treason or felony. But, if pardoned, her right revives, though the husband have aliened in the mean time. Co. Lit. 83 a; 13 Rep. 23.

4. The charters must relate to the lands in which dower is claimed, and the tenant by his plea must show the certainty of the charters, so that an issue may be joined. A stranger cannot set up this defence, even though the charters were conveyed to him by the husband. He who pleads detainee of charters, ought to plead that he has been always ready, and yet is, to render dower, if the demandant would deliver them.(1)

5. Inasmuch as a widow is dowerable of all lands, &c., of which the husband was seized *during coverture*, it follows of course, that no transfer, by the husband, of land once acquired and owned after the marriage, will bar or defeat the wife's dower. Nor will even the release and extinguishment of a rent, in which she is dowerable, bar her right to dower therein. So a second husband cannot convey his wife's dower in the first husband's estate.(2)(a)

6. Where a husband conveys away his land on the very day of his marriage, the law, favoring dower, will intend the marriage to have preceded the conveyance, and the widow shall have dower. But where a man before marriage makes a conveyance of lands, which is never acknowledged or legally recorded, his widow shall not have dower.(3)(b)

7. The principle above stated, although undoubtedly in force in this country as a rule of the common law, has been recognized and affirmed in many of the States by express statute. In Indiana, it is provided that the wife shall not be barred of her dower, by any *decree, execution*(c)

(1) *Ann Bedingfield's case*, 9 Rep. 17 b; *Co. 79*; *Haydon v. Ewing*, 1 B. Monr. 114; *Brickhead v. The Archbishop, &c.*, Hob. 199; *Manse v. Buchanan*, 1 Md. Ch. 202.

4 Dane, 666.

(3) *Stewart v. Stewart*, 3 J. J. Mar. 48;

(2) 4 Kent, 50; *Abergavenney's case*, 6 Blood v. Blood, 23 Pick. 80.

(a) So dower is allowed, notwithstanding an agreement to convey by the husband, executed under a decree of court after his death. *Riddlesberger v. Mentner*, 7 Watts, 141; *Covert v. Hertzogg*, 4 Barr, 145. In New Hampshire, (Comp. Sts. 419,) the husband of an insane woman may obtain authority from the court to release her dower in land conveyed by him. So in Virginia, (Virg. Code, 537.)

(b) So, where a statute provided, that a deed in trust should not be valid against *creditors and purchasers*, unless proved and registered; held, such deed barred dower, though not proved, &c., till after the husband's death—the widow being neither a creditor nor purchaser. *Norwood v. Marrow*, 4 Dev. & B. 442. A conveys to B, who enters upon the land, and reconveys to A, neither deed being recorded. A then conveys to C, who has no knowledge of B's having ever owned the land. Held, the widow of B could not claim dower against C. *Emerson v. Harris*, 6 Met. 475. If the husband makes a voidable deed, but never avoids it, dower is barred; otherwise, if the deed is void. 4 Dev. & B. 442. Thus, if made for usurious consideration, the widow is entitled to dower, without waiting for the heirs to avoid the deed. Ib. A widow is not entitled to dower in lands, conveyed away by her husband before marriage, although such conveyance was fraudulent and void as against his creditors. *Whithed v. Mallory*, 4 Cush. 138. See *Richards v. Richards*, 11 Humph. 429; *Cook v. Cook*, 7 Eng. 381.

The owner of land before his marriage made a fraudulent conveyance thereof. The grantee conveyed to a third person for the consideration of love and affection, after which the grantor married. A creditor of the grantor subsequently levied his execution on the land so conveyed, and the appraisers made a deduction from the value on account of the possible right of dower therein of the wife of the judgment debtor. In a writ of entry by the creditor against the second grantee to recover the land levied on; held, the wife had no right of dower therein; and that the tenant might avoid the levy, on the ground that by reason of such deduction too great an amount of land had been taken on the execution. Ib. But if a husband convey land without consideration, or to one as heir, in order to defeat dower, equity will compel an account with the widow, for one-third of the property. *Jenny v. Jenny*, 24 Verm. 324.

(c) So in Alabama. *Nance v. Hooper*, 11 Ala. 554.

or mortgage, to which she is not a party.(a) In Missouri, the laches, default, covin and crime of the husband are also guarded against. Similar provisions are made in New York, Ohio and Arkansas. In Tennessee, it has been decided, that the title of a widow is paramount to the rights of creditors, claiming after the husband's death (1)

8. There is one instance in the English law, where a transfer by the husband alone will operate as a bar of dower. This is the case of an *exchange* of lands. (See *Exchange*.) In such case, the widow must elect to be endowed either of those given or those taken in exchange—she cannot have dower in both.(2) The form of conveyance known to the English law, technically, as an exchange, is but little if at all practiced in the United States. But Mr. Dane lays down the principle above stated as a rule of American law. It has been recognized in Kentucky and New York. But in the latter State it is held, that the word *exchange*, as used in the Revised Statutes, in exclusion of the wife from dower in lands exchanged, requires a mutual grant of equal interests in the respective parcels of land, the one in consideration of the other. The transfer of an estate, under a lease in perpetuity, in 75 acres for 11 acres and \$700 in other property, will not constitute a legal exchange; and, where two defective conveyances are proved, two valid conveyances will not be presumed, to perfect a legal exchange. So, in New Hampshire, where an exchange consists in merely giving land for land, by deeds in common form, without the use of the word *exchange*, the English rule does not apply. In Arkansas and Wisconsin, where one exchanges lands, his widow must take dower in those received by him, unless, in one year from his death, she brings a suit for dower in the lands parted with.(3)

9. In equity, a mere agreement by the husband to convey the land, or a verbal sale or gift of it, if made before marriage and enforced or executed after, bars the widow of her dower. The husband is regarded as never having been seized during coverture. So, although he was an infant at the time of the contract, but conveys after coming of age, and after marriage.(4) And it is said to have been held in Ohio, (probably in equity, upon the principle of an equitable estoppel,) that where a widow was present at a sale of the land by the administrator, having previously agreed to it, and not dissenting at the time, and the land was sold free from dower, and brought a larger price in consequence; she was barred of her dower, though the purchaser knew of her claim.(5) In Virginia, both of the principles above stated have been suggested, as doubtful and unsettled points; although, in a case rela-

(1) Ind. Rev. St. 238-9; Misso. St. 228; Combs v. Young, 4 Yerg. 218; Ark. Rev. St. 358; 1 N. Y. Rev. St. 742; 2 Chase, 1315. See Reed v. Campbell, 1 Meigs, 388; London v. London, 1 Humph. 1; Frost v. Etheridge, 1 Badg. & Dev. 30; Norwood v. Marrow, 3 Bat. 442. See *Infra*, 16.

(2) Co. Lit. 31 b.

(3) 4 Dane, 668; Stevens v. Smith, 4 J. J.

Mar. 64; 1 N. Y. Rev. Sts. 740; Wilcox v. Randall, 7 Barb. 633; Cass v. Thompson, 1 N. H. 65; Wisc. Rev. Sts. 333.

(4) Greene v. Greene, 1 Ham. 538; Oldham v. Sale, 1 B. Mon. 77; Gaines v. Gaines, 9, 295.

(5) Walk. Intro. 326; Smiley v. Wright, 2 Ohio, 509. See Lawrence v. Brown, 1 Seld. 394.

(a) As dower is allowed in that State in all lands of which the husband was seized during coverture, the enumeration of these three modes of charge or transfer of course does not enable the husband to bar dower in any other way—as, for instance, by an absolute deed.

ting to the former, the husband had received the price of the land or a part of it, and the wife had notice of the contract before marriage; and in the case relating to the latter, the sale of the land was made to an innocent purchaser.(1)

9 a. Where the guardian of minors, with the concurrence of the widow, who had a right of dower, obtained an order for the sale of their land, and she was present at the sale, acquiescing therein, and received a part of the purchase-money in commutation of dower; held, she could not afterwards claim dower.(2)

9 b. So, where a widow administers on the estate of her deceased husband, sells real estate under order of court, and conveys it with covenants of warranty; she will be thereby estopped to claim dower.(3)

9 c. Two infants intermarried, and before their majority a decree for alimony was rendered, giving the wife certain property, which she took and enjoyed. After their majority, they were divorced *a vinculo*, and the wife afterward married twice, and she and her second husband brought an action for dower against a purchaser of land sold under execution against her first husband, in which she had not released her dower. Held, as she received and enjoyed the property during her infancy and since her majority, she was not entitled to any dower.(4)

9 d. A *feme covert*, after a sale of land by her husband, accepted from the purchaser two slaves, in lieu of dower, and retained them, without claim of dower, seven or eight years after the death of her husband. Held, although the agreement made by her while covert was voidable, yet her long acquiescence might be construed into a renewal of it; and where, after having recovered her dower in proceedings at law, she brought a bill for arrears of dower, the court refused her application.(5)

9 e. A widow applied for dower in an estate, which the husband had given bond to convey, and the administrator conveyed, under direction of the Probate Court, paying to the widow her distributive share of the proceeds. Held, the court could not notice the fact of such payment.(6)

9 f. A widow entitled to dower, married again, and the real estate in which she was dowable, was sold by the administrator of her first husband, for the payment of his debts, she not joining in the deed. The purchaser conveyed the same to the second husband, who subsequently mortgaged, and then sold it, with covenants of general warranty, the wife not joining in either of the deeds. Held, by the covenants of the husband, he and his wife were estopped from claiming dower in the estate of the first husband, during the existence of their intermarriage.(7)

9 g. Upon a petition for dower, to which a plea was put in, and an order made for sale by the guardian; the widow was in court, assenting to the proceedings, received part of the price for her dower and attended the sale, the commissioner giving notice that a clear title would be conveyed, she claiming no dower. Held, a bar.(8)

(1) *Braxton v. Lee*, 4 Hen. & M. 376; *Heth v. Cocke*, 1 Rand. 344.

(2) *Ellis v. Diddy*, 1 Smith, 354.

(3) *Magee v. Mellon*, 23 Miss. 585.

(4) *Bourne v. Simpson*, 9 B. Mon. 454.

(5) *Bullock v. Griffin*, 1 Strobb. Eq. 10.

(6) *Wyatt v. Brown*, 8 S. & M. 365.

(7) *Potter v. Potter*, 1 Aug. 43.

(8) *Ellis v. Diddy*, 1 Cart. 561.

9 *h*. Where an execution was levied upon land, and, after the right of redemption had expired, the land was sold for more than the amount of the debt, and the balance paid over by the creditor to the debtor's wife and children; held, she was still entitled to dower therein.(1)

9 *i*. Nor is a widow barred of dower in land aliened by the husband, by accepting a share of his estate under the statute of distributions.(2)

9 *j*. So, it is no bar of dower, that the widow has disposed of personal property of the husband, of greater value than the dower.(3)

10. The mere acceptance of a conveyance of the land in which a widow is entitled to dower, which impliedly disclaims such title, will not operate as a bar of dower. Thus, where A the widow, and B the daughter, of the deceased, held the land undivided, and, upon B's marriage, she and her husband conveyed the land in settlement to trustees, of whom A was one, describing the land as B's property; held, no bar of A's right of dower.(4)

11. Nor will a widow be barred of her dower, by attempting to claim under a deed of the husband, which is avoided as fraudulent. Thus, where a husband conveyed fraudulently to the use of himself and his children, and contingently to the use of his wife, who did not sign the deed, and after the husband's death a creditor successfully sought to avoid the deed, the wife claiming under it; held, she should still have dower.(5)

12. It will be seen hereafter, that where the husband is a tenant in common, the right of dower is subject to the incident of PARTITION. (See ch. 12, s. 12; ch. 54, s. 34.)

13. At common law, the *deed* of a married woman is *ipso facto* void.(6)

14. In England, however, a widow may bar herself of dower, by joining with her husband in a *fine* or *recovery*, but not by joining him in a mere deed. But various devices have been there resorted to, chiefly by way of complicated limitations, to effect this object. These are not practised, because, as will be seen, not necessary, in the United States.(7)(a)

15. In the States of Vermont, Connecticut, Ohio,(b) Tennessee,(c) North Carolina and Georgia, a widow shall be endowed of those lands only of which the husband dies seized.(8) Hence, if a man purchase

(1) O'Brien v. Elliot, 3 Shepl. 125.

(2) Leihaweaver v. Stoever, 1 M. & S. 160.

(3) Caruthers v. Wilson, 1 Sm. & M. 527.

(4) Wilcox v. Hubbard, 4 Mun. 346.

(5) Blow v. Maynard, 2 Leigh, 30.

(6) 3 Mas. 351.

(7) 1 Cruise, 139; 4 Kent, 50.

(8) Reeve, 40-1; 4 Kent, 41-2; 1 N. C. Rev. St. 613; Prince's Dig. 249; Verm. Rev. St. 289.

(a) By St. 3 & 4 Wm. 4, ch. 105, dower may be barred by any transfer of the land made by the husband, whether in the way of conveyance or devise; and is subject to all debts and incumbrances. So, also, it may be defeated by a simple declaration to that effect, contained in the conveyance to him, or the instrument of transfer by him. And a devise of any part of the land, which is subject to dower, for the wife's benefit, bars the right, unless the contrary is expressly declared. Otherwise with a devise of other land, or of personality. The act does not apply to women who were married previous to January 1, 1834.

(b) But see ch. 24, sec. 15.

(c) But not where the purchaser knows that the husband's intent in giving the deed is to bar dower. Brewer v. Connell, 11 Humph. 500.

lands, own them during coverture, but afterwards part with them; he thereby debars the widow's dower in those lands by his own separate act, and without any consent on her part. In Virginia, the husband of an insane woman may obtain license to convey free of dower; reserving a portion of the price to her.(1)

16. In Pennsylvania, Missouri and Tennessee, dower is barred by a sale of the lands under a mortgage or judicial process. But in Tennessee a widow is dowable of lands of her husband which are levied on before his death, but not sold. In Pennsylvania, the rule above stated seems to be founded upon no express provision, but upon a mere construction of the statutes on this subject. In the same State, where the husband, being insolvent, conveys to trustees for payment of debts, his widow shall have dower, and also one-third of the rents and profits, till creditors compel a sale of the land for debts, though by such sale her dower will be lessened. It has been more recently held, that a sale for payment of debts does not debar the widow of a deceased alienor of her dower.(2) Nor an assignment in insolvency under a compulsory process, and a conveyance by the husband's trustee.(3) But a sale of land under a testamentary power, for the payment of debts, discharges the land from dower.(4)

17. Where a vendee agreed to apply part of the purchase-money in satisfaction of all judgments and liens against the vendor, and he became the purchaser at a sheriff's sale under one of those judgments after the vendor's death; held, this did not divest the widow's dower, for he was bound to extinguish the debt for which the land was sold.(5)

18. A widow's thirds, as appraised under proceedings in the orphan's court, and left a charge on the land, are not divested by a sale of the land, under a decree of the orphan's court, as the property of the party who took it at the appraised value.(6)

19. In North Carolina a statute provides, that any fraudulent conveyance by the husband shall not bar dower. In the same State the widow has dower in lands sold after the husband's death, under a *fi. fa.* tested and levied before.(7)

20. In Virginia, dower is barred by a *bona fide* sale to satisfy a prior incumbrance, in creating which the wife joined. In Kentucky, dower is subordinate to a creditor's lien.(8) In Georgia, a conveyance by an officer bars dower, as if made by the husband.(9) In Indiana, dower cannot be affected by an execution sale. If a *mechanic's lien* accrue after the employer's marriage, and the employer die after the accruing of the lien, the right of dower of the employer's widow will be paramount to the lien. So, in Illinois, dower cannot be affected by a *mechanic's lien*, and the widow should not be made a party to the proceedings to enforce it, if she has no other interest in the premises.(10)

(1) Vir. Code, 537.

(2) Keller v. Michael, 2 Yea. 300; Kneider v. Knieder, 1 Miles, 220; Liehaweaver v. Stoeber, 1 W. & S. 160; Helfrich v. Obermeyer, 15 Penn. 113; Rutherford v. Reed, 6 Humph. 423.

(3) Eberle v. Fisher, 13 Penn. 526.

(4) Mitchell v. Mitchell, 8 Barr, 126.

(5) Shurtz v. Thomas, 8 Barr, 359.

(6) Vandever v. Baker, 13 Penn. 121.

(7) N. Car. Rev. Sts. 613; Frost v. Etheridge, 1 Dev. 30.

(8) M'Clure v. Harris, 12 B. Mon. 261.

(9) Georgia Sts. 1842, p. 75.

(10) McMahan v. Kimball, 3 Blackf. 6; Pifer v. Ward, 8 Ib. 252; Shaeffer v. Weed, 3 Gilm. 511.

In Alabama and Arkansas, dower is allowed from an insolvent estate.(1)

21. In Maryland, upon a creditor's suit, the real estate of the debtor may be sold, subject to dower.(2)

22. Where the land of which a husband died seized is sold by a court of equity, free from the claim of dower, for the payment of debts, by reason of the insufficiency of the personal estate to pay them, and his widow is a party to such proceeding, she will be barred of her right of dower so long as the decree remains unreversed.(3)

23. In New York, a widow cannot claim dower in the surplus arising from a sale in foreclosure, where the husband was living at the time of making the decree, and when the sale took place.(4)

24. The statutes of New York, relating to the sale of the real estate of deceased persons, under a surrogate's order, for the payment of debts, do not authorize the sale of a widow's estate in dower, where dower has been actually assigned to her. [JEWETT, C. J., and BRONSON, J., and HOYT, J., dissenting.](5)

25. A municipal corporation was authorized by statute to take lands for the public use, making compensation in the manner prescribed to the respective owners and persons, entitled to or interested in the same, whereupon the corporation was to become seized in fee-simple. Compensation for a portion of the lands, whereof A was seized in fee, was awarded and paid to him, without notice of the inchoate right of dower of his wife, or award made to her therefor. Held, her interest, for the purpose of compensation under the act, was not to be considered as distinct from that of her husband, so as to require a separate estimation, and that he was, for that purpose, to be deemed the entire owner of the estate; and hence she was not entitled to dower. The right of dower, being an incident to the marriage relation, was merely inchoate during the lifetime of the husband, constituting no vested or certain interest, and before his death any regulation of it might be made by the legislature, though operating to divest dower. The general doctrine was laid down that the power of the state to take private property for public uses results from its right of eminent domain, which is only restricted by the constitutional provision, that just compensation shall be made to the owner. In cases of this character, the husband is justly considered the entire owner, and the award is properly made to him. And on payment to him of the full value of the property, the title vests in the public, discharged from any claim of dower.(6)

26. In Maine, one whose land was attached on *mesne* process, married. A judgment being obtained, the execution was seasonably levied on the land. After the levy, he died. Held, the widow had no right of dower.(7)

27. In Delaware,(8) a statute of 1816 provides, that a widow shall have dower in all lands owned by the husband during coverture, free from all conveyances, debts, liens, &c., excepting any lien or incum-

(1) *Allen v. Allen*, 4 Ala. (N. S.) 556; *Crittenden v. Woodruff*, 6 Eng. 82; ——— *v. Johnson*, Ib. 94. See *Outlaw v. Yell*, 3 Eng. —; *Nance v. Hooper*, 11 Ala. 552.

(2) *Mildred v. Neill*, 2 Bland, 355; *Ewings v. Ennalls*, Ib. 356.

(3) *Gardiner v. Miles*, 5 Gill. 94.

(4) *Frost v. Peacock*, 4 Edw. Ch. 678.

(5) *Lawrence v. Miller*, 2 Comst. 245.

(6) *Moore v. City, &c.*, 4 Sandf. 456.

(7) *Brown v. Williams*, 31 Maine, 403.

(8) *Dela. St.* 1829, 167.

brance existing before the passage of the act. And it is said that, previously, dower was subject to debts.

28. In Ohio, it is provided, that the husband of an *insane* woman may convey his land, free from the incumbrance of dower.(1)

29. But in all the States, the most usual mode of barring dower, is by a deed(a) of the husband in which the wife joins, and which contains at the close an express relinquishment of dower. In many of the States, this method is prescribed by express statutes, and added as an exception or qualification to the common law definition of dower.(2)(b) In Massachusetts, the practice was referred by one distinguished jurist to early colonial and provincial acts, and by another to New England common law.(3) A statute of Georgia recites, that the conveyance of the lands of a *feme covert*, by fine and recovery, was never practised in any of the American colonies.(4)

30. In many States, a *private examination* of the wife is required to render her release of dower valid, and seems to have been practiced before any statutory provisions requiring it. Substantially the same provisions are made, with regard to a release of dower, and a conveyance by the wife of her own lands, which has been already treated of, and to the remarks concerning which the reader is referred.(5)(c)

31. In Massachusetts, it was remarked by Parsons, Ch. J.,(6) that a release of dower has been sometimes effected by a separate deed of the wife, subsequent to that of the husband, and reciting the sale by him as the consideration. But the Revised Statutes provide, that the husband shall join in the subsequent deed, and such deed by the wife alone is void.(7) And Judge Story supposes,(8) that Judge Parsons' remark was by him applied, and is applicable only to the case, where the wife's deed, though subsequent, is made on the same day and as part of the same transaction with the husband's, and that this course was *sometimes* adopted, but not so generally as to give it the validity of a usage. If

(1) Ohio St. 1836-7, Mar. 29.

(2) 4 Kent, 58; 3 Mas. 351; Lufkin v. Curtis, 13 Mass. 223.

(3) Fowler v. Shearer, 7 Mass. 20-1; 3 Mas. 351-2.

(4) Anth. Shep. 592.

(5) *Supra*, ch. 7; Anth. Shep. 593.

(6) 7 Mass. 20; acc. Frost v. Deering, 8 Shepl. 156.

(7) Mass. Rev. St. 410; Page v. Page, 6 Cush. 196. So in Michigan,—Rev. St. 264; see Sts. 1849, 60; and Maine,—Rev. St. 392; and Wisconsin,—Wisc. Ib. 334.

(8) 3 Mas. 353.

(a) An unsealed release is bad. Manning v. Laboree, 33 Maine, 343.

(b) That is, "a widow shall be endowed," &c., *unless she have parted with her right*, in the method prescribed. In Massachusetts, the early colonial and provincial statutes, are said to imply and recognize, though not create, the power of a *feme covert* thus to bar her dower. Col. St. 1644; Prov. St. 9 Wm., ch. 7; 3 Mas. 351-2.

It has been held, that statutes providing for this mode of releasing dower, supersede all other methods. French v. Peters, 33 Maine, 396. In Indiana, a widow marrying again, cannot alienate her dower. Rev. Sts. Descent, sec. 18.

(c) It has been held, that the certificate of acknowledgment need only be in the usual form, and *substantially* conformable to the statute. Brown v. Farran, 3 Ohio, 15. See Dundas v. Hitchcock, 12 How. 256; Ravarty v. FriDee, 3 McLean, 230.

A statute requiring in any release of dower, or other conveyance of real estate by a married woman, a certificate of a magistrate on the deed, that the wife, on a private examination, apart from her husband, acknowledged that she signed and delivered the same "as her voluntary act and deed, freely, without any fear, threats or compulsion of her husband," is sufficiently complied with, if the words "freely and of her own accord," are substituted for the words, "as her voluntary act and deed, freely." Dundas v. Hitchcock, 12 How. U. S. 256.

the wife's deed be seven months subsequent to the husband's, given after two mesne conveyances, for a new consideration, and not reciting the husband's sale as the consideration, it is void. This is not *joining* in the deed of the husband, according to the words of the statutes. Nor does the husband's mere assent make any difference. So, a release indorsed upon the husband's deed, in consideration of the sum mentioned in the deed, is insufficient.(1)

32. In Kentucky, the wife may release by a subsequent deed.(a) But in general, the sole deed of a wife is void. In Ohio, she may join with the husband's attorney.(2)

33. A release of dower before marriage is void.(3)

34. In New Hampshire, the wife may release alone. So, although an infant. The wife cannot release to the husband.(4)

35. In Massachusetts, merely joining in the husband's deed is insufficient, without words of release. So, in Maine, a wife does not release her dower, unless she uses apt words to express such intention. The words, "in token of her free consent," inserted in the conclusion of the deed, are not sufficient.(5) But in Maryland the deed may bar dower, though the wife be not named in it.(6) So, in Ohio, the wife need not join in the covenants, nor expressly release her dower.(7)

36. The wife need not sign the deed *in person*. A signing by any third person, or by the husband, if done in her presence and under her direction, will be sufficient. And, in case the witnesses to her signature fail to prove it, her own admissions are competent evidence.(8)

37. The demandant in a writ of dower is not barred by a release of dower made by her to a third person under whom the tenant does not claim.(9)

38. Where a wife releases her dower, and afterwards the purchaser from the husband recovers damages of him for a breach of the covenant that he had a right to convey, there being attachments on the land at the time of conveyance, the release of dower becomes void, because the recovery in this action debars the purchaser from afterwards claiming anything by his deed. So, where a wife joins in the deed of her husband and releases her dower, and an execution against him is afterwards levied upon the land, and the creditor recovers it from the purchaser, on the ground that the conveyance was fraudulent, the right of dower revives, and the widow may recover it from such creditor or his assigns.(10)

39. Where land was mortgaged to secure a debt, in which mortgage the wife joined, and was subsequently sold under a judgment against

(1) *Powell v. Monson, &c.*, 3 Mas. 317; *Shaw v. Russ*, 1 Shepl. 32; *French v. Peters*, 33 Maine, 396. *feme* is voidable. *Oldham v. Sale*, 1 B. Monr. 77.

(2) 1 Ky. Rev. L. 436; *Thompson v. Peebles*, 6 Dana, 391; *Glenn v. Bank, &c.*, 8 Ohio, 172; *French v. Peters*, 33 Maine, 396. (5) *Stevens v. Owen*, 25 Maine, 94. (6) 3 Mas. 347; *Catlin v. Ware*, 9 Mass. 218; *Learned v. Cutler*, 18 Pick. 9; 1 Md. L. 128; *Stevens v. Owen*, 25 Maine, 94.

(3) *Hastings v. Dickinson*, 7 Mass. 155. (7) *Smith v. Hardy*, 16 Ohio, 191. (4) *Ela v. Card*, 2 N. H. 176; *Rowe v. Hamilton*, 3 Greenl. 63; N. H. Rev. St. 297. (8) *Frost v. Deering*, 8 Shepl. 156. (9) *Robinson v. Bates*, 3 Met. 40. (10) *Stinson v. Sumner*, 9 Mass. 143; *Robinson v. Bates*, 3 Met. 40.

(a) Not by parol, though privately examined. *Worthington v. Middleton*, 6 Dana, 300.

the husband, at the suit of a stranger to the mortgage; held, the wife was not divested of her dower, though the court had ordered the purchase-money in part to be applied to the mortgage debt.(1)

40. The wife may validly join in a *lease* as well as an absolute deed. In such case she shall be endowed of the rent.(2)

41. In Maine, the wife of one under guardianship may release her dower alone.(3) In Alabama,(a) by statute, an *infant* may release dower. In Wisconsin, the guardian of an infant. So, in Maryland, Chancery may affirm the release of dower by an infant. But it has been held in New York and Ohio, that a release of dower, though a substitute for the old process of recovery, does not so far partake of the nature of the latter, as to render valid the release of an infant. Nor does a private examination give validity to such release. Nor is a release of dower, like a *fine*, made valid by mere *consent* of the husband.(4)

42. It has been seen, that in equity, which regards a conveyance agreed to be made, as actually made, dower may sometimes be barred even without any release. On the other hand, equity will sometimes allow dower even after a release, where the deed was merely preparatory to another deed which has never been made.

43. Thus, where several tenants in common, with their wives, conveyed lands, previously lotted out, to a trustee, to be sold in lots; held, the widow of a deceased tenant should have equitable dower in those lots which the trustee had neither conveyed nor contracted to convey.(5)

43 a. Where a widow, having a right of dower in land of her deceased husband, sells the land, while acting as administratrix upon his estate, to a person whom she afterwards marries, by whom it is again sold by a warranty deed, in which she joins "in token of relinquishing her right of dower in the premises," her release divests her of all the right of dower which she has in the land, either by reason of her first or second marriage.(6)

43 b. A wife who joins in a deed with her husband is no party thereto, except for releasing her dower, and is not thereby estopped from setting up a subsequent title.(7)

43 c. A wife uniting with her husband in conveyance of his land, in which she has no interest but her right of dower, incurs no obligation by reason of any collateral and merely personal covenant inserted in the deed, nor by the representations it may contain. Such covenants are the acts of the husband alone.(8)

43 d. A release of dower may be either gratuitous or for a consideration paid to the wife. And though this much exceed the value of the right relinquished, the transaction will not be adjudged void unless there be a want of good faith in her.(9)

(1) Avery, J., dissenting. *Taylor v. Fowler*, 18 Ohio, 567.

(2) *Herbert v. Wren*, 7 Cranch. 370. See *Hall v. Hall*, 2 M'Cord, Cha. 280.

(3) Me. St. 1853, 29.

(4) St. of Ala. 1836, No. 22; Md. L. 1095; *Priest v. Cummings*, 16 Wend. 617, 20, 331;

Jones v. Todd, 3 Mas. 361, 356; *Hughes v. Watson*, 10 Ohio, 137; Wisc. Rev. St. 334.

(5) *Hawley v. James*, 5 Paige, 318.

(6) *Usher v. Richardson*, 29 Maine, 415.

(7) *Blair v. Harrison*, 11 Ill. 384.

(8) *Shelton v. Deering*, 10 B. Mon. 405.

(9) *Hoot v. Sorrell*, 11 Ala. 386.

(a) In the same State, a deed, to bar dower, must be signed in presence of two or more creditable witnesses, or acknowledged. Clay, 174. If made out of the State, it may be acknowledged before a notary, or a judge of a court of record. *Ib.*

44. A release of dower can operate only *as a release*, accompanying the conveyance of another, and ceasing to operate with the latter; not as the transfer of an independent estate. Thus, where a husband, whose land is bound by the lien of a judgment, conveys the land with a release of dower, and it is afterwards sold under the judgment, the purchaser from the husband cannot claim as an assignee of the wife, or as deriving a distinct estate from her, against the execution purchaser. So, upon a sale of mortgaged lands, the vendee takes them clear of dower, if released. But if the mortgage is paid, never takes effect, or ceases to operate, the right of dower revives. Where the husband only owned a right of redemption, this alone passed or was incumbered by the mortgage, and his wife's dower could not have been released to any greater extent. And where that right expired by lapse of time, the mortgage became inoperative, and ceased to be a conveyance of the husband's estate, and therefore could no longer operate as a bar to dower. So, a widow is not barred of her claim for dower against a mortgagee who has foreclosed; if she did not join in the mortgage, by her release of dower to the purchaser of the equity of redemption.(1)

45. A very common method of barring dower, is by devise or bequest from the husband to the wife. Upon this subject, the English law has been thus stated: Every devise or bequest in a will imports a *bounty*, therefore cannot, in general, be averred to be given as a satisfaction for that to which the devisee is by law entitled; hence a devise is no bar of dower, unless so expressed in the will, either at law or in equity. The court will go as far as it can not to exclude the claim to dower.(2) Several English cases sustain this doctrine.

46. A person being indebted, devised part of his lands, which were subject to a satisfied mortgage, to his wife, but not in bar of dower, and the residue to his executors till his debts were paid. The wife having recovered dower at law, the heir brings a bill in equity for relief. Held, the devise was no bar of dower.(3)

47. A devised lands to his wife for life, and other lands to his brother in fee. The former lands were of greater value than the wife's dower. Held, both in law and equity, the devise was no bar of dower.(4)

48. More especially does this rule apply, where the devise is made for the term of widowhood of the wife, or is in any other respect less beneficial than dower.(5)

49. A devises to his wife lands for her widowhood, afterwards, with all his other lands, to trustees for a term of years, for payment of debts and legacies; and directs, that after the expiration of two years of the term, the trustee shall permit her to receive the rents and profits of another farm, for the rest of the term during her widowhood. The widow having recovered her dower at law, and an application in Chancery for an injunction having been granted; upon a rehearing in the latter court, it was held, that even at law the devise was no bar of dower, and, if it were so at law, it would not be in equity; and the

(1) *Douglas v. McCoy*, 5 Ohio, 527; *Pride v. Boyce*, Rice, 275; *Holdich v. Holdich*, 2 Y. & Coll. Cha. 18; *Ellis v. Lewis*, 3 Hare, 310; *Blain v. Harrison*, 11 Illin. 384; *Littlefield v. Crocker*, 30 Maine, 192.

(2) 1 Cruise, 139; Walk. Intro. 325; Dick-

son v. Robinson, Jac. 503; *Hilliard v. Binford*, 10 Ala. 977; *Church v. Bull*, 2 Denio, 430.

(3) *Hitchin v. Hitchin*, Prec. in Cha. 133.

(4) *Lemon v. Lemon*, 8 Vin. Abr. 366.

(5) *Lasher v. Lasher*, 13 Barb. 106.

decree was reversed.(a) This judgment was afterwards affirmed by the House of Lords.(1)

50. Devise of land, in trust to sell, and pay part of the proceeds to the widow. Held, she need not elect between the devise and her dower.(2)(b)

51. But where a devise or bequest is expressly given as a satisfaction, substitute, or recompense for dower, or upon condition that the wife shall not claim dower, she is bound to elect between the two, and an election of one is a perpetual waiver of the other. Nor is it material whether the property given by will consists of real estate or personal, except perhaps, that to make personal property a bar of dower, stronger proof of an intent to that effect is required, than in case of a devise of lands. But if, after the widow has elected and enjoyed the provision by will, it from any cause fails, as for instance, if personal property, from which an annuity is to be raised, becomes exhausted, it seems she may claim her dower.(3) In Massachusetts, Maryland(c) and Virginia, express statutes so provide.(4) But where a testator devised to his wife his whole estate *during widowhood*, and she makes no renunciation of the devise, but afterwards forfeits it by marriage, she shall not have dower.(5)

52. So, in New York, where a testator, in lieu of dower, devised certain property to his wife, and directed that his sons should annually deliver to her a certain quantity of wood; and, after the widow had accepted the devise, and for many years enjoyed the property, the sons failed to deliver the wood as directed: held, the widow could not claim dower, but her remedy was under the will, against those chargeable with its execution: that, although the wife would not be bound by a post-nuptial *agreement* merely, yet she would be bound by an *election* to avail herself of such agreement; and, in this respect, a devise stood on the same footing with a settlement made upon the wife after marriage.(6)(d)

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| (1) <i>Lawrence v. Lawrence</i> , 1 Lord Ray. 230. | (4) <i>Mass. Rev. St.</i> 411; <i>Anth. Shep.</i> 451; |
| 438; 2 Vern. 365; 3 Bro. Parl. Ca. 433. | 1 Vir. Rev. C. 171. |
| (2) <i>Ellis v. Lewis</i> , 3 Hare, 310. | (5) <i>Vance v. Campbell</i> , 1 Dana, 229. |
| (3) <i>Leake v. Randall</i> , 4 Rep. 4 a; <i>Bush's Case</i> , Dyer, 220; <i>Gosling v. Warburton</i> , Cro. Eliz. 128. (See <i>Ayres v. Willis</i> , 1 Ves. sen. | (6) <i>Kennedy v. Mills</i> , 13 Wend. 553; <i>Ib.</i> 556 |

(a) Because, as is said, the matter had been previously settled at law. 1 Ld. Ray. 438, n.

(b) In a very late case in Virginia, a husband conveyed land with warranty, the wife not joining in the deed, and devised all his estate to her, remainder to her children. Held, she should take the devise, and also dower in the land sold. *Higginbotham v. Cromwell*, 8 Gratt. 83.

(c) "If nothing shall pass by such devise." In the same State, if the will gives her both personal and real property, she must renounce the whole in order to claim her legal rights. *Md. L.* 407.

(d) But, in the same State, where the testator devised his whole property to his wife for life or widowhood, remainder to his children, and she occupied some years under the will and then married again; held, she should have dower. *Bull v. Church*, 4 Hill, 206. See *Fuller v. Yates*, 8 Paige, 325; *Lewis v. Smith*, 11 Barb. 152; *Flagler v. Flagler*, 11 Paige, 457.

A testator devised all his real and personal estate to his wife, "during her life, or so long as she should remain his widow," and after her decease, or remarriage, to his children. The wife survived him, entered and occupied under the will for several years, and then married a second husband. Held, she was entitled to dower. *Church v. Bull*, 2 Denio, 430.

Where a testator owned the entire estate in certain premises, subject to dower, and devised a part of the premises to the person having the right of dower, and the residue to A,

53. A provision by will, though not *expressed* to be a bar of dower, shall still operate as such, if its fulfilment is manifestly inconsistent therewith. It is said, that no person shall dispute a will who claims under it, and this rule is as applicable to a dowress as to any other person. Hence, where the dowable estate is so divided, that the claim of dower makes a material change in the will itself, the widow is barred. There is no difference between declaring that she shall not hold both, and devising so that she cannot hold both without disturbing the will.(1)

54. This doctrine seems to have been first settled in courts of equity, and a devise has therefore been called an *equitable bar*. But the language of the modern cases and the better opinion seem to be, that if the wife has fairly and understandingly, with a full knowledge of the facts, made her election between her dower and the testamentary provision, and in favor of the latter, she will be held to her election at law as well as in equity. It is said, there is no difference in principle between the courts of law and equity on this subject, but the difficulty of reaching the justice of the case has frequently thrown these questions into equity.(2)

55. Equity will not interpose to compel an election, unless—1, the devise is expressed or strongly and necessarily implied to be a substitute; or 2, clearly inconsistent with dower; or 3, where the whole will would be overturned by an allowance of dower.(3)

55 *a.* It is said, a devise to others of all the testator's real estate, is not necessarily inconsistent with the right of dower, as such a devise is to be understood as subject to all lawful claims upon the land, including dower.(4)

(1) 4 Kent, 56; *Villa, &c. v. Galway*, 1 Bro. Rep. 293 n.; *Gretton v. Howard*, 1 Swanst. 413; *Hamblett v. Hamblett*, 6 N. H. 333; *Weeks v. Patten*, 18 Maine, 42; *Stark v. Hunton*, Saxt. (N. J.) 216; *Church v. Bull*, 2 Denio, 430; *Lasher v. Lasher*, 13 Barb. 106.

Kent, 56; *French v. Davies*, 2 Ves. jun. 578. (But see *Pickett v. Peavey*, 2 Con. S. C. 748.) *Edwards v. Morgan*, 13 Price, 782; *Taylor v. Taylor*, 1 Y. & Coll. Cha. 727.

(3) *Kennedy v. Nedrow*, 1 Dall. 418.

(4) Per *Walworth, Ch.*, *Church v. Bull*, 2 Denio, 430.

(2) *Kennedy v. Mills*, 13 Wend. 555; 4

but without declaring his intention, in his will, to dispose of the whole estate, including the right of dower, or that the dowress should relinquish either such dower or her devise, and no such intention was deducible by clear and manifest implication from the will; held, the presumption was, that the testator intended only to devise to A his own estate in the premises, subject to the right of dower therein, and that the dowress was not put to her election. *Leonard v. Steele*, 4 Barb. 20.

The principal trusts of a will, some years after the testator's death, were declared void by a vice-chancellor; but the payments made previously were sanctioned by the decree, and the widow was required to elect between her dower and certain valid provisions of the will. Appeals were taken, and the suit protracted, pending which the executors continued to make payments, and the widow, having made no election, died before the decision, which affirmed the decree. In a suit by the executor against the assignee of one of the next of kin; held, the latter could not object to the payments made prior to the decree; that the payments made subsequently were invalid, and must be disallowed; and that the widow's administrator might now make the election granted to her by the decree. *Howland v. Heckscher*, 3 Sandf. Ch. 519.

Where a husband gave to his wife by will, in lieu of dower, a decent and comfortable support out of his estate, in sickness and in health, during her lifetime, leaving the residue of his estate to his two children; held, such allowance was not to be measured by the sum necessary to support her in a boarding-house, but that she should have sufficient to maintain her in house-keeping at the place of her residence, and in the manner to which she had been accustomed while living with her husband; such sum being less than the interest on one-third of the testator's estate. *Tolley v. Greene*, 2 Sandf. Ch. 91.

56. Instances of inconsistency, are where the interest of one-third of the amount of sales of the whole land is given to the widow for life; so, where the rents of lands are charged with the maintenance and education of children, and provision is made for selling lands to pay debts.(1)

57. A testator devises one-third of his estate to his wife, the other two-thirds to his two children. Held, the widow could not claim both the devise and her dower.(2)

58. A devised to his wife an annuity of 200*l.*, to be issuing out of his lands, with power of distress and entry; subject thereto, he devised his real estates to his daughter in strict settlement; and directed all his personal estate to be invested in land and settled to the same uses. It was held in equity, that the claim of dower was inconsistent with the will: 1. Because it would deprive the trustees of their possession of a part of the land, whereas by the will they were to hold the whole, subject to the annuity and distress, and the widow was to enter, only upon non-payment. 2. Because it would diminish the annuity itself, inasmuch as by entering upon a third of the land in right of her dower, the widow would sink so much of her annuity as that third ought to bear in proportion. The annuity, being charged upon the whole land, could not, by an equitable marshalling, be thrown upon the remaining two-thirds.(3)

59. In some later cases, the charging of an annuity upon lands has been held not to be a bar of dower.(a)

60. Where a testator, not noticing his wife's title to dower, devises to her the residue of his personal estate, this is no bar of dower, because the claim of the latter does not break in upon the will.(4)

61. And if only a part of the lands subject to dower are devised to the widow, she may claim her dower in the residue, unless the intent is clearly otherwise. So, the devise of a contingent remainder in the whole lands to the widow is no bar of her immediate title to dower, by implication, because the two estates are not incompatible. Nor will the widow be barred of her dower, although there is a probability that the husband was ignorant of her right to claim it.

62. Where the husband devises his lands, or all his estate, to trustees, charged with an annuity to the widow; dower being a paramount claim, equity will not presume, from his having disposed of all his own property, that he meant also to dispose of what was not his own, unless peculiar circumstances justify such construction.(5)

63. If the lands subject to dower would be insufficient to meet the

(1) *Duncan v. Duncan*, 2 Yeates, 302; *Chalmers v. Stovil*, 2 Ves. & Beam. 222; *Herbert v. Wren*, 7 Cranch, 370. *Dickson v. Robinson*, Jac. 503.)

(2) 4 Dane, 680.

(3) *Villa Real v. Galway*, 1 Bro. Rep. 292. 324; *Hitchins v. Hitchins*, Freem. 241; *Incleton v. Northcote*, 3 Atk. 435; *French v. Davies*, 2 Ves. jr. 577, 581; *Foster v. Cook*, 3 Br. 351; *Wood v. Wood*, 5 Paige, 596.

See *Reynard v. Spence*, 4 Beav. 103.

(4) *Ayres v. Willis*, 1 Ves. 230. In this case, the claim of a widow as devisee is compared with that of a child. (See further,

(a) Where a widow is to elect between her dower and an annuity, receiving the latter for five years has been held not conclusive evidence of an election. *Reynard v. Spence*, 4 Beav. 103.

charges made upon them, dower would probably be barred; and, it seems, a reference may be granted to ascertain the fact.(1)

64. A widow, receiving a devise for her release of dower, is deemed a *purchaser*, and shall be fully paid before other legatees; even though the legacy be not the only consideration of such release. Her claim is even paramount to that of *creditors*. By relinquishing her dower, she discharges a highly favored debt due from the testator; and relieves his real estate from a lien in her favor, which would have preference to any that he himself could have created. Hence, where the widow filed a creditor's bill in Chancery,(a) praying a sale of the real estate, for payment of debts; and subsequently presented a petition, alleging that she accepted a devise from the husband improvidently, that the estate was greatly charged with debts, and that she should receive no compensation for her dower, and praying to be let in to the latter; it was held, that although she could not waive her election of the devise, affirmed by her bringing this suit, in the absence of any fraud or mistake; yet, according to the language of the statute, (of Maryland,) she was "a purchaser with fair consideration," both at law and in equity, and that the creditors, having joined with her in an application for sale, could not now claim to be paid in preference to her, but, in order to have equity, must do equity, and allow her legacy in full.(2)(b)

65. Where devises and legacies are proportionably abated, to make up the portion of a *post-testamentary* child, the widow's legacy shall be taken into account, in estimating the amount to be deducted from each of the other bequests. But the *post-testamentary* child, in order to claim a rateable portion of the widow's legacy, must take his share of the real estate subject to dower. In Illinois, a statute provides, that if by the widow's renunciation of her legacy, other legacies are increased or diminished, the court shall equalize them.(3)

66. If the provision by will is stated to be for the widow's own support, and the support and education of her children, and she elects her dower; the bequest fails *in toto*, and cannot be apportioned for the benefit of the children.(4)

67. If the testator devises real and personal estate to the widow in lieu of dower, and the whole of his property, subject to such devise, to his executors in trust, and the widow afterwards elects her dower; the

(1) *Pearson v. Pearson*, 1 Br. 292.

(2) *Anth. Shep* 451; *Burridge v. Brady*, 1 P. Wms. 127; *Blower v. Morret*, 2 Ves. sen. 242; *Heath v. Dendy*, 1 Russ. 545; *Margaret, &c.*, 1 Bland, 203; *Gibson v. McCormick*,

10 Gill. and J. 65; *Thomas v. Wood*, 1 Md. Ch. 296; *Hubbard v. Hubbard*, 6 Met. 50.

(3) *Mitchel v. Blain*, 5 Paige, 588; *Illin. Rev. L.* 624.

(4) *Hawley v. James*, 5 Paige, 318.

(a) On the other hand, an annuity bequeathed by a testator to his widow, in lieu of dower, and charged upon his real and personal estate, is liable to the claims of creditors of the widow, and may be reached by a creditor's bill against her. *Degraw v. Clason*, 11 Paige, 136.

(b) In the same State, it is held, that a devise in lieu of dower is to be treated *as dower*; and, if not claimed by the widow in a creditor's suit, the land shall be sold clear, and she may claim her share of the proceeds. *McCormick v. Gibson*, 3 Bland, 501. The rule of priority stated in the text does not apply, unless the bounty to the widow consists of real estate. *Accey v. Simpson*, 5 Beav. 35.

property included in the first devise does not pass by the second, but is distributed to the next of kin.(1)(a)

68. The principles above stated belong to the English law,(b) and, independently of statutory provisions, are generally adopted in this country.(c) But, in the States of Massachusetts, Maine,(2) Indiana, Iowa, Vermont, Pennsylvania, Maryland,(d) (with slight modification,) Virginia,(e) Wisconsin, Illinois, New Hampshire, and Alabama,(f) the widow cannot claim both the provision made by will and dower also, unless such plainly appears to have been the testator's intention. In Pennsylvania, Maryland, and Illinois, this intention must be shown by an express declaration in the will. In Alabama, where the devise is "not satisfactory" to her, the widow may waive it and claim dower.(3)

69. In Missouri and Delaware,(g) the statutory provision applies only to a devise of *real estate*,(4) and in Missouri bars dower only in land of which the husband died seized.

70. In South Carolina it has been held, that although Chancery might

(1) *Hawley v. James*, 5 Paige, 318.

(2) *Herbert v. Wren*, 7 Cranch, 370; *Keller v. Michael*, 2 Yeates, 302; *Webb v. Evans*, 1 Binn. 565; Mass. Rev. St. 410. See St. 1854, 73; *Purd. Dig.* 220-1; *Park & J.* 468; *Mich. Rev. St.* 264; *Wisc. Rev. St.* 335; *Anth. Shp.* 50, 450; *Maine Rev. Sts.* c. 95; *Illin. Rev. L.* 624; *N. H. L.* 199; *Ala. L.*

884; *Reid v. Campbell*, 3 Port. 378; *Green v. Green*, *Ib.* 19; *Hastings v. Clifford*, 32 Maine, 132.

(3) *Ala. L.* 258.

(4) *Misso. St.* 228; *Dela. St.* 1829, 168; *Hamilton v. O'Neil*, 9 *Mis.* 11; *Dela. Rev. Sts.* 291; *Iowa Code*, ch. 83, sec. 1407.

(a) Where the will vested the whole title to the testator's estate in trustees, and his widow renounced the provisions the will made for her, and dower was assigned to her in slaves, which were included in the estate devised to the trustees; held, the assignment only divested the title of the trustees, to the extent of the interest which the law conferred upon the widow in the property assigned as dower; and as she had, by operation of law, a life estate in the slaves, the trustees were only divested of the title to them to that extent, and the reversion remained in them by virtue of the will, and a creditor might sell the title to the reversion under an execution. *Myers v. Davies*, 10 B. Mon. 394.

In Indiana, previously to the Revised Statutes of 1843, if a devise to the wife did not state that it was in lieu of dower, and her claim of dower was not inconsistent with the will, she had a right to take both. *Kelly v. Stinson*, 8 Blackf. 387.

Previously to the Revised Statutes, a testator devised certain goods to his wife, and the residue of his property, real and personal, to his children. The devise to the wife was not said to be in lieu of dower, nor would her taking dower overturn the will. After the testator's death, the widow released her claim by dower (as it was called) on the personal estate, except the provisions made for her in the will. Held, she was entitled to dower in the real estate. *Ostrander v. Spickard*, 8 Blackf. 227. See *Smith v. Baldwin*, 2 Cart. 404.

(b) But see sec. 14, n. a, for a late statutory alteration. The English rule is still adopted in Georgia. *Tooke v. Hardeman*, 7 Geo. 20.

(c) Under section 10 of the intestate law of Pennsylvania of 1797, the widow's acceptance of a devise to her, does not bar her of dower in land which her husband conveyed in his lifetime, though with general warranty, and in the conveyance of which she did not join. *Borland v. Nichols*, 12 Penn. 38.

(d) A partial failure of a devise to a widow, who abides by the will, will not entitle her to compensation out of the residue of the estate, unless the failure is to such an extent, as to make what she receives under the will less in value than her legal share of her husband's estate. *Thomas v. Wood*, 1 Maryland Ch. 296.

(e) It has been very recently held, that to exclude dower, there must either be an express declaration, or an implication equivalent to it. *Higginbotham v. Cornwell*, 8 Gratt. 83.

(f) Where lands mortgaged are devised with other lands, and she does not dissent, she has no dower against the mortgagee. *Inge v. Boardman*, 2 Ala. (N. S.) 331.

(g) No *advancement* made in the husband's lifetime shall affect dower. *Dela. Rev. Sts.* 279.

imply a provision by will to be a bar of dower, a court of law could not do it.(1)(a)

71. With regard to the *time and mode* of electing, it is held in England, where the widow is bound to elect, that if she enters upon and enjoys the estate, an election of such estate will be presumed. So, if she partially accede to a settlement, she will be bound for the whole. Otherwise, where any act is done under an ignorance of her rights or the testator's circumstances.(2) But if an *insane* woman waives the devise to her in due form, does not retract the waiver in any lucid interval, nor her guardian for her, but claims dower and petitions for an allowance; the waiver will bind her.(3)

71 a. Where real estate was charged by a testator with an annuity, for the benefit of the widow, and it was provided, that at her death the estate should be disposed of by the executors in accordance with the directions of the testator; held, the dissent of the widow from the will discharged the incumbrance, and that the estate thereupon passed to the devisees.(4)

72. Though a devise be not made expressly in lieu of dower, and therefore not a bar, yet the widow by her own acts may make it such. Thus, if she contracts with the heir, reciting in the agreement that she receives certain things in satisfaction of the devise and in lieu of dower; she shall be barred of the latter. Dower, before assignment, being a *right of action* merely, may be released, without formal conveyance, by acts and agreements.(5)

73. A widow, to whom property was bequeathed, not expressly but constructively in lieu of dower, having occupied the house devised to her, and received other property given her by the will, and disposed of a part of it, fourteen years after the husband's death claimed dower. Held, a reasonable time for her election had elapsed, and she could not waive the devise.(6)

74. In the absence of any election, whether the widow shall take her dower, or the provision made for her by will, seems to be a point somewhat differently settled in different states. In Ohio, (7) if she fails to elect, the law gives her dower.(b) But in Massachusetts, if the provision by will is more beneficial than dower, an acceptance of the former

(1) Pickett v. Peay, 2 Con. S. C. 746.

(2) Milner v. Harewood, 17 Vez. 150; Pusey v. Desbouvrie, 3 P. Wms. 321; Chalmers v. Storil, 2 Ves. & B. 225; Duncan v. Duncan, 2 Yea. 305; Tooke v. Harden, 7 Geo. 20; U. S. v. Duncan, 4 McL. 99. Some of these cases sustain the principle stated in

the text rather by analogy than directly.

(3) Brown v. Hodgdon, 31 Maine, 65.

(4) Armstrong v. Park, 9 Humph. 195.

(5) Shotwell v. Sedam, 3 Ohio, 12.

(6) Reed v. Dickerman, 12 Pick. 146.

(7) Walk. Intro. 325; Swan, 998-9; Hamilton v. O'Neil, 9 Mis. 11.

(a) A devised one half of his estate to his daughter, and the other half to his wife. The latter married again, having first made a marriage settlement, by which the moiety of A's estate was conveyed to her second husband. He died, and devised the same half to his widow, in lieu of dower; but she elected to take her dower, and so the devise lapsed. She then applied to have her dower in A's estate assigned to her. Held, as she had accepted the devise, her right of dower was barred. [DARGAN, Ch., dissenting.] Bailey v. Boyce, 4 Strobb. Eq. 84. Where a widow occupied a plantation for eleven years under the will of her husband, she was held to have elected to take under the will, and could not claim dower, although the will contained no express provision that she should elect. Caston v. Caston, 2 Rich. Eq. 1.

(b) So, it seems, in Missouri. Hamilton v. O'Neil, 9 Mis. 11.

will be presumed.(1)(a) And the general rule undoubtedly is, that the widow will be understood to accept the devise or legacy, unless she expressly declare a contrary determination.

75. In most of the States, a definite time is fixed, within which she shall make a formal election. In Massachusetts, Maine, Tennessee, Ohio and North Carolina, within six months from probate of the will; in Vermont,(b) eight months; in Connecticut, two months (from the time of exhibition of claims;) in Maryland, ninety days; in Missouri and Illinois,(c) twelve months.(2) In Michigan, Indiana and Alabama,(3) one year. In Pennsylvania,(d) New York and Wisconsin, one year from the testator's death. In Pennsylvania, upon a summons from any party interested. In Virginia and Kentucky, upon renunciation within one year from the husband's death, the widow shall be entitled to one-third of the *slaves* for life.

76. The statutes of the several States designate the form in which an election shall be made. It is done sometimes by a personal appearance(e) of the widow before the Court of Probate, but generally by the filing of a written declaration, which becomes matter of record. In Virginia and Kentucky,(f) either openly in court or by deed. In Tennessee, in the former mode. In New York and Michigan, by an entry upon or suit for the land. In Wisconsin, by a suit. In Arkansas, by a release to the heirs within eighteen months.(4)

(1) *Merrill v. Emery*, 10 Pick. 507. See *Clay v. Hart*, 7 Dana, 6; *Malone v. Majors*, 8 Humph. 577.

(2) Mass. Rev. Sts. 410; Maine Ib. c. 95; Walk. 325; Illin. Sts. 1842-3, 319; Anth. Shap. 50, 451; 1 N. C. Rev. Sts. 613; Swan, 998; Conn. Sts. 189; Verm. Rev. Sts. 289-90; *Cummings v. Daniel*, 9 Dana, 361. See *Bell v. Wilson*, 6 Ired. Equ. 1; *Armstrong v.*

Baker, 9 Ired. 109; *U. S. v. Duncan*, 4 McL. 99; *Harvy v. Green*, 9 Humph. 182.

(3) Ala. L. 258; Mich. Rev. Sts. 264; *Hilliard v. Binford*, 10 Ala. 977; Ind. Rev. Sts. *Descent*, s. 41.

(4) Anth. Shap. 483, 648; 1 N. Y. Rev. Sts. 742; *Malone v. Majors*, 8 Humph. 577; Wisc. Rev. Sts. 335.

(a) The later doctrine is, that such acceptance will be presumed in all cases in the absence of any election. *Pratt v. Felton*, 4 Cush. 174. If the widow demand dower, and afterwards, being in possession of the land devised to her, lease it, and the lessee enter and occupy; this is not a sufficient election under the statute. Ib.

(b) In this State, if the widow was not the first wife, if there are no issue, if there was an ante-nuptial agreement, and she receives a comfortable support—an election will not be allowed. Verm. Rev. Sts. 200.

The right of a widow to waive the provision in the will and claim dower, must be exercised within eight months, though the executor declines to act, and administration is granted with the will annexed. *Smith v. Smith*, 20 Vt. 270.

(c) The act does not apply, unless the provision is such, as to raise a reasonable presumption that the devise was intended in lieu of dower. *U. S. v. Duncan*, 4 McL. 99.

(d) The statute of Pennsylvania of April 11, 1848, allowing to a widow, who elects not to take under her husband's will, the share of his personal estate which she would have been entitled to had he died intestate does not apply to a case where the husband died before its passage, although the election were not made until afterwards. *Hinnershitt v. Bernhardt*, 1 Harris, 518.

The share which a widow would have in the estate of her husband if he died intestate, is not dower within the statute of April 8, 1833, allowing a widow to elect between her dower and the provision in her husband's will. Ib.

(e) In North Carolina, it has been held, that a widow must dissent from her husband's will in person, and cannot do so by attorney or guardian; and if she be lunatic, no objection can be made. *Lewis v. Lewis*, 7 Ired. 72; *Hinton v. Hinton*, 6 Ired. 274.

In Delaware, it may be done by attorney, if she is unable to attend. Dela. Rev. Sts. 29. So, by a recent statute, in North Carolina, in case of sickness. And the guardian of a lunatic or *non compos*, may dissent. N. C. St. 1848-9, 90.

(f) See *McCallister v. Brand*, 11 B. Mon. 370.

77. But in New York it has been held,(1) in Chancery, that where a widow, by deed, relinquishes the testamentary provision, records the deed, and notifies the executors and trustees, or the tenant of the land, of her election, who thereupon recognize her right of dower and make payments on account of it; this is equivalent to the statutory formalities, and an entry upon, or suit for, any part of the lands is sufficient.(a)

78. It has been held in Massachusetts, that though provision is made for a widow in the husband's will, and though she fails to make her election within six months, she may still claim her dower, if it appear that the estate is insolvent, and the provision in the will wholly fail. By the Revised Statutes, (ch. 60, sec. 13,) if the widow is lawfully evicted of lands assigned as dower, or is deprived of the provision made for her by will or otherwise in lieu of dower; she may be endowed anew. Upon this ground the case was decided.(2) So, in Maine, if deprived of the provision in the will, she has dower. Or of any substantial part of it.(3)

79. The same provision is held applicable in Massachusetts, in case of a devise of all the testator's property to the widow, on condition that she pay all his debts, legacies, &c., as well as where there is a bequest of a certain sum of money or specified property.(4)

(1) *Hawley v. James*, 5 Paige, 318.

(2) *Thompson v. McGaw*, 1 Met. 66.

(3) *Hastings v. Clifford*, 32 Maine, 32.

(4) *Thompson v. McGaw*, 1 Met. 66.

(a) In Mississippi, though the probate of a will made in vacation is invalid, yet, if acted upon by the executor in administering the estate, and by the widow of the testator and other parties in interest for the period of seven years, without objection, the widow will be deemed to have elected to take the provision made for her by the will, and cannot afterwards renounce such provision. *Sanders v. Sanders*, 14 S. & M. 81.

Where a widow has formally waived the provision in the will, a subsequent contract with the heirs and legatees to accept it, and make no other claim on the estate, can have no effect on the action of the Probate Court. *Gowen, &c.*, 32 Maine, 516.

Where a widow dissents to her husband's will, she thereby rejects all the provisions in her favor, and is let into the rights which the law would have conferred upon her, if her husband had died intestate. *Armstrong v. Park*, 9 Humph. 195.

Devise to the testator's widow of all his estate, in trust to sell, and invest the proceeds for her and her children. The widow entered, and "as widow and sole devisee, acting under and by virtue of the last will" of her husband, released certain land mortgaged by him to the mortgagee, in consideration of a large sum, and of his relinquishing all claim upon certain other property of the testator, with the usual terms of a quit-claim deed. Held, she could not afterwards elect to claim her dower, though within the statutory period. *Dundas v. Hitchcock*, 12 How. 256.

Where a widow remains in the mansion-house, uses the property given her by her husband's will, and makes a will disposing of said property, which will is itself annulled by a subsequent event; she may renounce the testamentary provisions, and her motives in making such renunciation are not to be inquired into. *McCallister v. Brand*, 11 B. Mon. 370.

Where a limited power of disposition of certain property is given to a widow, she may renounce on the ground of such limitation. *Ib.*

If a widow make a conditional renunciation within one year, and the contingency happen within that year, the renunciation is valid, though it be not recorded before the happening of the contingency. *Ib.*

Whether the renunciation must be recorded within the year or not, *Quære*. *Ib.*

The renunciation by a widow does not create a new right, but merely confirms a pre-existing right which the law creates in the right to elect. *Ib.*

A renunciation amounts to a transfer by the widow of her testamentary provision to the heirs and devisees, and entitles her to what the law gives from them. *Ib.* Where the widow fails to assent within the time fixed by law, she cannot afterwards claim relief in equity, on the ground of mistake as to sufficiency of the estate to meet the charges upon it. Otherwise, where her acceptance of the devise is obtained by fraud. *McDaniel v. Douglas*, 6 Humph. 220.

80. The widow having applied for her dower, it appeared that a previous application had been made and refused, before there was sufficient evidence that she would lose her devise, and that she did not appeal from such decree. Held, these facts were no bar to the present petition.(1)

81. The provision of the Revised Statutes, as to a widow's electing between her dower and the provision made for her by will, does not apply, where a widow claims her third of unbequeathed personal property in addition to the provision of the will.(2)

82. Devise, that the testator's widow "shall have her dower out of my estate, in the same manner she would be entitled to, if this will had not been made." Held, as she was hereby limited to dower, and excluded from her share of the personal property, the devise constituted a *provision* for her, within the meaning of St. 1833, c. 40; and, upon waiving it, she might claim an allowance from the personal property.(3)

83. A testator devised to his wife, during her widowhood, all his property, subject to debts and legacies, and appointed her his executrix. He also authorized her during widowhood to sell and convey so much of his real estate as she might judge necessary, &c., for payment of his debts, for support of herself and her children, and for their education. She accepted the trust and administered the estate. Within two years, she sold a part of the real estate, under the authority in the will, and soon afterwards married again. Subsequently, she sold the rest of the real estate for payment of debts, under a license of court, and with her husband conveyed the same, not reserving her dower, and having full knowledge of the situation of the estate. Thirteen years after the death of her second husband, she first claimed dower in the land sold under the license. Held, she had accepted the provision made for her by the will, and thus waived her claim for dower.(4)

84. Devise of parts of the real estate to the wife in fee, and of all the personal estate; the other parts of the real estate to be disposed of according to law. The wife having accepted the devise; held, a bar of dower.(5)

(1) *Thompson v. McGaw*, 1 Met. 66.

(2) *Kempton*, 23 Pick. 113.

(3) *Crane v. Crane*, 17 Pick. 422.

(4) *Dolay v. Vinal*, 1 Met. 57. See *Holm v. Low*, 4 Met. 190.

(5) *Adams v. Adams*, 5 Met. 277.

CHAPTER XI.

ASSIGNMENT OF DOWER.

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| <ol style="list-style-type: none"> 1. Necessity of assignment. 2. Nature of estate before assignment. 11. Tenancy in common with the heirs, in Massachusetts, &c. 14. Assignment not required in equity. 18. <i>Quarantine</i>. 24. Assignment by the heir or other tenant. 30. Action at law for dower. 32. When the only remedy. 33. <i>View</i>. 34. Damages. 36. Demand. | <ol style="list-style-type: none"> 40. Costs. 41. Bill in equity for dower. 48. Assignment by Probate Court. 56. Forms of proceeding. 58. How far evidence of title. 60. When adverse and compulsory, or otherwise. 67. Application for assignment—by whom. 70. Wrong assignment—how remedied. 71. Assignment—when it may be demanded. 72. Limitation of suit for dower. |
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1. **ALTHOUGH** by the death of the husband the right of the widow to dower becomes consummate, yet, in general, she has no title to any specific lands, and no right of entry upon them, until her dower is *assigned* or *admeasured* by the heir or other tenant of the freehold, or in a course of legal proceedings. She has only a *potential* interest, or *right in action*.(1)(a)

2. Upon this principle, a mere judgment for dower, in a suit brought by the widow, gives her no right of entry, like a judgment in other real actions; even though the dower is to be assigned in common, and will, therefore, be rendered no more certain by the assignment.(2)

3. In Pennsylvania, the widow of a tenant in common cannot, before assignment, maintain a writ of partition.(3) But in New York it is intimated, that although the widow is not properly made a party to a partition among heirs, devisees, &c., and cannot recover her dower by process of partition, where the husband was sole seized; she is a proper party to such partition, where he was a tenant in common.(4)

4. So, in general, it is no defence to an ejectment against the widow, brought by the heir for lands descended to him, or by a devisee, that he has failed to assign dower therein.(b) That part of the

(1) Gilb. Ten. 26; 9 Mass. 13; Cox v. Jagger, 2 Cow. 638; 10 Wend. 528; 3 Ohio, 12; 13 Pick. 35; Robinson v. Miller, 1 B. Monr. 91; Johnson v. Shields, 32 Maine, 424; Pennington v. Yell, 6 Eng. 215.

(2) Hildreth v. Thompson, 16 Mass. 191; Co. Lit. 34 b.

(3) Brown v. Adams, 2 Whart. 188.

(4) Coles v. Coles, 15 John. 319.

(a) Where, before assignment of dower, the widow married again; held, the second husband's interest in the land did not pass by an assignment of all that he held in right of his wife. Brown v. Meredith, 2 Keen, 527. It has been held in Vermont, that the wife, previously to her dower being assigned, has the same right of entry upon the land, whether as against a stranger or her co-tenant, which the husband had during his life. Gorham v. Daniels, 23 Verm. 600. In Delaware, dower is a right at common law; but the right to have it assigned by the Orphans' Court is derived from the act of 1816. Layton v. Butler, 4 Harring. 507.

(b) But in Kentucky, neither the heir nor a purchaser from him can maintain an action against the widow for land inherited, till dower is assigned. Robinson v. Miller, 1 B. Monr. 93. In Alabama, the heir may recover the land from one to whom the widow conveyed before assignment of dower. Wallace v. Hall, 19 Ala. 367. Where a widow remains in

land, which the widow is specially authorized to occupy without assignment, (as will be seen hereafter,) is of course excepted from the above remarks.(1)

5. A quiet possession of the land and actual receipt of the rents and profits, for six years, are not equivalent to a legal assignment, so as to give the wife a freehold estate, but constitute either a disseizin or tenancy at will. But where a mother had the right of dower, and the land descended to her daughter, of whom she was guardian, and there was no assignment, but the daughter remained in the family of the mother; held, all the income that was practicable should be obtained from the estate, and the mother charged with two-thirds, but allowed to retain the rest in lieu of dower.(2)

6. But after dower has been set off, the widow may enter before return of the writ. So, after an assignment by commissioners, made with the assent of the widow and heir, and the report of which is subsequently accepted by the Probate Court; the widow, before such acceptance, may enter and take the crops sown by the heir before the assignment.(3)

7. It has been held in New York,(4)(a) that before assignment the widow may release, but cannot transfer her right; and in Maine, Illinois, Arkansas and Kentucky,(5) that it cannot be taken in execution. But in Alabama, a widow may assign her interest in her husband's estate, in equity.(6) In Ohio,(7) a conveyance by the widow of her dower, before admeasurement, is not void, and will not be set aside on application of a purchaser who has entered and enjoyed. 'He can only claim to have his title perfected. But no transfer can be made, which will justify a suit for dower in the purchaser's own name. In North Carolina, although the widow before assignment is not seized and cannot convey a legal title; she may make a contract concerning the land, which equity will enforce.(8) So, a receipt for money, received as a substitute for dower, given by a widow to the purchaser of the lands of her deceased husband from her sons, in ratification of an ar-

(1) *Evans v. Webb*, 1 Yea. 424; *Moore v. Gilliam*, 5 Mun. 346; *Branson v. Yancy*, 1 B. & Dev. Equ. 77.

(2) *Windham v. Portland*, 4 Mass. 384; *Mathes v. Bennett*, 1 Fost. (N. H.) 204.

(3) Co. Lit. 37 b. n. 2; *Parker v. Parker*, 17 Pick. 236.

(4) *Cox v. Jagger*, 2 Cow. 638; *Siglar v. Van Riper*, 10 Wend. 414; *Ritchie v. Put-*

nam, 13, 524; *Green v. Putnam*, 1 Barb. 500; *Blain v. Harrison*, 11 Illin. 384.

(5) *Mason v. Allen*, 5 Greenl. 479; *Shields v. Batts*, 5 J. J. Marsh. 15; *Summers v. Babb*, 13 Illin. 483; *Pennington v. Yell*, 6 Eng. 215.

(6) *Powell v. Powell*, 10 Ala. 900.

(7) *Todd v. Beatly*, Wright, 461; *Douglass v. M'Coy*, 5 Ohio, 527.

(8) *Potter v. Everett*, 7 Ired. Equ. 152.

possession of the land, the remedy of the heirs is at law, not in equity, unless there be some special reason to the contrary. *Egbert v. Thomas*, 1 Cart. 393. Where land was conveyed, with a covenant that the grantor was lawful owner, had good right to convey, and would warrant and defend, there being a claim for dower at the time, but no assignment; and afterwards the grantee was compelled to pay an annuity in lieu thereof: this was no breach of the covenant. *Tuite v. Miller*, 10 Ohio, 382.

(a) So in Illinois. *Summers v. Babb*, 13 Illin. 483. So it is held, in Maine, that a widow's right of dower, before it is assigned to her, rests only in action, and she cannot release or convey it, except to a party in possession or in privy of the estate from which it accrued. Such right is not embraced by the Maine Rev. Stat. c. 91, sec. 1, abrogating the common law rule, by which disseizees are prevented from conveying. *Johnson v. Shields*, 32 Maine, 424. The right is a *chose in action*, which may be reached by a creditor's bill. *Stewart v. M'Martin*, 5 Barb. 438.

rangement between her sons, and after consultation with them and her attorney, and due deliberation, she having received a payment under it, estops her from contesting its validity or claiming her dower.(1)

8. In Indiana, the widow cannot *mortgage* her dower before assignment.(2) So, the interest of the widow before assignment is not a proper subject of *lease*. Hence, a covenant, in an instrument purporting to be a lease of such interest, to pay her a certain sum annually as rent, in consideration of her forbearing to exercise her right of dower, is merely *personal*, and does not run with the land, or bind an assignee of the supposed lessee. Neither can such transaction have the effect of a *release*, which must operate presently and absolutely.(3)

9. The widow having before assignment a mere *right of action*, this may be lost to her without the formality of a conveyance, as, for instance, by an award.(4)

10. In Connecticut,(a) upon a construction of the statute concerning dower, it has been held, that immediately upon the husband's death, the widow becomes a tenant in common with the heirs, and may enter without assignment. She is not regarded as a tenant under the heirs.(5) But in New York, the statute, substituting *ejectment* for the former remedy of the *writ of dower*, has not the effect to make the widow a tenant in common with the heirs. Her title is still a mere right of action.(6)(b)

11. In Massachusetts, Vermont, Wisconsin, and Michigan, the widow may occupy the land with the heirs, or receive one-third of the profits, until they object. This was also allowed in England by the ancient law, as "*rationabile estoverium in communi*." In Virginia, she may receive one-third of the profits, till assignment.(7)

12. In Maine,(8) she shall have one-third of the rents and profits till assignment, if the husband died seized.

13. These provisions were probably intended to give the widow a remedy only against the heirs; enabling her to recover the rents and profits from the husband's death without demand, and making the amount of them the measure of her damages. It seems, they do not authorize *assumpsit* against any other tenant of the freehold than the heirs, thereby allowing the title to land to be tried in this form of action.(9)

14. In equity, a formal assignment of dower is deemed unnecessary.

15. Thus, in New York, the widow's right may be reached by creditors, before assignment, by a process in Chancery.(10)

16. An infant heir brings a bill in equity against the widow of the deceased, for an account of rents which the latter had received as guar-

(1) Simpson, 8 Barr. 199.

(2) Strong v. Bragg, 7 Blackf. 62.

(3) Croade v. Ingraham, 13 Pick. 35.

(4) Cox v. Jagger, 2 Cow. 638; 3 Ohio, 12.

(5) Stedman v. Fortune, 5 Conn. 462.

(6) Yates v. Paddock, 10 Wend. 528.

(7) Mass. Rev. St. 410; Mich. Rev. St.

263; Verm. Ib. 290; Wisc. Ib. 334; Vir. Code, 474.

(8) Co. Lit. 34, b; Foster v. Gorton, 5 Pick. 185; 1 Smith's St. 170; Bolster v. Cushman, 34 Maine, 428.

(9) Gibson v. Crehore, 3 Pick. 475.

(10) 4 Kent. 61.

(a) In this State, where dower is claimed in an equity of redemption, with the consent of the widow, the court may order a sale of the whole, allowing to her her proportion of the proceeds. Sts. 1839, 124.

(b) So in North Carolina. 1 Bad. & Dev. Equ. 77.

dian. The widow was entitled to dower, but it had never been assigned. Held, she should be allowed, in accounting, one-third of the rents.(1)

17. And the widow of a mortgagor may have a bill of equity to redeem before any assignment of dower, because such assignment does not affect her right of redemption, and because she has no right to demand such assignment as against the mortgagee, before she redeems. Nor is an assignment by the heirs necessary, because she could not redeem a part of the land without the whole.(2)

18. To the general rule at law, that an assignment of dower is necessary to perfect the title of the widow, there is one exception. Magna Charta provided, that the widow might remain in her husband's capital mansion-house, with the privilege of reasonable *estovers* or maintenance, for *forty days* after his death, during which time her dower should be assigned. These forty days are called the widow's *quarantine*. Some have said, that by the ancient law this time was an entire year.(3)

19. In most of the States, a similar provision has been expressly made by statute. In Massachusetts, and New York,(a) the widow is entitled to possession of the mansion-house for forty days; In Arkansas, two months; in Maine, ninety days; in Ohio, Wisconsin and Michigan, one year. In Indiana, Virginia, Kentucky,(b) Rhode Island, New Jersey, Alabama, Illinois and Missouri, she may occupy till dower is assigned. In Illinois, Kentucky, Indiana, Missouri, New Jersey, Virginia and Alabama, she may also occupy the plantation or messuage. In Arkansas,(c) the mansion and farm. In Georgia, the mansion and tenements.(4)

20. In Virginia and Kentucky, if deforced before assignment, the widow shall have a *vicontiel writ*, in the nature of a "*de quarantine habenda*."(5)

21. Quarantine is a *personal* right, not assignable, and said to be forfeited, by implication of law, by a second marriage; though it has been held, that the statutory privilege, of occupying the dwelling-house till assignment, is not lost by this cause, and in Missouri, that the right is assignable. So, the heirs may recover the mansion-house from one claiming by a transfer from the widow before assignment of dower.(6)

(1) *Hamilton v. Mohun*, 1 P. Wms. 118.

(2) *Gibson v. Crehore*, 5 Pick. 149.

(3) Co. Lit. 32, b; *Seider v. Seider*, 5 Whart. 208.

(4) Mass. Rev. Sts. 411: 4 Kent. 62; Walk. Intro. 231, 324; 1 N. C. Rev. Sts. 617; Me. Rev. Sts. 393; Ark. Rev. Sts. 338-9; Mich. Rev. Sts. 265; Wisc. Rev. Sts. 335; Ind. Rev. L. 209; 1 Vir. Rev. C. 170;

Ala. L. 260; Misso. Sts. 229; Illin. Rev. L. 237; N. J. Rev. C. 397; 1 Ky. Rev. L. 573; *Pharis v. Leachman*, 20 Ala. 662; *Springle v. Shields*, 17, 295; *Shelton v. Carrol*, 16, 148; *Singleton v. Singleton*, 5 Dana, 89; *Rambo v. Bell*, 3 Kelly, 207.

(5) 1 Vir. Rev. C. 170.

(6) Co. Lit. 32, b; *Wallis v. Doe*, 2 Sm. & M. 220; *Stokes v. McAllister*, 2 Misso. 163.

(a) The statute relates to lands in which she has a right or claim of dower. It does not apply to leasehold property. *Voelckner v. Hudson*, 1 Sandf. 215.

(b) But where the widow left the mansion with her family, and it was leased by the administrator to her father; held, the lease was to be regarded for the benefit of the heirs, and not as continuing the widow's possession. *Burk v. Osborn*, 9 B. Mon. 579.

(c) In this State, the husband's usual dwelling is assigned for dower, unless serious injury would be thereby occasioned. (See *Meniffee v. Meniffee*, 3 Eng. 9.) In Indiana, the term *messuage* is held to include a few acres adjoining the dwelling-house, and peculiarly appropriated thereto. *Guines v. Wilson*, 4 Blackf. 334. In Alabama, the widow of one residing in a town cannot retain the rents of a plantation, of which her husband died seized, until it has been assigned to her for dower, on the ground of quarantine. *Smith v. Smith*, 13 Ala. 329.

But in Mississippi, in ejectment by a grantee of the husband, even though the premises are held by a tenant of the widow, yet if she has not given a lease or actual transfer of her privilege of possession, and she be let in to defend in the action, she may rely on her right of possession under the statute.(1)

22. It is said, notwithstanding the widow's right of occupancy, the legal title is still in the heir. But it has been held in Virginia, that the heir cannot maintain an action for trespass to the mansion-house land.(2)

23. The widow's right to occupy the mansion usually ceases upon expiration of the *quarantine*, though dower have not been assigned; and the heir may enter and bring a suit. Trespass lies against her; for, she being neither a joint tenant nor tenant in common with the owner of the inheritance, the latter would otherwise be without remedy.(3)(a)

24. By the ancient common law, dower was assigned by the heir, subject to the judgment of the "*pares curie*," in case of any dispute. But the assignment might be made by any tenant of the freehold; and this seems to be the universal rule in the United States.

25. If the land is in possession of a wrongful occupant, as, for instance, a disseisor or abator, the widow is not bound in law to wait for her dower until the heir asserts his title, but may compel the *terre-tenant* to make an assignment. This will be valid, unless he is in possession by fraud and covin of the widow, for the purpose of obtaining dower; in which case the heir may avoid the assignment, although "equally made by the sheriff after judgment." None, however, can assign dower, except those who have the freehold and against whom an action would lie.(4)

26. Lord Coke says,(5) if the husband have conveyed several lands to different persons, and one of them assign to the widow in satisfaction of her whole dower, the others cannot avail themselves of such assignment. But if a part of the lands descend to the heir, and he assign in full satisfaction of her whole dower, a grantee of another portion of the land, being sued, may vouch the heir, who may plead this assignment in bar, there being a privity between the heir and the grantee.

27. In Virginia, Kentucky, Missouri, New Jersey and Delaware,(6) statutes provide, that it shall be no defence against a suit for dower, that another person has assigned it, unless this assignment be shown to be in satisfaction of dower from the lands in question.

28. In some cases, where the widow brings a suit against the terre-tenant, and the latter vouches the heir, the tenant may "go in peace,"

(1) *Doe v. Bernard*, 7 S. & M. 319; Sts. H. & H. 597, s. 47.

(2) *Branson v. Yancy*, 1 Bad. & Dev. 77; *Latham v. Latham*, 3 Call. 181.

(3) *Jackson v. O'Donaghy*, 7 John. 247; *McCully v. Smith*, 2 Bai. 103.

(4) Co. Lit. 35 a; 3 Co. 784; 4 Dane, 669; *Norwood v. Marrow*, 4 Dev. & B. 442.

(5) Co. Lit. 35 a; (Perk. s. 402 con.)

(6) 1 Vir. Rev. C. 170; 1 Ky. Rev. L. 574; *Misso*, St. 231; 1 N. J. Rev. C. 398; *Dela. St.* 1829, 165; *Rev. St.* 292.

(a) The action brought (in South Carolina) was *trespass to try title*. This or some other similar remedy must of course, be requisite. In Indiana, if the widow enter upon *any other lands*, than "the mansion-house and messuage thereunto belonging," and apply the proceeds to her own use, she is a wrongdoer, and liable to the owner for the rents and profits. 4 Blackf. 331. See *Taylor v. McCrackin*, 5 Blackf. 261; *Stokes v. McAllister*, 2 Misso. 163. In Arkansas, the heir is required to assign dower *as soon as possible*. *Rev. Sts.* 340.

and judgment shall be given against the heir alone. Thus, if the heir is vouched as having assets in the same county, which the demandant acknowledges, judgment shall be against the heir; otherwise against the tenant, and for him *over in value*. If the heir has assets in the county only in part, the judgment is conditional.(1)

29. The right of the heir to assign dower is not impaired by the statutory provisions for such assignment, which exist in all the States, and will be hereafter mentioned.(2)

30. As has been already intimated, the widow may maintain an action for her dower, where it has not been voluntarily assigned her, against the heir, or the tenant or immediate owner of the freehold. If no dower has been assigned, the form of action is a writ of dower, *unde nihil habet*; if it has been assigned in part, a *writ of right of dower*, which lies also in the former case.(3) The writ *unde nihil habet* is the only one provided in Massachusetts, Maine, Virginia, (it seems,) and Kentucky. In New Hampshire, an action of dower lies, in one month after demand, upon the party seized of the freehold, if in the State; otherwise upon the tenant. The proceedings in such suit are similar to those upon a petition for dower in the Probate Court.(4)

31. The writ "*unde nihil habet*," lies only against a tenant of the *freehold*.(5)(a)

32. A suit for dower in most of the States may always be brought at the election of the widow, and it is the only remedy, where the right is not conceded, but dower is claimed in lands of which the husband was *not seized* at his death; as, for instance, those which he conveyed or mortgaged, without her signature to the deed. And, if he conveyed different parcels to several persons, the widow shall be endowed proportionally from each, and they cannot be joined in suit. So it has been held in Kentucky, that the Probate Court cannot assign dower in an *equitable* estate.(b) But, if a mortgagee of the husband assent to an assignment by the Probate Court, although it has no jurisdiction in

(1) Co. Lit. 39 a, n. 6.

(2) Moore v. Waller, 2 Rand. 418.

(3) 4 Dane, 665, 672; Stearns on R. A. 300

(4) Mass. Rev. St. 616; 1 Smith's St. 168;

1 Ky. R. L. 573; N. H. Rev. St. 412.

(5) Miller v. Beverly, 1 Hen. & M. 368; Hurd v. Grant, 3 Wend. 340.

(a) In New York, ejectment to recover dower will lie against a tenant who has an estate or interest less than a freehold, and before dower has been assigned. *Ellicott v. Mosier*, 11 Barb. 574.

Such action must be brought against the actual occupant, if any. *Ib.*

A verdict in a real action, as of dower, in favor of one of several defendants, on his separate plea, will not avail another who has suffered a default. *Lecompte v. Wash*, 9 Mis. 551. With regard to the *description* of the property in which dower is claimed, in an action for dower, if the writ claims dower in the *whole*, while the evidence shows title to it in only *moiety* of the premises, the demandant will recover. *Hamblin v. Bank, &c.*, 1 Appl. 66. A vendor, by articles, before making a deed, and while any part of the consideration remains due, is so far tenant of the freehold, as to make him a proper party to the action of dower *unde nihil habet*. *Jones v. Patterson*, 12 Penn. 149. See *Shawe v. Boyd*, *Ib.* 215.

It seems, *non-tenure* is a good plea in bar. *Casporus v. Jones*, 7 Barr. 120. In Maine, it must be pleaded in abatement. *Manning v. Laboree*, 33 Maine, 343. If the defendant in a suit for dower, buy an outstanding title after suit is brought, this is no defence. *Ib.* See Taylor, 3 Harr. Dig. (Suppl.) 716. A declaration for dower need not show the forfeiture of the demandant, or the possession of the defendant. *Foxworth v. White*, 5 Strobb. 113.

(b) So, the county courts cannot try a *contested claim* of dower; they can only assign dower where the right is conceded. *Garris v. Garris*, 7 B. Mon. 461. *Murphy v. Murphy*, *ib.* 232.

So, in Mississippi, the proper remedy for one who resists a claim of dower on the

such case, the assignment will be good. Without such assent, it would be absolutely void.

33. If the widow resorts to an action, the assignment is made upon execution, by the sheriff, and, in general, upon a *view*. Hence, a description by metes and bounds in the writ is unnecessary. In Illinois such description is given in the judgment upon petition, and in Kentucky, in the judgment upon a writ of dower. In Delaware, no view is granted. And in New York, it is not, of course, allowed, but only upon affidavit, for cause.(1)(a)

34. By virtue of the ancient statute of Merton, 20 Hen. 3, in a suit for dower, the widow may have judgment for damages from the husband's death, as well as for the land; but only where the husband died seized. As against an alienee, they are recovered from the time of demand and refusal. This principle has been adopted by statute in Wisconsin, Pennsylvania and Kentucky, (where the statute of Merton seems to be literally copied,) and was settled by an early decision, and is now adopted by statute, in New York.(b) So in New Jersey.(c) So the statutes of Merton and Westminster, respecting dower, have always been in force in Delaware.(d) In Maine, New Hampshire and Rhode Island, damages are recovered only from demand. In Indiana, damages are recovered from a demand, unless there is a minor heir. In Missouri,(e) damages are recovered to the time of trial.

(1) *Sheafe v. O'Neil*, 9 Mass. 9; Ind. Rev. L. 236, 7; Dela. St. 1829, L. 210; *Rintch v. Cunningham*, 4 Bibb. 462; *Fosdick v. Gooding*, 1 Greenl. 30; *Hawkins v. Dana*, 347; *Vischer v. Conant*, 4 Cow. 396; *Ostrander v. Kneeland*, 2 John. 276; *Nance v. Hooper*, 11 Ala. 552; Wisc. Rev. St. 334. Mass. 83; Ill. Rev. L. 236, 7; Dela. St. 1829, 164; Rev. St. 292; *Taylor v. Brodrick*, 1 Page, 4 Mon. 137; *Watkins*, 9 John. 245; *Pinkham v. Gear*, 3 N. H. 163; *Fisk v. Eastman*, 5, 243; Co. Lit. 34 b.; *Ayer v. Spring*, 10

ground of paramount title in himself, is ejectment: not in the Probate Court, nor in equity, for an injunction against the probate decree. So, the widow's remedy, if she is out of possession, is ejectment. *Pickens v. Wilson*, 13 S. & M. 691.

In the latter case, the Probate Court has jurisdiction, as between the widow and her husband's representatives, but its judgment cannot affect the rights of the person in possession, even though he appears and answers in the suit. *Bisland v. Hewett*, 11 S. & M. 164.

(a) The demand of an assignment of dower, claimed dower "in certain real estate, situate in G B, of which my husband, A, was seized during his marriage with me, or in the land conveyed by B and wife to A, by deed bearing date February 22, 1830, recorded at G B, book 65, p. 211, and which land was conveyed by A and you in common, and now all of it held by you." The deed referred to was a conveyance by B, in which B's wife merely released her dower. Held, the description was sufficiently certain. *Atwood v. Atwood*, 22 Pick. 283. In New Hampshire, the sheriff is commanded to give seizin of such part of, &c., with the appurtenances, as will produce a yearly income equal to such third on, &c., being the date of the husband's alienation or death. Rev. St. 412, 329.

(b) The husband is held to have died *seized*, though he mortgaged the land and the debt had become due, if there had been no entry nor foreclosure. *Hitchcock v. Harrington*, 6 John. 290.

(c) But it has been held in this State, that *tout temps prist* is a good plea for the heir or devisee of the husband, if he died seized, and he need not aver in his plea that he is heir or devisee. *Hopper v. Hopper*, 1 N. J. 543. But see 2 Ib. 715. But it is not a good plea for the husband's alienee, who is liable to damages from the husband's death. *Woodruff v. Brown*, 4 Harri. 246.

(d) In this State, interest may be recovered on arrears of an annuity given in lieu of dower, though there be a power of distress. *Houston v. Jamison*, 4 Harr. 330.

(e) Execution runs only against the land subject to dower. If the widow die before judgment, it is rendered for damages only. Misso. Sts. 232, 233.

In Alabama, from commencement of suit; but not in the Orphan's Court.(1)

35. In South Carolina and Ohio,(a) no damages are recovered. Interest, or rents and profits, are allowed in South Carolina,(b) where the husband died not seized. In Maine, the widow has one-third of the *rents* till assignment. Also, damages after demand.(c) In Virginia, she has an account of profits, as against a purchaser from the husband, only from the date of the subpoena. In Maryland, from a demand and refusal, and only in a court of chancery. In this State, an alienation by the widow of her right to dower, pending a suit for rents and profits, is a bar to such suit. In case of a partnership, there is no right of dower till the accounts are adjusted and the debts paid. The widow cannot, therefore, claim rents and profits from the husband's death. In Wisconsin, the widow recovers one-third of the profits from the husband's death, from the heir; from others, only from demand. If the heir alienate the land, he is liable to damages from the husband's death to such alienation, not exceeding six years, and not recoverable against both the heir and purchaser.(2)

36. In England, a widow cannot recover her dower without a previous *demand* for it. It is a good plea by the defendant, that he hath been always ready and yet is to render dower; because the heir holdeth by title, and doth no wrong till a demand be made, which manifestly distinguishes this case from other actions for recovery of land and damages. And it is said the widow shall have no damages where, before assignment, she has had the use of the land, as where she has an estate for years.(3)

37. In general, a previous demand is necessary to maintain an action for dower in the United States. Otherwise in New York; and even damages may be recovered without demand. But the plea of "*tout temps prist*," is a good defence against the claim for damages. By the

(1) 4 Kent, 64; Co. Lit. 32 b; N. H. Rev. St. 412; Embree v. Ellis, 21 John. 119; Purd. Dig. 221; Sharp v. Pettit, 3 Yea. 38; Marshall v. Anderson, 1 B. Mon. 198; Layton v. Butler, 4 Harring. 507; McClanahan v. Porter, 10 Mis. 746; Rankin v. Oliphant, 9, 239; Beaners v. Smith, 11 Ala. 20; Smith v. Smith, 13, 329; 1 N. J. Sts. 397; 1 N. Y. Rev. St. 742; 1 Smith, (Maine,) 169; N. H. L. 88; R. I. L. 189; Ind. Rev. St. 240; 1 Ky. Rev. L. 574; 5 Mon. 283. See Davis v. Logan, 9 Dana, 186; McElroy v. Wathen, 3 B. Mon. 137; Ganton v. Bates, 4, 367; Sea-

ton v. Jemison, 7 Watts, 533; Wisc. Rev. Sts. 335; Francis v. Garrard, 18 Ala. 794.

(2) Heyward v. Cuthbert, 1 McC. 386; Wright v. Jennings, 1 Bai. 277; McCreary v. Cloud, 2, 343; Rickard v. Talbird, Rice, 158; Bank, &c. v. Dunseth, 10 Ohio, 18; Me. Rev. St. 392; Tod v. Baylor, 4 Leigh, 498; Steiger v. Hillen, 5 G. & J. 121; Tellman v. Bowen, 8, 333; Kiddall v. Trimble, 1 Md. Ch. 143; Goodburn v. Stevens, Ib. 420; Wisc. Rev. Sts. 335.

(3) Co. Lit. 33 a, and n. 3.

(a) The commissioners for assigning dower appraise the yearly value of the land, from the date of the petition to that of the assignment, and one-third of the amount, deducting any improvements by a purchaser from the husband, is decreed to the widow. Ohio St. 1842, 6.

(b) So, although the widow has been put to her election whether to take dower, or under her husband's will. Woodward v. Woodward, 2 Rich. Eq. 23. Where commissioners assess a sum of money in lieu of the widow's dower, in lands of which her husband died seized, she is entitled, in equity, in addition to the sum assessed, to one-third of the mesne profits from the death of her husband until the return of the commissioners is confirmed, and to interest on the sum assessed, from the time the return is confirmed until the money is paid. Ib.

(c) Where the demandant in a suit for dower dies, her executor, &c., may recover damages. Me. St. 1852, 255.

statute of New Jersey, the heir of a husband, who dies seized, is obliged to assign dower without demand, and is liable to damages for neglect to assign.(1)

33. A demand for dower may be *by parol*, and need not be in presence of witnesses. An agent may make it without written power of attorney, and elsewhere than on the land. It should describe the land with reasonable certainty,(a) and be made upon him who is tenant of the freehold at the time of demand, though he were not such tenant at the death of the husband.(2)

39. In Indiana,(b) if the heirs, &c., reside out of the county where the major part of the lands lie, or any of them are minors without a guardian, a demand is unnecessary. A similar provision is made in Illinois.(3)

40. In New York, if the tenant of the freehold assign during quarantine, no costs shall be recovered in an ejectment for dower. But if, after quarantine, he offer to assign, though before suit brought, costs are allowed (4) In South Carolina, the heir or other owner must pay the cost of assignment, whether by his own act or process of law, even though he return to the summons that he was ready and offered to assign before it was issued.(5)

41. Dower is an important subject of *equity* jurisdiction; which has become so common a resort for the enforcement of this claim, (in England,) that a distinguished judge remarked, that writs of dower had almost gone out of practice. This jurisdiction was never questioned for all purposes of mere *discovery*. The difficulty of obtaining access to title deeds in the hands of the heir; of ascertaining the precise lands from which dower is to be assigned, and their relative value; and of procuring a fair assignment of one-third of the estate; presents a strong case for the interposition of Chancery, to remove all impediments in the way of the legal title. And although the further power of *relief* was formerly doubted, it is now fully settled that equity has in all cases concurrent jurisdiction, through commissioners or otherwise, actually to assign dower, unless the title is disputed, and then it sends the case to an issue at law. If the estate is merely equitable, Chancery is said to have *exclusive* jurisdiction. In Maryland, although the limita-

(1) Hopper v. Hopper, 2 N. J. 715.

(2) Jackson v. Churchill, 7 Cow. 287; Hitchcock v. Harrington, 6 John. 290; Baker v. Baker, 4 Greenl. 67; Bear v. Snyder, 11 Wend. 592; Leavitt v. Lamprey, 13 Pick. 382; Page v. Page, 6 Cush. 196;

Haynes v. Powers, 2 Fost. (N. H.) 590;

Watson v. Watson, 1 Eng. L. & Equ. 371.

(3) Ind. Rev. L. 209-10; Illin. Rev. L. 238.

(4) Yates v. Paddock, 10 Wend. 528.

(5) Harshaw v. Davis, 1 Strobb. 74.

(a) A demand, made by an attorney in fact, in virtue of a power authorizing him, for the constituent, and in her name and behalf, to demand her just dower to be assigned to her, "in any and all of the before-mentioned premises, or any other," no premises whatever being mentioned, is insufficient; although such authority is ratified by a second power of attorney, in which she recites the former, and authorizes the attorney to commute for and settle all her claims of dower *in the premises*, no premises being described. Sloan v. Whitman, 5 Cush. 532.

In Massachusetts, the demand must be a *personal* one; and if there are more tenants than one of the freehold, it must be made on each of them. Burbank v. Day, 12 Met. 557. A written demand upon all, served by a sheriff, by a copy delivered to one, and copies left at the dwellings of the others, is insufficient. *Ib.*

(b) In this State, the petition for dower must allege a demand. Boyers v. Newbanks, 2 Cart. 388.

tion above named was formerly recognized, it seems to be now disclaimed, and the Court of Chancery asserts its full concurrent jurisdiction with other courts, to settle even a disputed legal title.(1)(a)

42. It was remarked by Lord Alvanley, then Master of the Rolls, in a case which has been called "the pole-star of the doctrine," that a dowress stands on the same footing as an infant, in the view of equity, and that it would be unconscientious to turn her over to law for the recovery of a provision necessary to her immediate subsistence, when she has been compelled to resort to equity for discovery.(2)

43. In some respects, Chancery gives a relief more perfect than can be obtained at law. Thus, although at law the widow recovers damages from the time of demand, yet, if either she or the tenant dies before they are assessed, they are thereby lost.(b) While equity, although awarding no damages *as such*,(c) in this case as in all others, will order an account of rents and profits from the husband's death, if he died seized. In England, by a recent act, and also in New York, such account is limited to two years previous to commencement of suit. The rents and profits go to the executor, not to the heir, of the widow.(3)

44. But though, in favor of the widow, the interposition of Chancery may sometimes be peculiarly requisite in cases of dower, yet, in general, equity follows the law, the parties are to stand on their legal rights, and nothing will be effectual as a bar of dower in equity which would not be such at law, unless there be fraud and imposition, or some counter equity against the widow's claim. Thus, equity will not cure any defect in the form of a release of dower. So courts of equity will not permit an equity to be interposed to defeat the dower. But where the widow applies for equitable relief, she cannot resist an equitable defence, as against a purchaser for a valuable consideration, who is igno-

(1) *Wild v. Wells*, Tothill, 145; *Goodenough v. Goodenough*, Dickens, 795; *Swain v. Perine*, 5 John. Cha. 482; *Herbert v. Wren*, 7 Cranch, 370; 1 Story on Equity, 576-7-8; *Powell v. Monson, &c.*, 3 Mas. 347; *Wells v. Beall*, 2 Gill. & J. 468; *Steiger v. Hillen*, 5 Gill & J. 127; *Grayson v. Moncure*, 1 Leigh, 449; *Kendall v. Honey*, 5 Monr. 284; *Stevens v. Smith*, 4 J. J. Mar. 64; *Badger v. Bruce*, 4 Paige, 98; *London v. London*, 1 Humphrey, 1; *Le Fort v. Dela-*

field, 3 Edw. 32; *Scott v. Crawford*, 11 Gill. & J. 379; *Marshall v. Anderson*, 1 B. Monr. 198; *M'Mahan v. Kimball*, 3 Blackf. 12; *Blain v. Harrison*, 11 Illin. 384; *Kiddell v. Trimble*, 1 Md. Cha. 143.

(2) 1 Story, 579; *Curtis v. Curtis*, 2 Bro. Cha. 620, 630, 634.

(3) 1 Story, 577; *Johnson v. Thomas*, 2 Paige, 377; 4 Kent, 70 and n. 2; *Coons v. Nall*, 4 Lit. (Ky.) 264.

(a) But, where the husband's seizin is disputed, it is usual to send the case to law. *Tellman v. Bowen*, 8 Gill. & J. 333. On the other hand, equity may be called upon to interfere by injunction with a suit at law for dower. But this it will not do, except in case of some forfeiture or bar of dower, not proveable at law, but only in equity. There must have been something received by the widow, which was both paid and accepted as an equivalent for dower. *O'Brien v. Elliot*, 3 Shepl. 125. Where a bill for dower is filed against a purchaser from the husband, who files a cross bill for indemnity, (on his covenants,) the former will be continued, to abide the result of the latter. *Lawson v. Morton*, 6 Dana, 471.

(b) It has been seen that this defect in the law has been remedied in some of the States.

(c) Otherwise in Tennessee. *London v. London*, 1 Humph. 1. It is held in Maryland, that equity alone can give damages against an alienee of the husband, *Kidall v. Trimble*, 1 Md. Cha. 143. A suit in equity does not lie for rents and profits, after an unsuccessful suit at law. *Ib.* In Alabama, damages are allowed on the ground of title, and interest upon the arrears. *Beavers v. Smith*, 11 Ala. 20.

rant of her claim.(1) So there can be no dower in equity, unless the husband was seized during coverture.(2)

45. Whether Chancery will sustain a bill for discovery and relief, in favor of a widow, against a purchaser of the land for valuable consideration and without notice, is a doubtful point (3)

46. Generally speaking, in America, fewer cases occur in regard to dower, in which the aid of a court of equity is wanted, than in England, from the greater simplicity of our titles, the rareness of family settlements, and the general distribution of property among all the descendants in equal or nearly equal proportions. Such instances, however, sometimes occur. As where the husband was a tenant in common, and a partition, account or discovery is rendered necessary. So where the lands are held by various purchasers; or the relative values are not easily ascertainable, as in the case when they have become the site of large manufacturing establishments; or where the right is affected with numerous or conflicting equities.(4)

47. In New Jersey, although possessing a court with full Chancery powers, dower was formerly considered as exclusively within the cognizance of the common law courts, except for discovery. By a late statute, however, Chancery jurisdiction upon this subject is distinctly recognized.(5)(a)

48. In the United States, suits for dower both at law and in Chancery are comparatively of rare occurrence. The statute law of all the States provides a summary mode for obtaining an assignment of dower, by application or petition to the Prerogative, Probate or Orphan's Court, having jurisdiction of the estates of persons deceased.(b) The assignment is made by commissioners or a special jury, after notice to all parties interested.(c) It has already been stated that this course can in general be resorted to, only where the husband died seized of

(1) *Powell v. Monson, &c.*, 3 Mas. 360; *Maybury v. Brien*, 15 Pet. 21; *Blain v. Harrison*, 11 Illin. 384. See *Egbert v. Thomas*, 1 Cart. 393.

(2) *Dennis v. Dennis*, 7 Blackf. 572.

(3) 1 Story, 585.

(4) *Ib.* 587.

(5) *Harrison v. Eldridge*, 2 Halst. 401-2; N. J. St. 1845, 92.

(a) The courts of chancery, in Arkansas, have jurisdiction in matters of dower, especially where the lands lie in different counties; notwithstanding the jurisdiction given to the probate courts. *Menifee v. Menifee*, 3 Eug. 9.

Where the husband was joint tenant, held, the widow, in a bill in equity for dower, against the administrator, might unite the other tenant, or, in case of his death, his heirs, as defendants, so that the lands might be divided, and her dower assigned. *Ib.*

When, on a bill in equity for dower and the settlement of accounts between a widow and the administrator, it appears that she has retained a gold watch belonging to her husband; the court may allow her to keep the watch, and charge her with its value. *Ib.*

(b) In Massachusetts, this mode of assignment, though immemorially practiced, is said to have been authorized merely by an *inference* from certain statutes. *Sheafe v. O'Neil*, 9 Mass. 10-1. A judge of probate has no authority, under Massachusetts Revised Statutes, c. 60, s. 3, to assign dower in *mortgaged* lands. *Raynham v. Wilmarth*, 13 Met. 414. By a late statute, (1850, 343,) where a testator provides by his will, that his widow shall have the use and improvement of an undivided part of his real estate for her life or widowhood; the Probate Court may set off her interest, as in case of dower.

(c) Notice to the administrator, of proceedings in the Probate Court (under Rev. Sts. of Michigan, 1828, c. 2, p. 262) for assignment of the widow's dower, is not necessary. *Campbell*, 2 Doug. 141.

the land from which dower is claimed, and the widow's right to dower is not disputed by the heirs or devisees.(1)

41. In Ohio, it is said, probably no *action* for dower will lie, but the only two modes of obtaining it, are a voluntary assignment by the heir, &c., and a petition; and the latter is the only method, where the land is incumbered. In Wisconsin, the writ of dower is abolished.(2)

50. In Vermont and Michigan,(3)(a) it is provided that the widow may recover her dower *as the law directs*. Under this clause, an action for dower may undoubtedly be maintained, although in Vermont subsequent provision is made for an assignment by the Probate Court.

51. In New York,(4) the action of dower is abolished; but the remedy of ejectment is provided for the recovery of dower before assignment. In this suit, commissioners are appointed to make an admeasurement, and possession is given accordingly.(b) So in Illinois.

52. In Delaware,(5) provision is made for an assignment by the Orphan's Court; but the action of dower is also recognized and regulated.

53. In Pennsylvania,(6) the question has arisen, how far the common law remedy for recovery of dower had been superseded by the statutory provisions for an assignment in the Probate Court. The action was a writ of dower *unde nihil habet*. The husband had been a tenant in common with the defendant. It was contended by the counsel for the latter, that the common law right of dower was abrogated by the statute law, which had created an estate for the widow *in lieu* of dower; and that no remedy therefore would lie for its recovery, except that expressly provided. On the other hand it was contended for the plaintiff, that such a construction would impair the right of a trial by jury. The court held, that although the right of the widow was given by statute, yet this was merely declaratory or in affirmance of the common law; that in this case of tenancy in common, the Probate Court would have no jurisdiction; neither could the widow maintain a writ of partition; and therefore the action brought was her only remedy. Judgment for the plaintiff.(c)

54. A testator ordered that the residue of his estate, except a house devised to his wife in addition to her dower, should descend as if no will had been made. Held, the widow could not maintain an action

(1) Mass. Rev. St. 409; 4 Kent, 72. See *Stiver v. Cawthorn*, 4 Dev. & B. 501; Me. Rev. St. 451. In Mississippi, the Probate Court is said to have full jurisdiction of the claim of dower in all cases. *Caruthers v. Wilson*, 1 Sm. & M. 527.

(2) Walk. Intro. 326; Wisc. Rev. Sts. 586.

(3) 1 Vt. L. 132, 158; Mich. L. 30.

(4) 2 N. Y. Rev. St. 303, 343; Illin. St. 1838-9, 227-8.

(5) Dela. St. 1829. 164, 168; Rev. Sts. 292.

(6) *Brown v. Adams*, 2 Whart. 188. But see *Bratton v. Mitchell*, 7 Watts, 113; also *Rittenhouse v. Levering*, 6 Watts & S. 190.

(a) By the Revised Statutes, if not assigned in 30 days from demand, she may bring a writ of dower. Rev. Sts. 263.

(b) The action is brought against the actual occupant; or, if none, against the party owning or interested in the land. *Sherwood v. Vandenburg*, 2 Hill, 303. A proceeding for dower, under the Code of New York of 1848, may be regarded as a substitute for the former remedy by petition or bill; and will lie, though the defendant, being seized, is not in actual possession, and six months have not elapsed since the death of the husband. *Townsend v. Townsend*, 2 Sandf. 711.

(c) In Maine, before assignment of dower to the widow of a tenant in common, partition must be made. Me. Rev. St. 451.

of dower. If the land descended, the will being void, exclusive jurisdiction vested in the Orphan's Court; if it passed under the will, the widow was a purchaser, and her remedy was by ejectment.(1)

55. It may perhaps be safely said, that the remark, made in New York and South Carolina, is equally applicable in most of the other States; namely, that "the acts (concerning assignment of dower) are made, not to vary the right to dower," (or supersede the old remedy,) "but to institute a more easy and certain mode of obtaining it."(2)(a)

56. This method of obtaining an assignment of dower partakes of the nature of a *suit* in different degrees in the several States. The proceeding is usually termed a *petition*, but in Vermont(3) a *complaint*. It is in fact everywhere, and in North Carolina and Alabama(4) expressly declared to be, in its nature, *summary*.

57. In most of the States, the return of the commissioners appointed by the court to make the assignment, is not made the foundation of a judgment, upon which execution issues; but only gives a *right of entry*, or vests a title in the widow, which authorizes her to enter, and which she may maintain, if necessary, by a subsequent suit for possession. Neither are damages ordinarily allowed in this course of proceeding. Its chief object is, to prevent difficulty and contention between the widow and the heir or tenant, as to the just extent or ascertainment of her dower.(5)

58. In New York, the proceedings before the surrogate, for admeasurement of dower, are no evidence of *title*, in ejectment, but merely of *the location* of the land; but as to this they are conclusive. But commissioners for assigning dower have the same powers as the sheriff under an execution; and are not confined to a mere assignment by metes and bounds, but may exercise a discretion, and assign dower, for example, in *mines*, and such assignment may be enforced by the surrogate.(6)

59. A record of the assignment of dower in the Court of Probate, is presumptive evidence that the assignment was made upon the petition, and with knowledge, of the widow, such being the usual course, and the proceeding being for her benefit.(7)

60. But in some parts of this country, particularly the new Western States, a mere petition for dower, which may be called *amicable* at its in-

(1) Thomas v. Simpson, 3 Barr. 60.

(2) Yates v. Paddock, 10 Wend. 528; Scott v. Scott, 1 Bay, 507.

(3) 1 Ver. L. 158.

(4) Alab. L. 259; 1 N. C. Rev. St. 614; Ark. Rev. St. 340-1.

(5) Williams v. Morgan, 1 Lit. 167; Martha Watkins, 9 John. 245.

(6) Jackson v. Dewitt, 6 Cow. 316; Miller v. Hixon, 17 John. 123; Coates v. Cheever, 1 Cow. 460. See White v. Story, 2 Hill, 543.

(7) Tilson v. Thomson, 10 Pick. 359.

(a) In Massachusetts, and probably elsewhere, the Probate Court has *exclusive* jurisdiction, only where the provisions of the law on the subject can be enforced by no other tribunal. In other cases, it has merely concurrent jurisdiction, which is taken away by the previous commencement of proceedings in another court. Stearns v. Stearns, 16 Mass. 171. See as to assignment of *devised lands*, St. 1839, 124. In Alabama, it is held that the statutory method of assigning dower is merely *cumulative*; and though such assignment be irregularly made, yet it is binding, if assented to by the wife, especially if she has had possession, and there is no fraud. Johnson v. Neil, 4 Alab. N. S. 166. The common law courts have jurisdiction of a claim for dower by the widow of a tenant in common, dying seized of a fee-simple in one-third of the lands, and a fee-simple determinable by executory devise in one-sixth. Evans v. Evans, 9 Barr, 190.

ception, assumes in its progress the character of an adverse and compulsory suit.

61. In Missouri,(1) where the widow is deforced of her dower, or cannot have it without a suit, or an assignment is made unfairly, or none is made for twelve months from the husband's death; she may bring a suit, and shall recover damages, from the death of the husband, if he died seized—otherwise from demand. It lies against any one in possession, or claiming an interest, or who deforces her. The suit is in form a petition, and the assignment made by commissioners; but a writ of possession issues. A "writ of dower," however, may still be brought.(2) In New Jersey, the right of suing is given in the same words. The time is limited to forty days.(3)

62. In Vermont, after the return of the commissioners who assign dower, "said dower shall remain fixed and certain," and all parties concerned shall be concluded.(4)

63. In South Carolina,(5) the form of application for dower is a *petition* to a common law court, which issues a *writ for admeasurement* to commissioners. They are sworn to "put the widow in full and peaceable possession," and return a plat of the land with their doings, which become matter of record, and are "final and conclusive."

64. In New York,(6) where an ejectment is provided for the recovery of dower, commissioners are appointed to admeasure dower, and possession is given by them; but (it seems) no writ of possession issues. After admeasurement, the widow may have ejectment for the specific lands assigned to her.

65. In the same State, it seems, if the land in which dower is claimed was alienated by the husband, such alienation and the value at that time are not subjects of inquiry upon trial of the ejectment, but are to be brought before the commissioners for admeasurement. So, a *settlement* made upon the wife in lieu of dower is not to be inquired into before the surrogate; but set up in defence to any action for the land which may be assigned to her. Nor have the admeasurers a right to consider any post-nuptial conveyance by the husband to the wife.(7)

66. In Delaware,(8) in the action of dower, the court appoint commissioners, whose return is conclusive, and the foundation of a writ of possession and a final judgment for damages and equitable costs.

67. Ordinarily, the assignment of dower is founded on an application made by the widow herself.

68. But in Indiana, Virginia, Connecticut and New York, it may be done on application of the heirs; in Illinois, Michigan and Vermont, of any party interested; in Missouri, of the heir, legatee, guardian, executor, &c., or a creditor of the widow or her second husband.(a)

(1) Misso. St. 229-30-1-2. See Peake v. Redd, 14 Mis. 79.

(2) Misso. St. 231-2.

(3) 1 N. J. Rev. C. 397.

(4) 1 Ver. L. 158.

(5) Scott v. Scott, 1 Bay, 504; 1 Brev. Dig. 270.

(6) 2 N. Y. Rev. St. 303, 343; Borst v. Griffin, 9 Wend. 307; Ward v. Kilts, 12, 137. See Code, 1851, 12.

(7) Hyde v. Hyde, 1 Wend. 630.

(8) Dela. St. 1829, 164-5; Rev. Sts. 292; Doe v. Carrol, 18 Ala. 148.

(a) In this State, the widow and children may join in a petition for assignment of dower and distribution of shares, where lands lie in different counties. Commissioners are appointed, but cannot act, if a division is impracticable. St. 1838, 40. In Maryland, a

In Missouri there shall be no damages. In New Jersey, the guardian of an heir may apply for admeasurement.(a) A purchaser of the widow's right cannot claim an assignment, the sale being void; and though made with the consent of the heir or his guardian, the proceeding is *coram non judice* and void. In Alabama, a purchaser from the husband may claim an assignment in equity. In the same State, if the widow occupies the husband's dwelling-house, the owner of the fee is bound to move for an assignment of dower.(1)

69. In Tennessee and Ohio, where the heirs of one deceased pray partition, dower shall first be assigned from the whole land. So in Ohio, where land is directed to be sold by administrators.(2)

70. In Missouri, one interested in the estate, and not made party to a suit for dower, may after assignment have an action against the widow for *admeasurement* of dower; alleging either that she was not entitled, or an undue assignment. If the latter is proved, the court shall assign anew, and award a writ of possession.(3)(b)

7. The time, after which the widow is entitled to have an assignment of dower, is variously established in the different States. In Vermont and Connecticut, sixty days from demand. In Michigan, thirty days. In New Hampshire, Rhode Island, Maine, Massachusetts, Indiana and Illinois, one month. In Missouri, twelve months from the husband's death. In New York, six months from the time the right accrued.(4)(c)

72. With respect to the time within which a suit for dower must be commenced, by the English law, such suit has been held not to be within the ordinary statutes of limitation. The same principle has been adopted in New Hampshire, Georgia and Kentucky, and, with regard to suits in equity, in Maryland,(d) although lapse of time may bar a

(1) Siglar v. Van Riper, 10 Wend. 419; Ind. Rev. L. 210; Illin. do. 238, Misso. St. 231; Moore v. Waller, 2 Rand. 418; 1 N. J. Rev. C. 399; Shields v. Batts, 5 J. J. Mar. 15; Jackson v. Aspell, 20 John. 411; Mich. Rev. St. 263; Conn. St. 189; Verm. Rev. St. 290. See Bancroft v. Andrews, 6 Cush. 493.
(2) Ten. St. 1823, 46; Walk. Intr. 327.
(3) See Swan. 299.
(4) (b) 3 Misso. St. 232.
(c) 1 Vt. L. 158; N. H. L. 187; R. I. L., 189; Smith's St. 168; Crocker v. Fox, 1 Root, 227; Ind. Rev. L. 209; Illin. do. 236; Misso. St. 229; Mass. Rev. St. 616; 2 N. Y. R. S. 303; Mich. Rev. St. 263.

commission to assign dower may issue, on petition of the widow in a creditor's suit. Simmons v. Tongue, 3 Bland, 344. So it may be done in such suit, without her being a party. Watkins v. Worthington, 2 Bland, 512. In Mississippi, a decree of dower without legal notice of the application therefor, is not binding upon the heirs. Muirhead v. Muirhead, 23 Miss. 97. In Alabama, upon petition of the widow, and citation to adverse parties, her right may be determined; and upon allotment being made, she is put in actual possession. Barney v. Frowner, 9 Ala. 101. Dower cannot be claimed from several alienees of the husband by the same petition. Ib.

(a) It seems, by an ancient English statute, 13 Ed. I. c. 7, the heir or his guardian might have a writ for admeasurement of dower. See 1 Ky. R. L. 86.

(b) Where dower has been assigned to a widow, on her petition to the county or superior courts of North Carolina, the heirs cannot have a re-allotment, on petition. If they have any remedy, it is not by petition. Bowers v. Bowers, 8 Ired. 247. In South Carolina, where a wrong summons had been served on a respondent in dower, for which reason he had neglected to appear and plead, all the other proceedings were set aside; for if the judgment were allowed to stand, it would stand as obtained through misrepresentation. Williams v. Lanneau, 4 Strobb. 27.

(c) In Arkansas, if dower is not assigned in one year from the husband's death, or three months from demand, the widow may file a petition in the Probate Court. Rev. St. 340-1.

(d) The act of 1839, limiting the application for dower to seven years from the husband's death, applies only to cases where the husband died after its enactment. Tooke v. Harde-man, 7 Geo. 20.

bill for an account. But by a recent English statute (3' and 4 Wm. IV. c. 27;) the time is limited to twenty years from the husband's death. In New York, a demand for dower is limited to twenty years from the husband's death, or the removal of certain disabilities. In Kentucky,(a) twenty years are held to be the limitation in Chancery. In Massachusetts, the only statutory limitation is not less than one month, nor more than one year, after demand. In South Carolina and New Jersey, the lapse of twenty years is a bar to the claim of dower. In Ohio, the lapse of twenty-one years.(1)

73. In Connecticut, lapse of time, though connected with other equitable grounds of defence, constitutes no bar to the claim of dower. Thus, fifteen years after the husband's death, his widow claims her dower. In the meantime, a creditor of one of the heirs had taken his share of the land, and the heir was insolvent. Held, she should have her dower without any reference to this incumbrance.(2)

74. A statute of limitation in common form is held inapplicable to dower, upon the ground that such statute contemplates the case of a seizin which once existed, and from the termination of which the statute begins to run. But a widow before assignment is not seized, and has no right of entry; nor would an entry be of any avail to her. Nor is she a tenant in common with the heirs. She may make a demand, and afterwards sue; or, neglecting to sue in the time prescribed, may make a new demand. Neither can the limitation run against her during the life of the husband; for she had then a merely future and contingent interest, and the allowance of such a limitation would render a conveyance by the husband, made twenty years before his death, a complete bar to her claim.(b) So, from an adverse possession of twenty years, the law will not presume a release of dower.(3) But it has been suggested in New Hampshire, that the circumstance of a great lapse of time might be left to the jury, as a ground for presuming a release of dower.(4)

75. A statute of limitation in regard to dower is not applicable to a case, where the husband died before the statute went into operation. But, in reference to such a case, it seems the statute runs from the time of its going into operation.(5)

76. A purchaser from the husband, recovering rents after his death,

(1) 4 Kent. 69; *Barnard v. Edwards*, 4 N. H. 107; *Wells v. Beall*, 2 Gill. & J. 468; *Wilson v. M'Lenaghan*, 1 M'Mul. 35; *Wakeman v. Roache*, Dudl. 123; *Berrien v. Conover*, 1 Harri. 107; *Tuttle v. Wilson*, 10 Ohio, 24; *Rickard v. Talbird*, Rice, 158; *Ralls v. Hughes*, 1 Dana, 407; 1 N. Y. Rev. St. 742; *Mass. Rev. St.* 616; *Kiddall v. Trimble*, 1 Md. Ch. 143; *Tooke v. Hardeman*, 7 Geo. 20; *Caston v. Caston*, 2 Rich. Eq. 1.

(2) *Crocker v. Fox*, 1 Root, 227.

(3) *Barnard v. Edwards*, 4 N. H. 107; *Moore v. Frost*, 3 Ib. 126; *Durham v. Angier*, 2 Appl. 242; *Parker v. Obeare*, 7 Met. 27-8. See *Ramsay v. Dozier*, 1 Const. S. C. 112; *Wells v. Beal*, 2 G. & J. 468; *Hogle v. Stuart*, 8 John. 104; 1 Swift, 85; *Spencer v. Weston*, 1 Dev. & B. 213; *Guthrie v. Owen*, 10 Yerg. 339.

(4) 4 N. H. 109.

(5) *Sayre v. Wisner*, 8 Wend. 661.

(a) Where the widow of one of the vendors was a claimant in the first instance of the surplus, the statute of limitations was considered to begin to run when her coverture ended. *Grundy v. Grundy*, 12 B. Mon. 269.

(b) Such is the reasoning of the court in New Hampshire. Whether a purchaser from the husband would in such case be regarded as holding under, or adversely to him. *Qu.*

is a *trustee* for the widow, and cannot avail himself of the statute of limitations.(1)

77. While the statute of limitations does not operate *against* the claim of the widow, on the other hand, it is held not to operate *in her favor*, as against the heirs of the husband. Thus, where a widow continued in possession, married anew, and with her second husband occupied over twenty-one years; held, the heirs of the first husband were not barred.(2) So, an informal assignment of dower, acquiesced in for twenty-one years, cannot be disturbed.(3)

78. The *death* of a widow before assignment of dower extinguishes her right. Her representatives have no right to recover its fruits.(4) So, where she dies after commencement of suit, the court will not allow entry of judgment as of a prior term.(5) Nor will they award damages even to an assignee of her right,(6) even though she died after judgment in her favor.(7) In Maryland, a statute provides that actions for dower shall not abate by the death of either party.(8)

CHAPTER XII.

ASSIGNMENT OF DOWER. WHAT SHALL BE ASSIGNED AND BY WHOM; AND THE EFFECT OF ASSIGNMENT.

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| 1. By metes and bounds or otherwise. | 19. Assignment against common right. |
| 3. Practice in the United States. | 21. Assignment of rent, &c. |
| 7. Value of land assigned. | 23. Assignment must be absolute. |
| 9. Assignment in common. | 24. Assignment by parol. |
| 12. Partition by husband. | 26. Assignment by guardian. |
| 13. Assignment by sheriff and commissioners. | 29. Implied warranty. |
| 15. Improper assignment by sheriff. | 30. Entry not necessary. |
| | 31. Assignment has <i>relation</i> . |

1. It is said that dower must be assigned *by the sheriff* by metes and bounds, or in certain closes by name, and that any other assignment is void. But the *heir* may endow the widow, generally, of the third part of all the lands whereof the husband was seized. And, if the lands were leased, the widow and lessee shall hold in common.(9)

2. And where the nature of the property does not admit of an assignment by metes and bounds, some other is allowed. Thus, if the property consist of a mill, the widow shall not be endowed of a separate third part, nor in common with the heir, but of the third toll-dish or of the whole mill for a certain time. So in case of mines. But from these dower shall be assigned by metes and bounds, if possible.(10)

3. This principle of the English law is adopted by the statute law

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| (1) Tellman <i>v.</i> Bowen, 8 Gill. & J. 333. | (8) Md. L. 407. |
| (2) Cook <i>v.</i> Nicholas, 2 W. & S. 27. | (9) Co. Lit. 32, b, and n. 1. |
| (3) Robinson <i>v.</i> Miller, 2 B. Mon. 287. See Johnson <i>v.</i> Neil, 4 Ala. N. 166. | (10) Coates <i>v.</i> Cheever, 1 Cow. 460. (This case (p. 480) contains a form of assignment in mines.) See Crouch <i>v.</i> Puryear, 1 Rand. 258; Heth <i>v.</i> Cocke, Ib. 344; Dunsett <i>v.</i> Bank &c., 6 Ohio, 76; Whaler <i>v.</i> Story, 2 Hill, 543; Smith <i>v.</i> Smith, 5 Dana, 179. |
| (4) 1 Knapp, 225; 4 Kent. 70, n. | |
| (5) Rowe <i>v.</i> Johnson, 1 Appl. 146. | |
| (6) Ib. | |
| (7) Atkins <i>v.</i> Yeomans, 6 Met. 438. See Sandback <i>v.</i> Quigley, 8 Watts. 460. | |

of nearly all the States, and undoubtedly practiced upon in all of them.(1)

4. In Massachusetts, in the case referred to, dower may be assigned in common. In Vermont,(a) Maine, New Hampshire and Rhode Island, where no division can be made by metes and bounds, *or the widow cannot be endowed of the premises*, she has one third of the rents and profits. In Kentucky, she may elect to have the property every third year, or one-third of the rents, &c.(2) In Alabama, an allotment of dower can be made, under the statute, only where it can be designated by metes and bounds.(3)

5. In Illinois(b) and Missouri,(4) where the commissioners for assigning dower report that a division will be injurious, a jury shall assess the yearly value, which shall be paid in lieu of dower. In Missouri, on failure of payment, execution issues. So for any arrears due at the death of the widow, in favor of her executors. A similar provision exists in South Carolina.(c) The valuation is either one-third of the annual income, or one-third of the whole value of the land for seven years; and where the commissioners returned one-third of the value of the entire fee, their return was set aside. In Georgia, if the property is within a city, village or public place of business, commissioners assign dower according to quantity or valuation, at their discretion. If otherwise, they assign with reference to shape and valuation.(5)

6. In New York, where the lands of one deceased are sold by order of court, if the widow will not accept a sum in gross in lieu of dower, one-third of the proceeds shall be invested for her benefit.(6)(d) In

(1) Illin. Rev. L. 238; Ind do. 210; Tenn. St. 1823, 46; Walk. Intr. 327; Mich. Rev. St. 263; Ark. Ib. 341-2; Wisc. Ib. 334.

(2) Mass. Rev. St. 409; N. H. Rev. St. 329; R. I. L. 189; Verm. Rev. St. 290; Hyzer v. Stoker, 3 B. Monr. 117; Ky. L. 1844, 16-17; 1 Verm. L. 153.

(3) Barney v. Frowner, 9 Ala. 901.

(4) Illin. Rev. L. 238; Misso. St. 231-3; Riley v. Clamorgan, 15 Mis. 331.

(5) 1 Brev. Dig. 271; 1 Bay, 504; Russell v. Gee, 4 Const. S. C. 254; Hayward v. Cuthbert, 2, 626; Ga. St. 1839, 148.

(6); 2 N. Y. Rev. St. .06; 4 Kent, 45; N. Y. St. 1840, ch. 177. See, also, N. J. St. 1845, 100.

(a) In this State, if the estate is insolvent, the widow and two-thirds of the creditors may agree on a provision in lieu of dower; which shall be valid, if approved by the court. Verm. Rev. St. 290-1.

(b) Where the widow remains in possession without assignment, there cannot be a partition on sale of the whole premises. Bonham v. Badley, 2 Gilm. 622.

(c) In Alabama, where a compensation for dower is made in money, the decree should be, not for a gross sum, based on the estimated value of the widow's life estate, but for the annual payment of the annual value of the dower interest during the life of the dowress, secured by a lien on the estate. Beavers v. Smith, 11 Ala. 20.

Where an assignment cannot be made of a portion of the premises, the interest of one third part of their value at the time of alienation, is a just criterion. Ib.

Where the principal value, in such case, consists of buildings, which require an annual outlay to keep them in repair, whether the dowress should contribute her portion of the expenses. *Quære*. Ib.

(d) The statute upon this subject is applicable, though the marriage and seizin were long prior to its enactment; and is not for this reason inconsistent with the constitution of the United States or the State; as dower arises, not by contract, but by operation of law. Lawrence v. Miller, 1 Sandf. 516. Such sale may be made, though dower has been assigned in equity. Ib. And a sale will pass a title to the lands so assigned, as well as those for which she has merely a right of action. Ib. But it is held, that where the estate is an entire farm, and dower has been assigned; the sale should be of the whole farm, subject to the widow's life estate in a portion of it. Maples v. Howe, 3 Barb. Ch. 611.

In a suit for partition, the contingent or inchoate right of dower was determined by a master under order of the court, by virtue of the New York Statute, passed April 28, 1840,

Maryland, (1)(a) upon such sale by application of the heirs, the dower land shall be reserved, unless the widow consent to a sale of the whole, she receiving a share of the proceeds, not more than one-seventh, nor less than one-tenth. In Pennsylvania,(2) where partition of an estate cannot advantageously be made, and the whole is therefore assigned to one or more heirs, the widow shall receive for her dower an annual sum, which shall remain charged upon the land as a rent, to be apportioned among such heirs. If, for want of an assignment to one heir, the land is sold, the purchaser shall retain one-third or one-half (according to circumstances) of the purchase-money, which shall be a charge on the land for payment of the interest to the widow. The right of the widow to her annuity, in lieu of dower, is personal to herself, and does not pass by *subrogation* to one of several heirs, who has paid more than his share, nor can the widow exercise her right of *distress* more than once.(b)

(1) 2 Md. L. 520.

(2) *Purd. Dig.* 407-12-15; *Mentzer v.* { *W. & S.* 400; *McCarthy v. Gordon*, 4 *Whart.*
Menor, 8 *Watts*, 296; *Shouffler v. Coover*, 1 { 321. See *Beeson v. McNabb*, 2 *Barr*, 422.

and the same was paid into court. After the death of the wife, the husband petitioned to have the money paid to him. Held, that the sum estimated by the master was the present worth of the wife's dower, and was absolute and personal, and that on her death the husband was entitled to it *jure mariti*. *Bartlett v. Janeway*, 4 *Sandf. Ch.* 396.

Dower cannot be assigned in a proceeding for partition. *Tanner v. Niles*, 1 *Barb.* 560.

A purchased the shares of some of the tenants in common of a farm, while a suit in equity for a partition was pending. The decree directed a sale. A having deceased, his widow was held entitled to dower in the proceeds. *Church v. Church*, 3 *Sandf. Ch.* 434.

A purchased the land, and entered, but died before receiving a deed, or paying the whole of the purchase-money. Held, his widow had an inchoate right of dower, subject to the payment of the residue of the purchase-money. *Ib.*

Exceptions having been taken by the creditors, the widow was exonerated from defraying any portion of the costs of the proceedings. *Ib.*

In Wisconsin, where the court orders a sale, the executor, &c., may contract with the widow to receive a certain sum in lieu of dower. *Wis. St.* 1853, 78-9.

(a) In this State, the widow may agree with the heir, &c., in lieu of an assignment of dower, that he shall lease the lands and pay her one-third of the rent; and she may maintain assumpsit against him therefor. *Marshall v. McPherson*, 8 *Gill & J.* 333. Dower shall be assigned before partition; but, if the widow consents to a sale by a writing filed in court, the land is sold free of dower, and she receives a share of the price. *Md. St.* 753.

A widow having been held entitled to an allowance from the proceeds of sales of partnership lands, in lieu of dower, the husband having died in 1825, and the sale not being made till 1845; held, the age of the widow at the husband's death should be taken in fixing her allowance under the Chancery rule. *Goodburn v. Stevens*, 1 *Md. Ch.* 420.

(b) Where an administrator, under a decree of court, conveys property contracted to be sold by his intestate, the price is personalty, and the widow, who releases her dower, has one-third absolutely. *Drenkle's Estate*, 3 *Barr*, 377.

If the purchaser agreed to take the land incumbered with her title, she could have claimed both her dower and a third of the proceeds. *Per Gibson*, C. J., *ib.*

Where the husband was a tenant in common, if no partition is made within a year, the widow's dower is charged upon the whole land. If partition is subsequently made, it may be charged on his share alone. In case of sale, her interest shall be protected. *Penns. St.* 1843, 360.

In Florida, where lands, from which a widow was dowerable, are converted into money, the money should not be ordered to be put out at interest, by a master in Chancery, unless there is a well grounded fear of loss, if it remains in her possession. *Osborne v. Van Horn*, 2 *Florida*, 360.

In Delaware, provision is made for securing the rights of tenants in dower and by the curtesy, where a sale is made of land held in common. *Dela. St.* 1843, 489-91. In Wisconsin, in case of the sale by an administrator of land in which the widow is dowerable, he may contract with the heir to commute her dower, and hold in trust such part of the price, as she would be entitled to on the principle of *annuities*. *Wisc. Sts.* 1853, 78.

7. The assignment of dower shall be such as to give, not one-third of the lands in quantity, but one-third of the *income*, or rents and profits, according to the quantity, quality, and productiveness of the lands; and such as is best calculated for the convenience of the widow and the heirs, and will least disturb the will, the provisions of which in her favor she renounces.(1)

8. In Alabama, Illinois, North Carolina(a) and Kentucky,(2) the assignment shall include the husband's dwelling-house, or, in Alabama, a portion of it, if it would do injustice to assign the whole. In Kentucky, it makes no difference that the widow does not herself occupy the mansion.

9. If the widow waives an assignment by metes and bounds, it may be made in common.(3)

10. This is the only practicable mode, where the husband at his death was a tenant in common with another person.(4)(b)

11. In one case, in Massachusetts, dower was had in ¹⁶⁵/₁₉₄₀ of the great sheep pasture in Nantucket.(5)

12. Contrary to the general rule, that no act of the husband alone can affect the wife's claim of dower, if partition were made of lands held by him in common during coverture, she shall have dower only in the portion allotted to the husband; upon the grounds, that the husband's co-tenant might have enforced partition by legal process, and that, partition being an incident to the estate, the wife's inchoate right of dower was acquired subject thereto. But fraud on the part of the husband, as, for instance, in taking for his share woodland, not subject to dower, would avoid the partition as to the widow.(6)(c)

13. It is said, that *the sheriff* must assign for dower a third part of each manor; or a third part of the arable, meadow and pasture; but the heir may, with the widow's assent, assign the whole of one manor.(7) In North Carolina,(8) a statute provides that the assignment need not embrace one-third of each tract. In Indiana, if the widow elects one

(1) *Hoby v. Hoby*, 1 Ver. 218; *Leonard v. Leonard*, 4 Mass. 533; *Miller v. Miller*, 12, 454; *Conner v. Sheperd*, 15, 167; 1 N. C. Rev. St. 613-4; Illin. do. 237; 4 Kent, 63, n. c; Alab. L. 259; 7 J. J. Mar. 637; *M'Daniel v. M'Daniel*, 3 Ired 61; *Stiver v. Cawthorn*, 3 Battl. 501; *Smith v. Smith*, 5 Dana, 179.

(2) Alab. L. 259; *White v. Clark*, 7 Mon. 642; Illin. Rev. L. 237.

(3) Co. Lit. 34 b, u. 1.

(4) 4 Dane, 673; *Rowe v. Power*, 5 B. & P. 1; Co. Lit. 32 b.

(5) 4 Dane, 674.

(6) *Potter v. Wheeler*, 13 Mass. 504. See *Jackson v. Edwards*, 22 Wend. 498; *Reynard v. Spence*, 4 Beav. 103; *Totten v. Stuyvesant*, 3 Edw. 299.

(7) 1 Cruise, 132; 1 Bay, 504. That assent cures a wrong assignment, see *Johnson v. Neil*, 4 Alab. N. S. 166.

(8) 1 N. C. Rev. St. 614.

(a) But the widow is entitled to only *one-third* of the real estate, in the *whole*, including the mansion. And if this would give her more than her third, she can have only part of it. *Stiver v. Cawthorn*, 4 Dev. & B. 501.

(b) In Massachusetts, by a late statute, 1842, p. 231, the judge of probate may authorize the commissioners, first to make partition, and then assign dower from the part allotted to the husband's estate.

(c) But where a wife concurs in the partition of her husband's land, releasing her right to the other tenants in their share of the property, and the husband's portion is conveyed to trustees of his will; she has dower in the whole, not an undivided part, merely, of such portion. *Reynard v. Spence*, 4 Beav. 103. The rule in the text applies where a division is made, in equal proportions, by mutual releases. But there is no such limitation to the right of the widow, if, for a valuable consideration, the division was purposely made in unequal proportions. *Mosher v. Mosher*, 32 Maine, 412.

tract, it may be assigned to her. In Kentucky, it is held, that where the husband has conveyed away part of a tract of land, dower shall be assigned, if possible, in the remaining part.(1)

14. But commissioners appointed to assign dower are bound, in general, like the sheriff in whose place they stand, to assign one third part of each parcel of land.(a) If they assign one third of a single tract, creditors of the husband may appear and object; because, if this were allowable, the commissioners might assign wholly from land of which the husband died seized, and the creditors would have no claim against that which he had conveyed in his lifetime.(2)

15. Where the sheriff assigns dower improperly, the court will punish him and set aside the assignment.

16. A sheriff returned, that he had assigned for dower, in a house, the third part of each chamber, and had chalked it out. Held, an idle and malicious assignment, and the sheriff was committed.(3)(b)

17. A sheriff refused to make an equal allotment of dower, and took sixty pounds for serving the writ. He was committed, and an information ordered against him.(4)

18. A third part of lands containing a coal-work was assigned by the sheriff for dower, without reference to the latter. Upon a bill in equity by the heir to set aside the assignment as fraudulent, and upon his offering one-third of both the land and coal-work by way of rent charge; held, the widow should accept this offer or be endowed anew.(5)

19. An assignment of one tract, in satisfaction of the widow's claim upon each separate portion of the husband's lands, is termed an assignment *against common right*. The effect of it is, to impose upon her the risk of any defect in the title to the land. If the estate assigned turns out to be more valuable than a third, she may still hold it; and on the contrary, if it proves less valuable, she must bear the loss. The principle is, that she has accepted what could not have been lawfully assigned to her against her will. It is a voluntary release of a legal right, for something supposed to be equivalent, or more.(6)

(1) Ind. Rev. L. 210; *Lawson v. Morton*, 6 Dana, 471. See *Childs v. Smith*, 1 Md. Ch. 483.

(2) *Scott v. Scott*, 1 Bay, 504; *Wood v. Lee*, 5 Mon. 55.

(3) *Abingdon's case*, 1 Cruise, 164. (Cites *Howard v. Candish*, Palm 264.)

(4) *Longvill's case*, 1 Keb. 743.

(5) *Hoby v. Hoboy*, 1 Vern. 218.

(6) 1 Pick. 317-18; *Wisc. Rev. St.* 336.

(a) Where the plaintiff in her complaint describes the lands in the possession of several tenants occupying different portions thereof, the defendant occupying but a small part; claims for her dower one third of the whole, and obtains a verdict; upon filing the record of judgment, commissioners are to be appointed, to make admeasurement of dower out of the lands which the jury have found in the possession of the defendant, and out of which the plaintiff is entitled to dower. *Ellicott v. Mosier*, 11 Barb. 574.

(b) In New York, it is held, that particular rooms in a house may be assigned for dower, with the right of using stairways, halls, &c., for the purpose of passing; and that the heir cannot object thereto. Whether the widow might object, *quæ*. *White v. Story*, 2 Hill, 543.

In Alabama, an assignment of dower may designate the lands by the designation of them at the land office. They need not be described by metes and bounds. *Adams v. Barrow*, 13 Ala. 205.

A sheriff returned, that commissioners to assign dower had been duly sworn, and proceeded to assign it, "as shown by the annexed return." Held sufficient, the return being presumed to be that of the commissioners. *Ib.*

20. The whole of one parcel of land was assigned to the widow for life, to be holden in full satisfaction of her dower, and subject to all the conditions and liabilities, and with all the privileges and incidents, of dower. The land assigned proved to be under mortgage, and at the time of assignment the mortgagee was in possession. Held, the widow should not have dower in other land of the husband, held by an innocent purchaser.(1)(a)

21. Lord Coke says, an assignment of lands in which the widow is not dowable, or of a rent issuing out of them, is no bar of dower.(b) Otherwise, with a rent issuing from lands of which she is dowable. Thus, if it is necessary to assign dower in the capital dwelling-house, and the widow refuses a single room or chamber in it, she shall have a rent therefrom. The statutory provisions of different States in regard to the assignment of rents and profits, in lieu of the lands themselves, have already been stated.(2)

22. It is said, if the heir assign dower of lands of which the husband was seized, but the widow is not dowable, she is tenant in dower. So, if she be endowed, and afterwards exchange with the heir for other lands, which the husband owned in fee, she shall hold in dower, and by the husband.(3)

23. The assignment of dower must be *absolute*. Any condition, exception, or reservation annexed to it—as, for instance, a reservation of trees—will be void; or the widow, at her election, may sue for her dower anew.(4)

24. At common law, the heir may assign dower by a mere parol declaration, that the widow shall have certain lands, or, generally, one-third of all the lands of which the husband died seized; and an entry upon the lands assigned, will vest in the widow a perfect title. The statute of frauds does not render necessary an assignment in writing. The widow holds her estate by *law*, and not by *contract*. And after an assignment of dower by the owner of the land, though made by parol, he cannot dispute that the land was subject to dower.(5)

25. The same principle seems applicable to an assignment by any other tenant of the freehold. Thus, one of two persons, to whom the

(1) Jones v. Brewer, 1 Pick. 314; French v. Pratt, 27 Maine, 381.

(2) Co. Lit. 34 b.; Turney v. Sturges, Dyer, 91. See White v. Story, 2 Hill, 543; Perkins, 406; Bickley v. Bickley, And. 287.

(3) Co. Lit. 34 b. u. 9.

(4) Co. Lit. 34 b.; Wentworth v. Wentworth, Cro. Eliz. 451.

(5) Co. Lit. 35 a; Baker v. Baker, 4 Greenl. 67; Conant v. Little, 1 Pick. 191; Shattuck v. Gragg, 23 Pick. 88; Johnson v. Neil, 4 Alab. N. S. 166; Boyers v. Newbanks, 2 Cart. 388.

(a) But where a widow has recovered judgment for her dower, and agrees with a warrantor of the tenant to receive an annual sum for life in lieu thereof, which is not paid, she may recover her dower. Sargeant v. Roberts, 34 Maine, 135. Such a transaction can operate neither as a lease nor release. There is no privity between the parties to it. *Ib.*

(b) In order to bar the widow of her action for dower, where rent has been assigned with her consent, and accepted by her, it must appear that the rent will endure for her life. *Ellicott v. Mosier*, 11 Barb. 574.

A plea in an action for dower, alleging that the husband died intestate; that the defendant occupied the premises under a lease from him, and that the plaintiff and heirs had collected and received the rents reserved ever since his death as the same became due, and had divided and enjoyed the rents, in proportion to the interest of each in the premises, the plaintiff receiving one-third in lieu of dower; and insisting that the plaintiff was thereby estopped from maintaining the action; constitutes no defence. *Ib.*

husband has transferred the land in joint tenancy, may assign a third part of it, and thereby bind his companion.(1)

26. So, the guardian of an infant heir may validly assign dower.(2)(a)

27. But in Missouri, Kentucky, New Jersey and Virginia,(3) where the widow sues such guardian for her dower, and he endows her *by favor*, or "makes default, or by collusion defends the plea faintly," the heirs, on becoming of age, may avoid the assignment.

28. In Ohio,(4) the assignment of dower by the heir or other party interested must be made by deed.

29. In the assignment of dower there is an implied warranty, that the tenant, if impleaded, may vouch the heir; and, if evicted by paramount title from the lands assigned, she shall be endowed anew;(b) except in the case above-mentioned, of an endowment *against common right*. But it is said, if the assignment of dower were made by an alienee of the husband, the widow shall not vouch him to be newly endowed, for want of privity. A new assignment is the widow's only remedy. She has no claim upon the covenants in her husband's deed, which can be enforced by the heirs alone. On the other hand, if after assignment of dower the heirs are deprived of any part of their lands by a claim adverse to the husband's title, there shall be a new assignment, although the dower land has not been taken. And in case of an excessive assignment the widow shall account for rents, &c., with an allowance for any improvements. So, also, her second and third husbands.(5)

29 a. Where the widow surrenders her dower, in part satisfaction of a claim against an estate of which she is administratrix, and the settlement is afterwards set aside at the instance of the creditor; she will be entitled to her dower or its value.(6)

29 b. A widow being evicted from an estate in which she had a right of dower, by a suit to enforce a lien for the purchase-money, to which she was not a party; held, her right of dower was not divested, and she was entitled to that proportion of the rents and profits, from the time the land was sold under a decree in such suit, which her right of dower bore to the value of the land, less the unpaid purchase-money.(7)

29 c. Where the husband's conveyance is set aside as fraudulent against creditors, and the land sold and conveyed under a decree for their benefit after his death, the widow shall have dower, though she joined in the conveyance.(8)

(1) Co. Lit. 35 a, n. 1 and 2.

(2) Jones v. Brewer, 1 Pick. 314; Boyers v. Newbanks, 2 Cart. 388.

(3) Misso. St. 231-2; 1 Ky. Rev. L. 575; 1 N. J. Rev. C. 398; 1 Vir. Rev. C. 171.

(4) Walk. Intro. 326.

(5) Bustard's case, 4 Cep. 122 a.; Mass. Rev. St. 411; Scott v. Hancock, 13 Mass.

168; Bedingfield's case, 9 Co. 17 b.; St. Clair v. Williams, 7 Ohio, part 2, 110; Singleton v. Singleton, 5 Dana, 89; Verm. Rev. St. 290; Wisc. ib. 335.

(6) Puisse v. Williams, 23 Miss. 64.

(7) Willet v. Beatty, 12 B. Mon. 172.

(8) Summers v. Babb, 13 Illin. 483.

(a) In Maine and Arkansas, statutes so provide. Ark. Rev. St. 340; Me. Ib., 463. In England, an infant cannot assign dower, *ad ostium*. Co. Lit. 34 a. In Wisconsin, where dower has been wrongly recovered from an infant, he may recover it back. Rev. St. 336. It is held in Indiana, that dower need not be demanded from an infant; that at common law he has no power to assign dower, and if he does it, and the assignment is excessive, a writ of *admeasurement* lies. McCormick v. Taylor, 2 Cart. 336. But he cannot defeat it by entry. And an *admeasurement* lies only for him, not for the widow. Ib.

(b) In Arkansas, if land assigned for dower is forfeited, the widow has double damages.

30. By the assignment of dower, the widow acquires a freehold estate without livery of seizin in England, and probably in this country without entry; because dower is due of common right, and the assignment is an act of equal notoriety.(1)(a)

31. After assignment, the law regards the widow, *by relation*, as having had possession from the death of the husband. She acquires *no new freehold*, but comes to her dower *in the per, by her husband*, and is *in*, in continuation of his estate; while, on the other hand, the heir is considered never to have been seized of this portion of the land.(2)

32. Upon this principle, where a disseizor dies, although the disseizee cannot enter upon the heir, yet, if dower be assigned in the land, he may enter upon this portion of it; because the widow claims under the husband, and not under the heir.(3) So the widow, after assignment, becomes entitled to the back rents.(4)

33. The principle of the common law above stated, so far as it avoids the seizin of the heir in regard to the lands of which the widow is endowed, can hardly be regarded as in force in the United States.(5) Indeed the English law itself seems to be confused and contradictory upon this subject; for while the assignment of dower is said to defeat the seizin of the heir, it is also laid down that such assignment constitutes a species of *subinfeudation*, and the widow holds as a tenant to the heir.(6) But whatever may be the rule of law in England, in the United States the ancient doctrine of seizin has been so far modified, either by express legislation or by necessary implication therefrom, sanctioned by usage and adjudication; that for all practical purposes, it seems, the heirs of a husband hold a vested reversionary interest in the lands from which the wife is endowed, subject to conveyance, devise, distribution and legal process. This peculiarity in American law, however, is a subject deserving of careful examination, and will be particularly considered in a subsequent portion of this work.(b)

(1) Co. Lit. 35 a; 4 Dane, 670.

(2) Windham v. Portland, 4 Mass. 388; Norwood v. Marrow, 3 Battl. 448. See Ross v. Ross, 12 B. Mon. 437.

(3) Lit. 393.

(4) 3 J. J. Mar. 48.

(5) Cook v. Hammond, 4 Mas. 467; Fay v. Hunt, 5 Pick. 400-1-2.

(6) Park, 344.

(a) Lord Coke remarks, in regard to the legal requisites of an assignment of dower, "here be two things that the law doth delight in, viz.: 1, to have this and the like *openly and solemnly done*; 2, to have *certainitie*, which is the mother of quiet and repose." Co. Lit. 34 b.

(b) A distinction seems to have been made in Massachusetts between curtesy and dower, as to their effect in defeating the seizin of the heir, in which respect they are alike at common law. The former has been held not to defeat such seizin; while, as to the latter, the English rule is said to be in force. (See 4 Mas. 467; 3 Ib. 368; also Robison v. Codman, 1 Sumner, 130.) In North Carolina, both the principles stated in the text are recognized as equally in force; to wit, that the widow holds of the heir or reversioner, and at the same time her estate is a continuation of the husband's, and, in case of any intervening title, relates back to his death. Norwood v. Marrow, 4 Dev. & B. 442.

A died seized of lands, and leaving a widow and six children, of whom B and C were two. An application was made by the heirs of A for partition, and an attorney of some of the children, minors, appeared for them, being appointed guardian. The commissioners appointed to make partition also assigned dower to the widow. She entered on the land assigned, and afterwards joined with C, one of the children, in a conveyance of his part, which came to E by sundry mesne conveyances. B brought ejectment against E for the part conveyed to him. Held, the assignment of dower displaced the heir's seizin, and related back, so as to give the dowress seizin from the death of her husband; that, as the

34. The widow is regarded as so far holding under the next owner, that, like other tenants, she is estopped to set up against him a paramount title purchased by her. Nor can a purchaser from her be allowed to do it.(1)(a)

(1) *Kirk v. Nichols*, 2 J. J. Mar. 470.

assignment of dower, which in itself was bad, had been followed by her entry and possession, and by the ratifying acts of the heirs, it was good; but that as the assignment and the judgment for partition were simultaneous, the latter was not defeated, so as to divest the heirs of the momentary seizin which followed the judgment and supported the partition. *Fowler v. Griffin*, 3 Sandf. 385.

It has been very recently decided in New York, that, after assignment of dower, the widow's title relates back to the marriage, if the husband was then seized of the land; if not, to the time of his seizin; that the assignment defeats the seizin of the heir *ab initio*; and, as she does not hold under the heir, she has no right to become party to an application for sale of the land to pay debts. *Lawrence v. Brown*, 1 Seld. 394. If the surrogate order a sale of all the husband's estate, including that assigned for dower, the sale is void as to this portion, though the widow were notified to appear. *Ib.*

(a) Having now finished the important and somewhat extensive titles of *curtesy and dower*, it is worth while briefly to compare these two estates, and designate their several points of similarity and of difference. See Co. Lit. secs. 2, 52, 53.

Both are *life estates* created *by act of law*, and arise out of the same relation, that of marriage. Both require a present seizin, either in law or in deed, in the owner of the inheritance; that is, a title not subject to any particular freehold estate. In both, marriage alone gives an *incipient* or *initiate* title, which the death of the party owning the inheritance is necessary to *consummate*. Both curtesy and dower are a continuation of the deceased party's estate, having the effect to interrupt the seizin as between ancestor and heir, although in the former case the estate is said to be *in the post*, and in the latter *by the husband*. And lastly, neither of these estates is defeated by the ending of the estate out of which it springs, according to the original *limitation*; while both alike are determined by forfeiture under a *condition*. Co. Lit. 30 b, n. 7.

In regard to the points of *distinction* between curtesy and dower, each seems to be in some particulars the more favorably regarded by the law. Tenant by the curtesy does not forfeit his estate, as a wife forfeits her dower, by elopement and adultery. The former may immediately enter upon the land after the death of the wife, while the latter must wait for an assignment or judgment of law. Curtesy embraces *the whole* estate of the wife; while dower is confined to *one-third* of the husband's estate.

On the other hand, *dower* does not require actual seizin on the part of the husband, as curtesy requires it in the wife. And the wife shall have dower, but the husband shall not have curtesy, without the birth of issue; provided that the issue, which she might by possibility have had, could inherit the estate.

CHAPTER XIII.

JOINTURE.

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| <ul style="list-style-type: none"> 2. Definition. 3. Origin. 5. Value. 6. When to take effect. 8. Quantity of estate. 11. Must be a legal interest. 12. Must be an entire satisfaction. 13. And so stated. 15. Ante-nuptial. 16. Provisions not strictly jointures. 20. Equitable jointure. 23. Who may receive a jointure. | <ul style="list-style-type: none"> 24. A provision—not a contract. 25. Infants. 26. Waste. 27. Emblements. 28. Eviction or breach of covenant; and the jointress' lien upon lands. 38. Favored in equity. 42. Interest. 43. How barred—by deed. 45. By elopement, &c. 47. By devise, &c. 58. Jointure in the United States. |
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1. THE next estate for life, and one immediately connected with that of *dower*, is a *jointure*.

2. A jointure is a competent livelihood of freehold for the wife, of lands or tenements, &c., to take effect presently in possession or profit after the decease of the husband, for the life of the wife at least, if she herself be not the cause of its determination or forfeiture.(1)

3. This estate originated with the statute of uses. By the common law, as has been stated above, (ch. 10, s. 1,) a wife's right to dower attached immediately upon her marriage, and could be defeated only in the few modes which have been mentioned. No conveyance to the wife during coverture would operate as a substitute for her dower; upon the maxim, that no right or title to a freehold estate can be barred by a *collateral satisfaction*; neither was her release, being made during coverture, of any effect.(a) To obviate this inconvenience, it became very common to convey lands to *uses*, a widow not being dowable of a use; and, when a *cestui que use* married, the friends of the woman, by way of provision for her, procured him to take a conveyance from his feoffees, and limit it to himself and the wife for their lives in joint tenancy or *jointure*. When the statute of uses transferred the legal estate to the *cestui*, the widow became dowable, even though the above-named provision had been made for her. Hence this statute provided, that no woman thus provided for should claim dower in

(1) Co. Lit. 36 b; Vance v. Vance, 8 Shepl. 364; Me. Rev. St. 392.

(a) In Alabama, it is held that an ante-nuptial agreement is no bar to dower, though made expressly in lieu thereof; but that such agreement, if reasonable, may be enforced in equity. Gould v. Womack, 2 Ala. (N. S.) 83.

So a conveyance by a husband to his wife of a life estate in certain property, which passes a present vested interest, and is not testamentary in its character, will not bar her dower. Mitchell v. Mitchell, 8 Ala. 414. Whether a release of any claim to dower is sufficient consideration for a marriage settlement. See Lewis v. Caerton, 8 Gratt. 148; Blackman v. Blackman, 16 Ala. 633. *Infra* p. 61.

A contract, made by husband and wife and her trustee, during the coverture, by which, in consideration of her receiving separately, and absolutely controlling, her property, she releases her dower in the husband's lands, is invalid, and no bar to dower. Townsend v. Townsend, 2 Sandf. 711.

the lands of her husband; in other words, it made a jointure, if conformable to its provisions, a bar of dower.(1)

4. From the definition of a jointure, given above, it may be seen that several circumstances are requisite to constitute this estate. These are enumerated at length, and the general principles of law upon this subject fully stated, in *Vernon's case*, already referred to.(2)

5. With regard to the amount and value of the property limited, although the statute seems to make no express provision upon this point, it must be a reasonable and competent livelihood, taking into view the circumstances of the parties, the amount of the husband's estate, and the portion which he received with the wife.(3)

6. The jointure must take effect, in possession or profit, immediately from the husband's death—otherwise, it would be less beneficial than dower. Thus, if the estate is limited to the husband for life, remainder to A for life, remainder to the wife; this is no bar of dower, it seems, even though A die during the coverture.(4)

7. So, a limitation to the husband in tail, remainder to the wife for life, is not a good jointure, though his issue die before himself, and therefore the widow come into possession immediately upon his death.(5)

8. The estate limited must be at least as great as for the life of the wife. It is insufficient, if only in part freehold, and in part an annuity, not secured by real estate. The estates mentioned in the statute, are to the husband and wife and his heirs; or to them and the heirs of their bodies, or one of their bodies; or to them for their lives or her life.(6)

9. It is said in an ancient treatise, that an estate to a husband and wife and their heirs is not a good jointure, because not mentioned in the act.(7)(a) But it has been since held, that these estates are mentioned only as examples, and do not exclude others equally beneficial and consistent with the intention of the act. Thus, an estate to a man and his wife and the heirs male of their bodies; or to him for life, remainder to her for life; is a good jointure.(8)

10. It was formerly held, that a jointure *durante viduitate* was good, because it would continue for life, unless terminated by the widow's own act. But it has been decided in New York, that a jointure *during life or widowhood* is bad, unless accepted.(9)

11. A jointure, to be strictly legal, must be limited to the wife herself, not to another person in trust for her, even though she assent. But equitable jointures are now allowed, and will be noticed hereafter.(10)

(1) *Vernon's case*, 4 Rep. 1; *Lincoln College case*, 3 Rep. 59 b.; *Co. Lit.* 36 b.; *Hastings v. Dickinson*, 7 Mass. 155; *Power v. Sheil*, 1 Moll. 296.

(2) *Supra*, 3; 4 Rep. 1; *Mass. Rev. St.* 410.

(3) *McCartee v. Teller*, 2 Paige, 511; 4 Dane, 686.

(4) *Co. Lit.* 36 b.; 4 Rep. 2 a.; 7 Mass. 155.

(5) *Wood v. Shurley*, Cro. Jac. 488; *Car-*

thers v. Caruthers, 4 Bro. Rep. 500; *Smith v. Smith*, 5 Ves. 192.

(6) 4 Rep. 3 b, 2 a; *Dyer*, 97 a, 248 a; *Co. Lit.* 36 b; *Vance v. Vance*, 8 Shepl. 364; *Ind. Rev. Sts. Descent*, sec. 38.

(7) Bro. Abr. *Dower*.

(8) 4 Rep. 3 b, 2 a.

(9) *Mary Vernon's case*, 4 Rep. 3; *McCartee v. Teller*, 2 Paige, 511.

(10) *Co. Litt.* 36 b.

(a) Another reason mentioned is, that such estate goes to the heirs generally, but the statute was intended to benefit *the issue*. *Dyer*, 248 a, n.

12. A jointure, to be a bar of dower, must be made in satisfaction of the *whole dower*.(1)

13. It must also appear to have been made to the wife *as a satisfaction of dower*. Before the statute of frauds, this fact might be *averred*, that is, proved by parol. And it has been suggested that the law is still the same, as there is nothing in that statute excluding averments. But the modern doctrine seems to be otherwise.(2) Thus, where to a bill in equity for dower, the heir pleaded that the husband made a bond, in trust, to secure the wife a certain sum; that it was intended in lieu of dower, and that she acknowledged it to be so: held, parol evidence of such acknowledgment was inadmissible.(3)

14. It is sufficient, however, if the deed show by strong implication that the provision was intended as a bar of dower. But equity requires a very distinct manifestation of such intent.(4)

15. A jointure, to be binding on the wife, must be made before marriage. If made after marriage, she may refuse it and demand dower.(5)

16. A jointure, made conformably with all these requisitions, is in general absolutely binding upon the wife, and prevents the claim of dower from ever arising. Many provisions made by the husband for the wife, though not in the form above prescribed, may operate as a bar of dower, if accepted by her.(6) In this respect, a settlement made during the husband's life stands on the same footing with a devise or bequest; which, it has been seen, if intended as a substitute for dower, the widow can receive only in that way. Indeed, a provision for the wife by will is often in statutes and elsewhere called a jointure, and was originally upheld as a bar of dower, as being within the equity and reason of the statute of uses, which establishes jointures.(7)(a)

17. Thus, if an estate be settled upon the wife after marriage, and if, after the husband's death, she accepts it, she is barred of her dower.(8)

18. So if the estate limited is less valuable than dower—being burdened with a condition, or made determinable during the life of the wife; still, if she accepts it, she shall not have dower. Thus, where an estate was limited by the husband to the wife for life, upon condition of her performing his will, and after his death she accepted and entered upon the estate; held, inasmuch as the estate was for life, though conditional, and the widow had accepted it, she was barred of her dower.(9)

19. In some cases, however, if the provision made for the wife has not the legal requisites of a jointure, the widow may claim both such provision and dower also. This is of course the case, where there was no intention to bar dower. And it is said, that where the estate limited

(1) Co. Litt. 36 b.

(2) 1 Cruise, 149; Owen, 33; 4 Rep. 3.

(3) Tinney v. Tinney, 3 Atk. 8; Walker v. Walker, 1 Ves. 54; Couch v. Stratton, 4 Ves. jr. 391; Charles v. Andrews, 9 Mod. 152.

(4) Ambler v. Norton, 4 Har. & McHenry, 23; Vizard v. Longdale, 3 Atk. 8; Lord Dorchester v. Effingham, Coop. 323.

(5) Co. Lit. 36 b; 4 Rep. 3 a; Vance v. Vance, 8 Shepl. 364.

(6) 1 Cruise, 151; 4 Rep. 2 a; Mass. Rev. St. 410.

(7) Vernon's case, 4 Rep. 4 a, b; 4 Dane, 685.

(8) Co. Lit. 36 b; Walk. Intro. 325. See Frank v. Frank, 3 My. & C. 171.

(9) Vernon's case, 4 Rep. 1; Dyer, 317 a.

(a) A jointure is ordinarily settled *before* marriage; and a devise takes effect *after it is ended* by death. Hence, they are held to stand on substantially the same ground. 4 Rep. 4 a.

is not to commence immediately upon the husband's death, the widow shall have such estate in addition to her dower, although the intermediate party have died before the husband.(1)(a)

20. *In equity*, any provision which a woman accepts before marriage in satisfaction of dower—as, for instance, a trust estate, or a mere personal covenant of the husband—may constitute a good jointure. Thus, a sum of money secured by bond. So, a bond to the mother of the intended wife, conditioned that the husband or his heirs should settle a certain sum *per annum* upon her, in satisfaction of dower. So even a covenant by the husband, that his *heirs, executors or administrators* will pay an annuity for life to the wife, though it be not charged upon lands, is a good jointure. For, although the husband might defeat his own covenant by immediately conveying away all his property, this would be an eviction, which would let in the wife to her dower. And although the husband was not in terms bound himself, equity would treat him as bound, and, upon a suit of the wife by her next friend, compel him immediately to settle the annuity.(2)(b)

21. So, where a man and infant woman, each of whom owned leasehold estates, assigned them to trustees, in trust to permit the husband to receive the rents for his life, and the wife for her's after his death; held, a good jointure.(3)

22. A jointure will be good in equity, though the estate limited does not proceed immediately from the husband. Thus it may come through trustees, or the demandant in a common recovery, suffered for the purpose of a jointure, or the father of the intended husband, by a conveyance from him to trustees, in pursuance of previous articles.(4)

23. All persons, capable of being endowed, are also capable of taking a jointure.(5)

24. It has been held in England, that a jointure is a *provision*, not a *contract*. Although it is undoubtedly necessary that the woman should have notice of it, yet there is no law requiring that she should be a party to the deed by which the jointure is created. Upon the same principle, it was decided by the twelve judges, three dissenting, that an infant woman is bound and barred of her dower, by a jointure made to her before marriage.(6)(c)

25. Inasmuch as a legal jointure bars the dower of an infant at law,

(1) 4 Rep. 2 a; Co. Litt. 36 b.

(2) *Tinney v. Tinney*, 3 Atk. 8; *Estcourt v. Estcourt*, 1 Cox, 20; 1 Cruise, 152; *Bucks v. Drury*, 3 Bro. Parl. Ca. 492; *Lechmere v. Lechmere*, Cas. Tem. Tal. 80; *Seys v. Price*, 9 Mod. 219; *Caruthers v. Caruthers*, 4 Bro. 506 n.; *Jordan v. Savage*, 2 Abr. Eq. 101; *Pottow v. Fricker*, 5 Eng. L. & Equ. 443.

(3) *Williams v. Chitty*, 3 Ves. jr. 545.

(4) *Bridge's case*, Moore, 718; *Ashton's case*, Dyer, 228.

(5) 1 Cruise, 152.

(6) *Buckingham v. Drury*, 3 Bro. Parl. Cas. 492; *Caruthers v. Caruthers*, 4 Bro. Rep. 506 n.; *Jordan v. Savage*, 2 Ab. Equ. 101; *Earl of Buckingham v. Drury*, 2 Eden, 73; 4 Kent, 55 n.

(a) Such is probably the meaning of the language, "although the wife attains to them, and enters and takes the profits; yet she shall have dower of the residue." 4 Rep. 2 a.

(b) Lease for life to A, remainder to his executors for years. The term vests in him, as if it had been to A and his executors. Co. Litt. 54 b.

(c) In this case, however, the settlement was made by an indenture of three parts, between the husband, the wife and trustees, executed in the presence of, and witnessed by, her guardian. Four judges only delivered opinions in the affirmative. In *Wisconsin*, (Rev. Sts. 334-5,) the woman must be a party to the deed; if she is a minor, her father or guardian shall join.

an equitable jointure will bar it in equity, more especially if assented to by the father or guardian. But, although in equity, as at law, a jointure not in itself valid may become a bar of dower by the acceptance of the wife, yet in the case of an infant it is otherwise; for an infant has no capacity in law to accept. Hence, a jointure for life or widowhood is bad.(1)

26. In general, a jointress, like other tenants for life, has no right to commit waste. But where there is a covenant that the lands settled shall be of a certain yearly value, and they prove otherwise; she may commit waste to make up the deficiency.(2)

27. A jointure is not, like dower, a continuation of the husband's estate. Therefore a jointress is not entitled to the crops sown at his death.(3)

28. *Eviction* from her jointure restores a woman's right to dower, either entirely, or in proportion to the value of the lands evicted; whether the eviction take place before or after the husband's death, and notwithstanding an acceptance by the widow of the remaining portion of the lands.(4)

29. A jointure was settled before marriage. The husband purchases other lands, aliens them and dies. The widow is evicted from her jointure. Held, she should have dower in these lands, though the husband owned them only while the jointure remained good, and while therefore her dower was barred.(5)

30. Upon the same principle, if a jointure is covenanted, or even merely expressed, by the husband to be of a certain annual value, and proves of inferior value; equity will make up the deficiency from his estate. And although the covenant is contained only in articles, not in the settlement itself, the widow will not be at first turned over to law for damages, but equity will inquire into the amount of the defect, and send it to be tried at law upon a *quantum damnificat*. In such case, the widow, in England, stands as a specialty creditor, and has a claim against the other lands of the husband.(6)

31. At law, a mere covenant to settle even certain specific lands gives no lien upon those lands. In equity, a covenant to settle lands generally, or lands of a certain value, gives no lien upon the husband's real estate; but the widow stands as a specialty creditor for an amount not exceeding her dower. But a covenant to settle particular lands gives a lien upon them, except as against ignorant purchasers for a consideration. So, if the covenant declare the settlement to be in execution of a power, equity will ascertain to what lands such power is applicable, and enforce a lien upon them.(7)

32. No act or neglect on the part of the wife, during coverture, will bind her, in case of eviction from the jointure, or of its proving of inferior value to that agreed upon. It is a maxim in law, that the *laches* of a *feme covert* shall not be imputed to her. Thus, a husband, after marriage, gives a voluntary bond to settle a jointure, and afterwards makes such settlement, whereupon the bond is given up. After the

(1) *McCartee v. Teller*, 2 Paige, 511; *Corbit v. Corbit*, 1 Sim. & Stu. 612.

(2) *Bassett v. Bassett*, Finch, 189; 1 Abr. Eq. 221.

(3) *Fisher v. Forbes*, 9 Vin. 373.

(4) *Gervoye's case*, Moore, 717; *Hastings v. Dickinson*, 7 Mass. 153; *Ambler v. Wes-*

ton, 4 Hen. & Mun. 23; 4 Kent, 55 n.

(5) *Mansfield's case*, Co. Lit. 33 a, n. 8.

(6) *Glegg v. Glegg*, 2 Ab. Eq. 27; *Probert v. Morgan*, 1 Atk. 440; *Speake v. Speake*, 1 Ver. 218; *Parker v. Harvey*, 2 Abr. Eq. 241; 1 Cruise, 110.

(7) 2 Story on Eq. 496, and n.

husband's death, the widow was evicted. Held, in equity, that the giving up of the bond did not bind her, she being a *feme covert*; and that the bond should be satisfied from the personal estate, unless she recovered her dower.(1)

33. A husband, having a power to settle a jointure, not exceeding 100*l.* per annum, after marriage, appointed lands to trustees for this purpose, covenanting that they were worth 100*l.*; and, if they were not, that, upon demand made during his life, he would make up the deficiency. The husband lived several years, and no complaint was made respecting the jointure. After his death, the widow brings a bill in equity, to have a deficiency made up from the personal estate. Decreed, in favor of the widow.(2)

34. If the wife had a title before marriage to the lands assigned her for a jointure, it seems, upon entering on them, she is remitted to her former title, and shall recover dower as if evicted.(3)

45. A widow shall be endowed for life only, though evicted from a jointure in fee(4)

36. In equity, a jointress is regarded as a purchaser, marriage being held a valuable consideration. Hence, a court of equity will always interpose for her protection; and, where there is a mere agreement for a jointure, compel an execution of it, which shall *relate* to the time when it ought to have been made.(5)

37. If the agreement is to settle a jointure before marriage, a marriage without such settlement is no waiver or release of the contract; but the wife, after her husband's death, may enforce it in equity.(6)

38. Equity will not relieve against a jointure, although it operates very unequally in favor of the wife.

39. As part of a marriage treaty between A and the father of B, A was to have a marriage portion of £5,000, and settle £500 per annum upon B. The father demanded that the fee of the jointure should be settled upon her, in case A died without issue, which A refused. A afterwards resumed the negotiation, received articles for the £5,000, settled the £500 per annum, and mortgaged the reversion of the jointure, with his other lands, for the payment of £5,000 to his widow, if he should die without issue. In a fortnight afterwards A died, having been feeble and sickly at the time, and having also declared on his death-bed, and in presence of the wife, without contradiction, that no such agreement had been made. The wife brings a bill for foreclosure of the mortgage against the heirs of A, and they bring a bill for relief, alleging fraud. Held, that marriage being a valuable consideration, mere unreasonableness in the provisions of a settlement, without fraud, was insufficient to set it aside; and that the fairness of the transaction was to be determined by the state of facts at the time, not what took place afterwards. The defendants were decreed to pay the £5,000, without interest.(7)

40. A jointress, being regarded as a purchaser, will be relieved in equity against a prior voluntary conveyance.(8)

(1) *Beard v. Nutthall*, 1 Vern. 427.

(2) *Fothergill v. Fothergill*, 1 Abr. Eq. 222.

(3) *Wood v. Shurley*, Cro. Jac. 490.

(4) 4 Dane, 685.

(5) 1 Cruise, 156; *Sydney v. Sydney*, 3 P. Wms. 276; *Buchanan v. Buchanan*, 1 Ball

& Beat. 206.

(6) *Hayner v. Hayner*, 1 Cruise, 218.

(7) *Whitfield v. Paylor*, Show. Parl. Ca. 20; (*Wickerley v. Wickerley*, 2 P. Wms. 619.)

(8) 1 Cruise, 157.

41. Where an heir or other person seeks in equity to avoid a jointure, for want of title in the husband to make it, and prays a discovery of title-deeds; in order to obtain such discovery, his bill must submit to confirm the jointure, even though made after marriage. And the widow will not be compelled to produce her own deed, unless the party not only offer to confirm, but actually confirm, the jointure. Upon such confirmation, the court will order her to deliver up even leases, if expired, or attendant on the inheritance, although she may have claims for back rents, and upon the covenants.(1)

42. Interest is not allowed upon the arrears of a jointure, except under special circumstances; as where the widow has been compelled to borrow money on interest. And even this ground is doubted. A *contract* is said to be the only proper reason.(2)

43. In general, a jointure, like dower, is not liable to be barred or affected by any act of the husband alone. But it may undoubtedly be barred by a joint deed of husband and wife.(3)

44. It seems, if the jointure were settled before marriage, it being an absolute satisfaction of the right of dower, this right will not be revived by a conveyance of the husband and wife, releasing her jointure. But if made after marriage, inasmuch as the widow might waive it and claim dower, such release will have the effect to restore the wife's right of dower.(4)

45. In England, a wife does not lose her jointure, like dower, by elopement and adultery. And, in equity, this is no defence to a bill brought by the wife herself, or by trustees, for a specific performance of marriage articles for a jointure; more especially where specific lands are to be settled, and where both the averment and proof are not of positive acts of adultery, but of mere elopement with another man.(5)

46. In New York, Missouri, and New Jersey, a jointure; and in New York and Arkansas, every other pecuniary provision in bar of dower, is barred by elopement and adultery. In Delaware, a jointure is barred by divorce for adultery of the wife, or by adultery and elopement or separation without the husband's fault, unless he be reconciled to her.(6)

47. With regard to the effect of a provision by will, for the benefit of the wife, it has been held in England, that such provision, being no bar of dower, is upon the same principle no bar of a jointure, which is to be considered as coming in the place of, and having the same privileges with dower. And where there is a covenant that the jointure lands shall be of a certain value, and they prove deficient, the devise or bequest shall not be taken as a satisfaction of such deficiency, or performance of a covenant, but as a bounty, and the defect shall be made up as if no devise had been made. It is said, this is not like the case where a husband covenants to settle lands, and permits them to descend; which is held an implied performance. But it is a question of the construction of a will, and the intent of a testator. The husband

(1) *Towers v. Davys*, 1 Vern. 479; *Leach v. Trollop*, 2 Ves. 662; *Lomax v. —*, Sel. Cas. in Cha. 4; 1 Story on Equ. 78.

(2) *Hubert v. Parsons*, 2 Ves. 261; *Tew v. Winterton*, 1 Ves. jun. 451.

(3) 1 Cruise, 160.

(4) Co. Lit. 37 a; *Dyer*, 358 b.

(5) *Blount v. Winter*, 3 P. Wms. 277; *Sydney v. Sydney*, 3 Ib. 269; *Buchanan v. Buchanan*, 1 Ball & B. 206.

(6) 1 N. Y. Rev. St. 742; 1 N. J. Rev. C. 400; Misso. St. 229; Dela. St. 1832, 149; 1829, 165; Rev. Sts. 291.

having contracted to make the jointure of a certain value, this is what the widow has a right to, as a purchaser; it is her own estate, or a debt from her husband to her. Nor does the largeness of the settlement at all vary her rights.(1)

48. By marriage articles between an intended husband and the father of his intended wife, the father covenanted to pay a certain sum of money, and to settle lands to certain uses, if the husband would settle lands upon his wife to the value of £500 per annum, as a jointure in lieu of dower. The father fulfilled his covenants, and the husband settled lands, the annual value of which exceeded the amount agreed upon. But afterwards, finding some defect in the title of a part of the lands, and being advised that upon his dying without issue, the jointure might become void in consequence of an entailment for the benefit of his sisters, he suffered a fine of the jointure lands, and also, in pursuance of a power from his father, appointed other lands to his wife, declaring the same to be in recompense of all deficiencies in her jointure. The husband afterwards made his will, by which he gave the wife a large pecuniary legacy, all his personal estate, several houses and lands, and made her a residuary legatee; all which provisions were more than double the value of the jointure. Neither the wife nor her father or friends had notice, during the marriage, of the title of the sisters. The husband, by the death of his wife's parents, received a considerable amount of property, and was allowed by her to have the benefit of her estates derived from her father. The will devised to the sisters and their issue, the reversion of all the husband's inheritance after the widow's death. After the husband's death, his sisters claimed the lands settled as a jointure, and by legal title evicted the widow therefrom. The widow files a bill in Chancery, to have her jointure confirmed or dower assigned; and the defendants file a cross-bill for discovery. Held, by Lord Harcourt, that the defendants should convey to the widow lands of her husband to the value of £500 per annum for life, which she should hold in addition to all the other provisions above-mentioned for her benefit. On appeal to the House of Lords, the decree was affirmed.(2)

49. A man, upon his marriage, gave bond to a trustee, to settle upon the wife, within four months, freehold lands worth £100 per annum. After marriage, he devises freehold and copyhold lands, of the value of £88, to *his loving wife* and her heirs; and dies within the four months. Held, this devise was no satisfaction of the jointure, because land cannot be a satisfaction of money, nor the converse; nor copyhold a satisfaction of freehold. That the phrase, *his loving wife*, imported a bounty, and that the wife should take the devise in addition to the £100, if there were assets for payment of bond debts, and those charged by will upon the land.(3)

50. More especially is this construction to be adopted, where the husband by his will expressly ratifies and confirms the marriage articles, although in the same sentence he gives to his wife lands for life.(4)

(1) *Probert v. Morgan*, 1 Atk. 440; 1 Cruise, 169 a; *Prime v. Stebbing*, 2 Ves. 409. (2) *Grove v. Hooke*, 4 Bro. Parl. Ca. 563; 5 Vin. Abr. 293. (3) *Eastwood v. Vinke*, 2 P. Wms. 613. (4) *Prime v. Stebbing*, 2 Ves. 409.

51. And the same rule prevails, though the specific lands charged with the jointure are expressly devised away, by the will which makes provision for the wife.

52. A man, in consideration of marriage and a large marriage portion, covenanted to convey lands in C to trustees, to raise an annuity for his wife, as a jointure and in lieu of dower. The conveyance was not made; but the husband, having sold large estates of greater value than the lands in C, and contracted for the purchase of others, made his will, devising to his wife a leasehold house in London with all the furniture, and also the estates contracted for, or the purchase-money of those sold, and devising the lands in C to trustees for the benefit of his heir, subject to an annuity. The widow, after entering upon the estates devised to her, brought a bill in equity against the heir for a specific execution of the marriage articles. Held, both in Chancery and in the House of Lords, that the devise was no bar of the jointure.(1)

53. If a devise is made expressly as a substitute or satisfaction for the jointure of the wife, she cannot hold both, but must make her election between them.

54. A man agreed to purchase lands to the amount of £10,000, and settle them upon his intended wife for her jointure. After the marriage, his father gave him an estate for life, with a power to grant a rent-charge of £400 per annum to any woman whom he should marry, for her jointure. The husband accordingly granted such rent-charge, in satisfaction of a part of the jointure; afterwards conveyed a leasehold of £200 per annum, in trust for the wife; and then, by will, confirmed the rent-charge, and the conveyance of the leasehold, by way of addition, and in full compensation of the jointure. Held, these provisions were a satisfaction of the jointure, and the widow must elect between them.(2)

55. It is suggested that, in analogy to the law concerning dower, a devise shall be held a satisfaction of the wife's jointure, if the will raises a strong implication that such was the testator's intention. The following case is cited to this point.(3)

56. The father of a husband settled lands upon the wife, and covenanted that they were worth £1,000 per annum. After the father's death, the husband, his heir, devised to his wife other lands worth £500, a legacy of £1,000, and a part of his household goods. Subsequently, being minded to make some further provision for her, he revoked the uses of a portion of his estates, and limited them to trustees to raise £10,000 for her. By a codicil, he devised to her an annuity of £500 for life. The widow brings a bill in equity to have a deficiency in her jointure made up. Held, the other provisions must be taken as a satisfaction of such deficiency.(4)

57. Upon this case, however, it is remarked, that it was prior to *Prime v. Stebbing*,(a) and also that it was finally decided upon the ground, that the husband was a very weak man, and under the influence of his wife, and, at the execution of the codicil, actually insane.

(1) *Broughton v. Errington*, 7 Bro. Parl. Ca. 461.

(2) *Grandison v. Pitt*, 2 Ab. Eq. 392.

(3) 1 Cruise, 171.

(4) *Mountague v. Maxwell*, 4 Bro. Parl. Ca. 598; 2 Ab. Eq. 421.

58. In the United States, no very considerable departures have taken place from the English law of jointure; except in a few of the States. Universally, a jointure accepted will operate as a bar of dower; and, in many of the States, the statutes providing for the right of dower, in the way of qualification or exception, expressly disallow it in cases where the widow has received a jointure. Vermont seems to be the only State where a woman of full age, "endowed by way of jointure," before marriage, could ever waive her jointure and claim dower. And now, by the Revised Statutes of that State, a jointure or pecuniary provision, made by the husband or any other person, before marriage, or, with the wife's consent, after marriage, to take effect after the husband's death and in lieu of dower; is a bar thereof. So any devise, &c., which the Probate Court determines to have been so intended. So her half of the estate, where there are no children or their representatives. And the widow cannot elect between an ante-nuptial provision and her dower, where she was not the first wife, and there are no issue, and she receives a comfortable support, if the court order otherwise. In Indiana, where both curtesy and dower are expressly abolished, a jointure will bar the wife's share of her husband's estate; and a similar provision for him will bar his share of her estate.(1)

59. Mr. Dane remarks, that the colony law of Massachusetts of 1644 supposed the widow might be barred of her dower by a jointure.(2)

60. In the same State, a jointure which would be good in equity has been held insufficient to bar dower.

61. By marriage settlement, a husband covenanted that the wife should have an annuity from his estate after his death, and, in consideration thereof, she covenanted not to claim dower. The husband died insolvent. Held, the covenant for an annuity could not operate as a jointure; nor the covenant of the wife as a release of her dower, or a valid contract: the claim of dower at the time of the covenant not having accrued, and the consideration failing by the husband's insolvency.(3) Nor could it operate by way of *estoppel*.(4)

62. So, where a man and woman, before marriage, entered into mutual covenants through a trustee, in the nature of a jointure; the former covenanting for an annuity, and the latter agreeing to relinquish all title to dower, and also that her covenant might be pleaded in bar to any claim of dower, with a saving of her right to the annuity: held, the covenants were not extinguished by the marriage, as they could not by possibility be enforced or performed during the marriage; but that a failure to pay the annuity would restore the wife's right to dower in full, although she might perhaps be liable upon the covenant for the difference of value between the two.(5)

63. In South Carolina, the English statute of uses on this subject has been almost in terms re-enacted. In Ohio, it is said the provision must be for the life of the wife.(6)

(1) Anth. Shep. 21; Verm. Rev. St. 289; Ind. Rev. Sts. *Descent*, secs. 36-7.

(2) 4 Dane, 685.

(3) *Hastings v. Dickinson*, 7 Mass. 153.

(4) 15 Mass. 110.

(5) *Gibson v. Gibson*, 15 Mass. 106; * *Vance v. Vance*, 8 Shepl. 364.

(6) Anth. Shep. 560; Walk. Intr. 325; 2 Const. S. C. 747. See *Green v. Green*, 7 Por. 19.

* This case is said to be not distinguishable from *Hastings v. Dickinson*, (*supra*, n. 3.) But some of the remarks of Wilde, J., would seem to imply that such a covenant, if performed, might bar dower.

64. In Massachusetts,(a) Maine,*Michigan, Arkansas, Wisconsin and New York, a woman's assent to her jointure, or any pecuniary provision in lieu thereof, must be expressed, if she be of full age, by her becoming a party to the conveyance by which it is settled, or, if she is an infant, by her joining with her father or guardian in such conveyance. Like provisions are made in Virginia. In South Carolina, by an old act, if a jointure be made after marriage, unless by act of Parliament, the wife may refuse it and demand dower.(1)

65. In Maine and Massachusetts,(2) if a jointure is settled before marriage without the wife's assent, or after marriage with her assent, she is allowed six months after notice of the husband's death, to elect(b) between the jointure and her dower. In Virginia, she is allowed nine months; in Vermont, sixty days; in New York, Indiana, Arkansas and Michigan, one year. In Missouri, if a jointure be settled upon an infant, or after marriage, the wife may elect.(3)

66. In Missouri,(4) a jointure may be created by an agreement with the husband, or a third person, prior to and in contemplation of marriage, for real or personal estate, to take effect after the husband's death by way of jointure, and expressed to be in bar of dower; or by a conveyance to the husband and wife, or a third person, and their heirs, to the use of them both or of her alone, as a jointure. So, in New York, a jointure may be limited *in trust*.(5)

67. In Delaware, dower will be barred by any estate in or charge on lands, prior to and in contemplation of marriage, for life, to take effect at or before the husband's death, in lieu of dower; provided the wife be of age. In Rhode Island,(c) by a jointure *by deed or will*, for

(1) Mass. Rev. St. 410; 1 N. Y. Rev. St. 741; Anth. Shep. 562; Mich. Rev. St. 264; Ark Rev. St. 337-8; Wisc. Rev. Sts. 334-5; Vir. Code, 474.

(2) Mass. Rev. St. 410; Me. Ib. 392.

(3) 1 N. Y. Rev. St. 742; Misso. St. 229; Mich. Rev. St. 265; Ind. Ib. *Descent*, sec. 40.

(4) Misso. St. 229.

(5) 1 N. Y. Rev. St. 741.

(a) Previous to the marriage of A with B, an indenture of three parts, sealed by the parties, was made by and between A, B and C. A covenanted and agreed with C, that in the event of the marriage taking place, and his wife surviving him, he would, "by his last will or otherwise," make a certain provision for her, by the payment of a gross sum to C, and by payment or giving security for the payment to him of a further sum yearly during the widowhood of the wife, for her use, and to be paid to her by C, instead and in satisfaction of dower in the real, and of any distributive share of the personal estate of A. C covenanted and agreed with A that he would accept the trust, and receive and pay over the money, for the use and benefit of B; and the latter covenanted and agreed with A and C, that in case the marriage took place, and she should survive A, and the money above mentioned should be provided to be paid and actually paid, and the annuity well and sufficiently secured and provided to be paid, as stipulated, the same should be in full satisfaction of her dower in the estate of A, and should bar her from claiming the same, if she should survive him, and also bar any claim on her part of any share in his personal estate, unless given her by his will. The marriage took place, and A died, leaving a will, in which no reference was made to the indenture, but which contained a general direction for the payment of the testator's debts and the performance of his obligations. The executor of A, within the time stipulated, made the payments and gave the security therein specified to C, for the benefit of the widow, who refused to receive the same, but made a demand of dower, and brought her action therefor. Held, by the indenture, a pecuniary provision was made for the benefit of the demandant, in lieu of dower, and assented to by her, within the provisions of the Rev. Sts. ch. 60, secs. 8, 9, by which the demandant was barred of her dower. *Vincent v. Spooner*, 2 Cush. 467.

(b) So, in Wisconsin, she may elect. Wisc. Rev. Sts. 335.

(c) A husband, by will, made certain provisions for his wife, declaring them to be in "lieu of her dower or other interest in my estate," and, after making the will, acquired other

life or in fee, in lieu of dower, to take effect in possession on the husband's death, and forfeitable only like dower. If made after marriage, or to an infant, she may waive it.(1) In Virginia and Kentucky,(2) the law is substantially the same; except that the jointure may be either *expressly or by averment* in lieu of dower. In Ohio, an infant jointress may waive her jointure.(3) In Tennessee, a post-nuptial settlement, made in lieu of maintenance, dower and distribution, is voidable at the election of the wife; yet, if she claims dower and distribution after the death of her husband, she must renounce the benefits of the deed.(4)

68. In Missouri, Michigan, Wisconsin, Indiana, Virginia, South Carolina, Delaware, Massachusetts, Maine, Connecticut and Ohio,(5) eviction from a jointure or any part thereof restores the right to dower, wholly or *pro tanto*. It is remarked, that this provision is omitted in the Revised Statutes of New York. But, in the absence of any statutory provision, the English rule undoubtedly prevails. (See *supra*, s. 28.)

69. In Missouri, Rhode Island, Virginia and Kentucky,(6) if through any informality in the settlement a jointure fails to bar dower, and the latter is claimed, the widow loses her jointure.

69 a. In Pennsylvania, where a marriage contract was set up in bar of dower and proved, and it also appeared that the contract had been given up by the trustee under it to the husband to be cancelled, and he did destroy it, but no evidence of its contents as to the terms or amount of the settlement was brought, and it appeared that the contract was made to quiet the children of the husband, who promised when he had shown it to them to destroy it; held, as the proof of the contents of the contract was not clear, and as it had been cancelled by the husband according to his original intention, though it was kept some time before it was actually destroyed, the widow's dower was not barred; that the destruction of the contract was binding on the husband, and, if ratified by the wife by her acts after his death, was binding on her.(7)

70. In Connecticut,(8) the rules of the English law relating to jointures have probably been farther relaxed than in any other State. There, a jointure may consist of personal estate; and any provision accepted before marriage in lieu of dower will be a good equitable jointure.(a)

71. It was agreed between husband and wife, that his executors should pay her \$100 in lieu of dower from his estate, which was worth

(1) Dela. St. 1829, 165; Dela. Rev. Sts. 290; R. I. L. 191.

(2) 1 Vir. Rev. C. 171; 1 Ky. Rev. L. 575-6.

(3) Walk. Intr. 325.

(4) Parham v. Parham, 6 Humph. 287.

(5) 1 Brev. Dig. 268; Walk. Intr. 325; Missou. Sts. 229; 1 Virg. R.C. 171; 4 Kent, 55 n.; Dela. St. 1829, 165; Mass. Rev. St. 411;

4 Hen. & M. 23; Maine Rev. St. 393; Conn. St. 190; Dela. Rev. Sts. 290; Wisc. Ib. 335; Vir. Code, 474; Ind. Rev. Sts., *Descent*, sec. 42.

(6) Misso. St. 229; 1 Vir. R. C. 171; 1 Ky. Rev. L. 576; R. I. L. 191.

(7) Gangwere, 2 Harris, 417.

(8) Dut. Dig. 53.

real estate. The widow having elected to accept the provisions of the will; held, she was barred of her dower in the after-acquired estates, and that a letter of the testator, enclosed with his will, was inadmissible to show a contrary intent. Chapin v. Hill, 1 Rhode Island, 446.

(a) By Statute, a jointure made before marriage must be expressed as made in lieu of dower. Conn. St. 189.

\$6,000. After his death, the widow gave a receipt acknowledging satisfaction. Held, in Chancery, a good bar of dower.(1)

72. A man and woman of advanced years, being about to marry each other, entered into a written agreement, by which he promised not to interfere with her property, to support and clothe her, and allow her a part of the avails of her labor. The husband executed his part of the agreement. After his death, his executor delivered to the widow the articles which she had brought to the house. In consideration of the premises, the widow by an unsealed instrument released the *estate* from her claim of dower, but afterwards brought a suit at law to recover it. The heirs file a bill in Chancery, for an extinguishment and release. Held, the contract was one highly beneficial, and the release founded on a valid consideration; and the bill was sustained.(2)

CHAPTER XIV.

ESTATE FOR YEARS.

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| <ol style="list-style-type: none"> 1. Estate less than freehold—estate for years—lease. 3. Definition—"term," what is a. 5. How created, and for what time. 6. Must be <i>certain</i>. 9. Estate of executors and trustees. 12. An inferior estate. 13. Tenant not <i>seized</i>. 14. When it commences—entry—<i>interesse termini</i>. 18. <i>In futuro</i>. 22. How terminated. 29. Is a chattel. | <ol style="list-style-type: none"> 26-36. Limitation of. 27. Husband and wife. 31-5. Liable for debts. 32. Freehold cannot arise from. 33. Incidents. 34. <i>Estovers</i>. 38. <i>Merger</i>. 48. <i>Surrender</i>. 54. Assignment and under-lease. 68. Assignment by reversioner. 77. Conveyance of. 78. Forfeiture. |
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1. HAVING treated of *Freehold Estates*, we proceed to consider *Estates less than Freehold*.

2. Of these, the first in order is an *estate for years*. This, next to a fee-simple, is the most common estate known the law. It is that to which the term *lease* is chiefly, though not exclusively, applied.

3. An estate for years, is a right to or a contract for the possession of land; for a certain specified time.(3) Both the time and the estate itself are called in law a *term*. Hence the *term* may expire before the time—as, for instance, by a *surrender*.(4) Thus, if a conveyance be made to A for three years, and, after the expiration of the said *term*, to B for six, and A surrender or forfeit his term after one year; B's estate takes effect immediately. Otherwise, if the language had been, "after the expiration of the said time, or the said three years." (*Infra*, ch. 15.)

4. Lease for years, if the lessee live so long, remainder to A for the residue of the *term*. A shall hold for the whole term after the lessee's death.(5)

(1) *Selleck v. Selleck*, 8 Conn. 79, n.

(2) *Andrews v. Andrews*, 8 Conn. 79.

(3) 4 Kent, 85; 1 Cruise, 174; 2 Black.

Comm. 112. See *Hitchman v. Walton*, 4 Mees. & W. 409.

(4) Co. Lit. 45 b.

(5) *Wright v. Cartwright*, 1 Burr. 282.

5. This estate is never created, like a life estate, by act of law, but always by act of parties. The title is applicable, though the time limited be less than a year.(1)(a)

6. Every estate for years must have a certain beginning and ending, to be ascertained, at its creation, either by express words, or by reference to some certain collateral act.(2)

7. According to the maxim, "*id certum est quod certum reddi potest*," a lease for so many years as *A shall name*, is a good estate for years; but a lease for so many years as *A shall live*, or by a parson for so long a time as he shall continue in that office, is bad, as an estate for years. In England, it would be void for want of livery; but in this country would probably create a life estate.(3)(b)

8. A conveyance for twenty-one years, if *A* shall so long live, creates a tenancy for years; because the estate, though it may end sooner, cannot last longer, than the time fixed.

9. A devise to executors, for payment of debts and till the debts are paid, gives them an estate for so many years as will be necessary to raise the required sum. A devise, till such time as a certain sum shall be raised from the rents and profits, has the same effect. Lord Coke speaks of the former of these estates as an uncertain interest; being neither for life, for years, nor at will. The uncertainty would make it a life estate; but this would defeat the object, as the party might die before the debts were paid.

10. Devise to trustees, of all the testator's lands in *A*; in trust to permit the wife to enjoy them for life, afterwards, out of the rents and profits, to pay *B* an annuity for five years, if he live so long. The will also gives legacies, to be paid when the legatees come of age, and constitutes the wife executrix. Held, the trustees took a chattel interest in the lands in *A*, either until the legacies were paid, or all the legatees came of age.(4)

11. A feoffment to the use of *A*, his executors and assigns, till ten pounds should be levied out of the profits, was held to pass a chattel interest.(5)

12. Tenancy for years is an inferior title to a life estate, however

(1) Lit. 67; Co. Litt. 54 b.

(2) 1 Cruise, 174.

(3) 2 Bl. Com. 115; Co. Litt. 45 b, u. 2;

Goodright v. Richardson, 3 T. R. 463.

(4) Co. Litt. 42 a; Matthew Manning's

case, 8 Rep. 96 a; Sir Andrew, &c., 4 Rep. 81 b; Carter v. Barnadiston, 1 P. Wms. 509; Doe v. Needs, 2 Mees. & Wels. 129.

(5) Co. Litt. 42 a, n. 7.

(a) A year, in law, consists of three hundred and sixty-five days, the additional day of leap year not being reckoned; and a half year, of one hundred and eighty-two days. A month, in England, means ordinarily a lunar month, except in mercantile contracts, or where the intention is otherwise. But in this country, a calendar month will be usually intended. In New York and New Hampshire, express statutes so provide. So in Massachusetts, in the construction of statutes. Co. Litt. 135 b; Ind. Rev. L. 409; 4 Kent, 95, n. b; 1 N. Y. Rev. St. 606, Mass. Ib. 60; N. H., Ib. 44. As to the meaning of the word *day*, see Pulling v. The People, 8 Barb., 314; Judd v. Fulton, 10 Ib. 117.

A term for years continues through the anniversary of the day on which it commenced. Ackland v. Tulley, 9 Ad. & Ell. 879. See Brewer v. Harris, 5 Gratt. 285.

(b) A lease, to hold till a child then unborn, shall come of age, has been held to constitute a *tenancy at will*, on account of the uncertainty whether the child will ever reach that age. Bishop, &c., 6 Co. R. 35.

Where one has a lease for forty years, a grant, for so many years as shall remain at his death, is void. Otherwise, with a demise for so many years, to commence after his death. The Rector, &c., 1 Co. 153 a.

long it may last; being in its nature a chattel interest, according to Lord Coke, "never without suspicion of fraud,"(1) and not real estate. This inferiority may be traced to the original nature of such tenancy, which grew out of the mere *possession* of land by the *villeins*, in the early period of the English law.(a) This naked possession was gradually enlarged into a tenancy at will, yielding rent in kind, and at length into a letting of the land for a certain specified time; but never rose to the dignity of a freehold. Before the statute of Gloucester, passed in the reign of Edward I., the law, regarding tenants for years as rather bailiffs or servants, than as having any estate in the land, allowed their title to be defeated by recovery against the landlord in a real action. This act, and the statute 21 Henry VIII., allow such tenant to *falsify* or avoid a collusive recovery.(2) These provisions have been re-enacted in New York and North Carolina, and extended to a tenant holding by an execution title.(3)

13. Such being the nature of his estate, a tenant for years is not said to be *seized of the land*, but only *possessed of the term*. The subject of seizin has already been considered, (chap. 2.)

14. At common law, the mere *delivery* of a lease does not make the lessee a tenant for years, till he enters. But he has an *interesse termini*, which passes to his executors, if he die without taking possession, and may be assigned over. So, when one buys land at a sheriff's sale, upon which there is a lease from the defendant in execution older than the judgment, and at the time of the sale the lessee has not entered into possession, the purchaser buys, subject to the lessee's right of entry and user. Before entry, a lessee cannot maintain trespass. But, more especially as against a wrong-doer, his possession of a part is that of the whole. And, under the statute of uses, an estate for years may be created without entry.(4)

15. It is remarked, that there are subtleties upon the subject of an *inter esse termini*, that betray excessive refinement, and lead to useless abstruseness;(5) and the rule of American law is stated to be, that the execution and delivery of the lease perfects the title of the lessee to all intents and purposes.(6)(b)

(1) Co. Litt. 46 a.

(2) 1 Cruise, 172; Gilb. Ten. 34; Wisc. Rev. Sta. 314.

(3) 1 N. C. Rev. Sta. 261; 2 N. Y. Rev. Sta. 340.

(4) Litt. 58, 66, 324, 459; Co. Lit. 200 b, 46 b, 51 b, 270 a; 1 Cruise, 175-6; Williams

v. Bosanquet, 1 Brod. & B. 238; Copeland v. Stephens, 1 B. & A. 593; Raine v. Alderson, 6 Scott, 691; Field v. Howell, 6 Geo. 423; 2 Phil. Evi. 182; Taylor v. Perry, 1 Scott N. 576.

(5) 4 Kent, 97, n. a.

(6) Walk. Intr. 278.

(a) In the time of Littleton, the letting of lands to a *villein*, for years, operated as an enfranchisement. Litt. 205. By the ancient law, a term could not exceed forty years. Co. Lit. 45, b. By the constitution of New York, (1846,) agricultural leases are limited to twelve years.

(b) If a person receive a lease *by metes and bounds*, his possession is co-extensive therewith, and is not available to establish the possession of his landlord any farther. Massengill v. Boyles, 11 Humph. 112.

A lease cannot give the lessee such a constructive possession of the whole tract, of which the defendant occupied a part at the time of the demise, as will enable him to maintain trespass against the defendant, however good the title of the lessor may be. Wilson v. Douglas, 2 Strobb. 97.

Littleton says, "when the lessee entereth by force of the lease, then is he tenant for term of years," and the lessor may distrain or have an action of debt for rent. Lord Coke says, "to

16. It seems, if a lessee enter upon the land before the time agreed on, his entry is a disseizin, not a possession under the lease; and, although he remain in possession after the time, he is still a disseizor as before, by *relation*.(1)

17. But if a lease is limited from a time past, and the lessee was in possession before that time, this shall be intended to have been by permission, and not a disseizin.(2)

17 *a*. After an agreement to lease, if the owner notifies the applicant for a lease, that he cannot take possession until a lease is made and security given for the rent; and the applicant subsequently takes possession, and cultivates a part of the premises at the same time with the owner; he cannot recover of the owner in trespass, although the owner harvested and retained the entire crops; such notice being sufficient to prevent any dispossession of the lessor.(3)

18. An estate for years may be created to commence *in futuro*, and the lessee acquires an immediate interest; because such conveyance does not, like a conveyance of the freehold *in futuro*, place the latter *in abeyance*, which is contrary to the policy of the law.(a)

19. Where a lease is to commence *in futuro*, if, before entry of the the lessee, a stranger enter by wrong, the former may still make a valid assignment of his term; because, before entry, the estate, not being vested, cannot be divested or turned to a mere right, by any wrongful act; but when the lawful time of entry arrives, the lessee or his assignee enters by a title paramount to all intermediate claims.(4)

(1) Hennings v. Brabason, 1 Lev. 45.

(2) Waller v. Campian, Cro. Eliz. 906.

(3) Crotts v. Collins, 13 Illin. 367.

(4) 1 Cruise, 176.

many purposes he is not tenant for years" till entry; and instances that his estate cannot be enlarged by a release, although he may release the rent; that the lessor cannot grant away the reversion, *as such*, nor the lessee make a valid *surrender*. But a release will operate to extinguish the rent, whether made before or after commencement of the term. And, before entry, there may be a *surrender in law*, as by taking a new lease, Co. Lit. 338 a.

In an action by a lessee against the lessor, for *refusing to deliver the premises*, the plaintiff cannot offer evidence of a contract to assign the lease, or a proposal to purchase it. *Lawrence v. Wardwell*, 6 Barb. 423. But he may show the amount of money paid to workmen, whom he was obliged to discharge for this cause. See *Noyes v. Anderson*, 1 Duer, 342. So he may recover expenses incurred in preparing to remove to and occupy the premises, together with the difference between the real value of the rent and the sum agreed to be paid; but not the profits which he might have made in his business, had he occupied the premises. *Giles v. O'Toole*, 4 Barb. 261.

Where demised premises are destroyed after the execution of the lease, but before the commencement of the term, and before the lessee has taken possession, he is not liable for rent. *Wood v. Hubbell*, 5 Barb. 601.

Delivery of possession is necessary to the obligation to pay rent, whether the lessor refuses, or is unable, to give possession. *Ib*.

In the equitable action for use and occupation, the tenant is not answerable, unless he has had the beneficial enjoyment of the property. *Gilbooley v. Washington*, 4 Comst. 217. But the action of covenant upon a sealed lease, for the non-payment of rent, does not depend upon occupation and enjoyment. *Ib*.

Where a lessor made a fraudulent representation to his lessee as to the territorial extent of his right, and the lease was made for a term commencing *in futuro*, and the lessee took possession at the commencement of the term, and after having discovered the fraud; held, the lease passed a present interest in the term to the lessee; and, by taking possession, he waived only his right to rescind the contract, but not his right to recover the damages occasioned by the fraud. *Whitney v. Allaire*, 1 Comst. 305.

(a) See ch. 2. *Allaire v. Whitney*, 1 Hill, 484; *Field v. Howell*, 6 Geo. 423; *Ind. Rev. Sts.* 232.

20. So if after commencement of the term the lessor continue in possession, the lessee may still make a valid assignment.(1)

21. But where a lessee *in futuro*, having entered, is turned out of possession, he can no longer make a valid assignment; having merely a right of entry left him, which is not assignable.(2)(a)

22. A freehold estate, in the language of Lord Coke, cannot begin nor end *without ceremony*. Hence such estate can in general be terminated, before its natural expiration, only by some similar act to that with which it commenced, such as entry. But a lease for years may begin, and so may end, without ceremony. Hence, it may be made to cease by a proviso in the instrument itself. Thus a trust term will cease, upon fulfilment of the trusts for which it was created, if the instrument creating it so provide.(3)

23. An estate for years is denominated a *chattel real*. Being an interest in land, it has the quality of *immobility*, which constitutes it real; but having no *indeterminate duration*, it is not ranked with inheritances and other freeholds, but is a mere chattel.(b) Hence an estate for years, upon the owner's death, passes with personal property to the executor, &c., and not with the real estate to the heir.(4)

24. Upon this principle, the levy of an execution upon a term, in the form of a levy on real estate, in Massachusetts is held void. But in New Hampshire a different rule has been settled.(5)

25. In Massachusetts it is now provided, that a term originally created for a hundred years or more, and of which fifty remain unexpired, shall have all the incidents of a fee-simple. So, in Vermont, the owners of long terms are invested with some of the privileges of freeholders. And in Ohio, lands, held by permanent leases, are treated as real estate in regard to judgments and executions, and descent. But a term for ninety-nine years is to be sold on execution, as a chattel.(6)

26. The legal succession to a term cannot be controlled by any limitation in the conveyance. Hence, if a lease be made to a minister, or other sole corporation, *and his successors*, the estate will still pass, upon his death, to his executor or administrator, who shall hold it, not in *autre droit*, but in his own right. The reason of the above rule is, that a chattel can never be *in abeyance*. Therefore such estate may pass to the successor of a sole, who is merely the head of an aggregate, corporation.(7)

(1) *Wheeler v. Thorogood*, Cro. Eliz. 127; 1 Leon. 118.

(2) *Bruerton v. Rainsford*, Cro. Eliz. 15; *Saffyn's case*, 5 Rep. 124 a.

(3) Co. Lit. 214 b; Ark. Rev. Sts. 263. See *Nicoll v. Walworth*, 4 Denio, 385.

(4) 1 Cruise, 177; *Wiscon. Rev. Sts. ch. 56*, 65; *Ellison*, 2 Y. & Coll. 528; *Ackland v. Pring*, 2 Man. & G. 937; *Dillingham v. Jenkins*, 7 S. & M. 479.

(5) *Chapman v. Gray*, 15 Mass. 439; *Adams v. French*, 2 N. H. 387.

(6) Mass. Rev. St. 411; 2 Chase's St. of Ohio, 1185; *Bisbee v. Hall*, 3 Ohio, 465; Ohio Sts. 1853; 1 Verm. L. 199.

(7) Co. Lit. 9 a, 90 a; 1 Co. Lit. (Thomas' ed.) 224, n. k; 2 Bl. Com. 431. See *Daniels v. Richardson*, 22 Pick. 565.

(a) A leases to B, for two years from a future day, a house, stated in the lease to be then in possession of C. C holds over wrongfully after the day fixed. B cannot sue A, as on an implied promise to deliver possession. *Cozens v. Stevenson*, 5 S. & R. 42. If a lessee assign his lease before the time of taking possession arrives, a judgment docketed against him before he became lessee is not a lien upon the land, as he never had possession. *Crane v. O'Connor*, 4 Edw. Ch. 409.

(b) Though for 999 years, and in consideration of a *sum in gross*. *Osborne v. Humphrey*, 7 Conn. 335. Acc. *Spanger v. Stanler*, 1 Md. Ch. 31.

27. Where a woman, owning a chattel real, marries, it does not, like personal chattels, vest in the husband absolutely, but *sub modo*. He has the power to dispose of it; but, if he does not, either legally or equitably, it reverts on his death to her.(1)

28. Where the husband, holding a term in right of the wife, leases the land for a shorter period and dies, the wife has the reversion, but the rent goes to his executors.(a) If the husband grant the whole term on condition, and the executors re-enter for a breach, they hold absolutely.(2)

29. If the husband and wife are ejected from the land, and the former recovers it in a suit brought by himself alone, this vests the term absolutely in him.(3)

30. In England, by the statute of frauds, if a wife die before her husband, he is entitled to administer upon her estate, and takes her chattels real to his own use. They vest absolutely in him, and upon his death pass to his administrator.(4) A similar rule generally prevails in the United States.

31. The purchaser of a term from an executor is in no case bound to see to the application of the purchase-money. Because, being personal estate, such term is primarily liable for debts.(5)

32. A freehold cannot be derived out of a term. Thus, a rent-charge for life, proceeding from an estate for years, is itself a chattel.(6)(b)

33. The *incidents* of an estate for years are in some respects the same with, and in other respects different from, those of a life estate.

34. Tenant for years is entitled to *estovers*. (See ch. 4.)

35. An estate for years, with other chattels, is primarily subject to the payment of debts, in the hands of an executor or administrator. So, also, it is liable to be attached and sold on execution. But a judgment is no lien upon it. This point will be further considered hereafter.(7)(c)

36. By the old law, the gift of a term, like that of any other chattel, for a day or an hour, passed the entire interest. But this rule has been changed, and a term for years may now be limited for any number of lives in being.(8)

37. But a term for years is not *entailable*. The disposition of such

(1) Steed v. Cragh, 9 Mod. 43; Co. Lit. 46 b; Ellison, 2 Y. & Coll. 528; Wynne v. Wynne, 4. Mann. & G. 253.

(2) Co. Lit. 46 b.

(3) Ib.

(4) Co. Lit. 351 a, n. 1; Harg. Law Tracts, 475; Squibb v. Wynne, 1 P. Wms. 378;

Cart v. Reeve, Ib. 382; Whitaker v. Whitker, 6 John. 112.

(5) Ewer v. Corbet, 2 P. Wms. 148.

(6) 1 Cruise, 179.

(7) 1 Cruise, 183; Vredenbergh v. Morris, 1 John. Cas. 223; Shelton v. Codman, 3 Cush. 318. See Mass. Sts. 1847, 440-1.

(8) Dyer, 74, pl. 18, (7 b, n. a.)

(a) Demise to A, and B his wife, for twenty-one years. A leases to C for nine years. Held, for an injury to his reversion, A might maintain an action, alleging the estate to be his. Wallis v. Harrison, 5 Mees. & W. 142.

(b) In England, an exception to this rule is the case of *tithes*, which may be freehold, though the estates on which they are charged are not. 3 Bl. Com. 104, n.

(c) See *Judgment, Execution*. The sale of leasehold property by a sheriff need not be on the premises, and his return is sufficient evidence of the sale. No deed is necessary to pass a title. Sowers v. Vie, 2 Harris, 99.

term to one and the heirs of his body passes the entire interest; so that the estate continues, though the grantee die without issue.(1)

38. In general, where a tenant for years becomes seized of the freehold,(a) the term *merges* in the freehold and becomes extinct. So one term merges in another immediately expectant thereon. The same person cannot fill the characters of tenant and immediate reversioner in one estate. "*Nemo potest esse et dominus et tenens.*"(2)

39. A leases to B, and, before the rent becomes due, conveys the reversion to C, and C conveys it to B. The rent is hereby extinguished.(3)

40. There is no merger, where the two estates are successive, not concurrent; as where a lease is granted to tenant "*pour autre vie*," to commence at the termination of his estate. Nor where there is any intervening estate, either vested or contingent; or the estate in reversion or remainder is smaller than the preceding estate. Thus, if a lease be made to a man for life, remainder to him for years, he holds both estates, and may grant either of them distinctly; for a greater estate may uphold a lesser, though not the converse.(4)

41. Where a lessee conveys his whole interest to the reversioner, reserving a rent, no reversion being left in the former, the rent is not incident to a reversion, as in ordinary cases, and there is no merger. As where a tenant for life leased for her own life to the reversioner.(5)

41 a. But where a tenant for years demised to the remainder-man, to have and to hold during the term, reserving to the lessor the right to erect buildings on the premises, without molestation, the lessee yielding and paying a yearly rent, and engaging to keep the fences in repair, and to pay all taxes, "it being understood, that in case the lessor should use any part of the land for buildings and their appendages, a proportionate amount shall be deducted from the rent which the lessee is to pay;" held, the term merged in the remainder, and that the lessee could not maintain an action of waste against the lessor.(6)

42. Where one is possessed of a term in his own right, and seized of the freehold in *autre droit*, or the converse, it seems the doctrine of merger does not apply; more especially where one of the estates falls to him by act of law. Thus, if a man having a term marries a woman who afterwards becomes seized of the freehold by descent; or if one having the freehold is made executor of a tenant for years in the same land; the term does not merge. Lord Coke, however, says, that where a man having a term for years takes the *feme* lessor to wife, the term is extinct. And in the case of *Platt v. Sleep*, this doctrine was sustained

(1) Dyer, 7 a, pl. 8, and n. a; 1 Cruise, 184; Hayter v. Rod, 1 P. Wms. 360; Kinch v. Ward, 2 Sim. & St. 409.

(2) Dyer, 112, pl. 49; 4 Kent, 98. See Sharp v. Carlile, 5 Dana, 489; Doe v. Lawes, 7 Ad. & Ell. 195; Webster v. Gilman, 1 Story, 499; Tayloe v. Gould, 10 Barb. 388;

Cottee v. Richardson, 8 Eng. L. & Equ. 498.

(3) York v. Jones, 2 N. H. 454.

(4) Doe v. Walker, 5 Barn. & Cress. 111; 3 Pres. on Conv. 166.

(5) M'Murphy v. Minot, 4 N. H. 251.

(6) Pyncheon v. Stearns, 11 Met. 304.

(a) So, where the tenant mortgages the term to the landlord. Cottee v. Richardson, 8 Eng. L. & Equ. 498. In Virginia it is provided, (Sta. 1849, ch. 260, sec. 1,) that a reversion expectant upon a lease shall merge in any other estate; but not to affect the reversioner's claim for rent.

by a dissenting judge, who said to the counsel at the bar, that as clear as it was that they were at the bar, so clear it was that the term was extinct.(1)

43. It is said, that where a wife has the inheritance, and the husband a term in the same land, if issue be born to them by which the husband becomes tenant by the curtesy, the term merges.(2)

44. So, also, that a term held by one as executor will merge in the freehold held by him in his own right, as far as he is concerned, and as between his heir and executor, though not in relation to creditors of the estate, who would be thereby deprived of their debts.(3)

45. A distinction is made between the case of a term held by the husband, and a freehold by the wife; and that of a freehold in him, and a term in her. There shall be a merger in the former case, but none in the latter; upon the ground that marriage, being the free act of the husband, may fairly be allowed to prejudice his rights, but not those of his wife, on whose part the marriage is regarded as the act of law.(4)(a)

46. Merger is not favored in equity, and will not be allowed but for special reasons. At law, the intention of a party is not regarded; but in equity, if there is any beneficial interest to be protected, such as that of creditors, infants, legatees, husbands, or wives, or any right or intention to the contrary; the union of the legal and equitable interests—as for instance, those of trustee and *cestui que trust*—in one person, will not effect a merger. The same rule applies where the party in whom the two estates unite is under some personal incapacity, such as infancy or insanity, to make an election.(5)

47. The foregoing view of the doctrines relating to merger fully justifies the remark of a distinguished writer upon the subject, Mr. Preston, that the learning in relation to it is involved in much intricacy and confusion, and there is difficulty in drawing solid conclusions from cases that are at variance or totally irreconcilable with each other.(6)

48. Analogous to merger, is a *surrender*; the former never takes place, unless there is a legal power to make the latter. *Surrender* is the yielding up of an estate for life or years, to him that hath the next immediate estate in reversion or remainder. Hence, it appears, that while merger is the *act of law*, surrender is the *act of a party*. The

(1) See *Doe v. Pett*, 11 Ad. & Ell. 842; Cro. Jac. 275.

(2) Sug. on Ven. 533; *Platt v. Sleep*, 1 Bulstr. 118.

(3) 1 Rolle Abr. 934, pl. 9; 1 Cruise, 186; *Cage v. Acton*, 1 Ld. Ray. 520; Sug. 533. See *Gibson v. Crehore*, 3 Pick. 482.

(4) 1 Cruise, 186; Bac. Abr. Lease, R.; *Cage v. Acton*, 1 Salk. 326. But see *Godb. 2*; 4 Kent, 101; 3 Pres. on Convey. 273, 285, 294; *Donisthorpe v. Porter*, 2 Eden

Rep. 162. See also *Huston v. Wickersham*, 8 Watts, 519.

(5) Pres. on Convey. 43-49; *Gardner v. Astor*, 3 John. Cha. 53; *Starr v. Ellis*, 6, 393; *Freeman v. Paul*, 3 Greenl. 260; *Gibson v. Crehore*, 3 Pick. 475; *James v. Johnson*, 6 John. Cha. 417; *James v. Morey*, 2 Cow. 246; *Mechanics' &c. v. Edwards*, 1 Barb. 271; *Lewis v. Starke*, 10 S. & M. 120.

(6) 4 Kent, 102.

(a) Where a husband, in right of his wife, accepted land at the appraised value, under a partition in the Orphan's Court, of the estate of her ancestor, and entered into recognizances to pay the valuation to the other heirs; held, he acquired a life estate in his wife's share of the land, and a fee-simple in his own right in the residue. *Snevily v. Wagner*, 8 Barr, 396.

former, indeed, as well as the latter, is often the *result* of a party's own act; as where he voluntarily purchases the reversion or remainder; but the result or final operation itself, of *drowning* one estate in the other, is an act of law; while a surrender has this very extinguishment, in the mind of the party making it, for its sole object. It is said, that a *relinquishment* by the tenant to the reversioner or remainderman constitutes a surrender; while a *grant* of it produces a merger. It is presumed, however, that no such subtle and artificial distinction would be now recognized. Thus, if a lessee conveys his interest to the landlord, by an instrument in the form of the lease, this is a surrender, and merges the term.(1)(a)

49. As the interest of an under-lessee would not merge in the reversion of the lessor, if acquired by the former; so he cannot surrender to the lessor, but only to his immediate landlord, or his assignee.(2)

49 a. A lease provided, that the lessee should surrender the premises at the lessor's request, upon failure to pay the rent within a certain time. Held, a provision for the lessor's benefit, and that it did not authorize the lessee to surrender for the purpose of giving up the lease.(3)

50. Though a surrender is characterized as *the act of a party*, yet it may be *implied*, in law. Before the statute of frauds, the cancellation of a lease operated as such; but, since the statute, it is otherwise. But the doctrine seems now well established, though once doubted, that the acceptance of a new lease, even by parol, or of any estate inconsistent with the old one, is a surrender in law, although the new lease be voidable, if not absolutely void. So an assent that the lessee shall cease to be liable, and the acceptance of a substituted tenant, discharges the lessee. So, an abandonment by the tenant is a surrender, and authorizes the landlord to re-enter.(4)

51. A surrender extinguishes the relation of landlord and tenant, and all their rights as such. Thus it extinguishes all rent not then due.(5) So, it seems, while a surrender, made by the original lessee, has no effect to destroy the estate of his sub-tenant, it at the same time discharges the latter from his covenants and liability for rent. To remedy this evil, an English statute provides, that a surrender made for the purpose of

(1) 1 Prest. 23, 25, 153; Co. Lit. 338, a.; Doe v. Forwood, 3 Ad. & Ell. N. 627; Shephard v. Spaulding, 4 Met. 416.

(2) 2 Prest. Abstr. 7.

(3) Proctor v. Keith, 12 B. Mon. 252.

(4) Magennis v. McCullogh, Gilb. Cas. 236; Whitney v. Meyers, 1 Duer, 266; Livingston v. Potts, 16 John. 28; Jackson v. Gardner, 8 394; Smith v. Miner, 2 Barb. 180; Vir. Code,

ch. 116, sec. 13; Greider, &c., 5 Barr, 422; Roe v. York, 6 E. 86; McKinney v. Reader, 7 Watts, 123; Hesselstine v. Seavey, 4 Shepl. 212. See Prestais v. McCall, 7 Gratt. 126.

(6) Barton's case, Moore, 94; Webb v. Russell, 3 T. R. 401; 2 Shep. Touch. (Prest.) 301; St. 4 Geo. 2, ch. 28, sec. 6; 1 N. Y. Rev. Sts. 744; N. J. Sts. 191-2.

(a) But if A & B leave to C, and C afterwards conveys to A, this is no surrender. Sperry v. Sperry, 8 N. H. 477. Where there is an outstanding lease for years, and the reversioner makes a second lease to a third person, to commence immediately, it is a vested estate, and will entitle the second lessee to take the rents reserved by the former lease, although his right of possession will not commence until the expiration of the first term; and, after the making of the second lease, if the first lessee becomes owner of the reversion, his lease will not merge in the greater estate; but if the term of the second lease, instead of commencing immediately, be to commence at the determination of the former term, then, on the first lessee acquiring the reversion, his term will merge, and the term of the second lease commence at the same time. Logan v. Green, 4 Ired. Equ. 370.

renewal, shall have no effect upon the relation between the first lessee and his tenant, a new lease being made by the landlord. Similar acts have been passed in New York, Virginia and New Jersey.(1)(a)

52. It has been intimated, that the quitting possession of premises leased, and delivering up the key, may amount to a surrender, where these acts are conformable to a well-known local usage. So, although a parol license to a tenant to quit has been held not to discharge him, acceptance of a new tenant is a surrender, and does discharge him.(b) But where a tenant for years quit in the middle of a year, and sent the key to the landlord, who gave notice that he should claim rent, took possession, and offered to let the house; held, the tenant was liable to an action for use and occupation, from the time of leaving till the premises were again leased.(2)

52 *a*. A leased to B, one of the firm of C & B, a store for B's sole use, as a jewelry and fancy goods store, in expectation that he and C would dissolve. The lease contained a restriction against the use of the store for any other business. C and B did not dissolve, and B desired to relinquish the lease, but could not agree with A on the terms. B never entered into actual possession, and, while the store was vacant, C executed a lease of it to E for a hat store, for a term corresponding with the unexpired term of B's lease. C delivered the key to E. Both C and E disclaimed all connection with B, and denied that he had been consulted, or had any connection with either of them in the transaction. Held, that E must be considered, in respect to A's rights, as substituted in the place of B, the lessee.(3)

52 *b*. After a lessee had underlet the whole of the premises by two written sub-leases, the landlord called on the under-tenants, produced the sub-leases, demanded of them the rent, forbade their paying any more rent to the original lessee, and said he was the rightful landlord, and had taken the place off the lessee's hands; and he afterwards collected all the rents which were collected of the sub-tenants. Held, there was a surrender of the original lease by operation of law, and that the landlord could not collect the subsequent rent of his original lessee.(4)

53. An assignment by the lessee, with permission of the lessor, can-

(1) Gneider, &c. 5 Barr, 422.

(2) Randall v. Rich, 11 Mass. 496; Mar-
seilles v. Kerr, 6 Whart. 500; Lamar v. Mc-
Namee, 10 Gill & J. 116; Ackland v. Lutley,
9 Ad. & Ell. 879; Feltham v. Cartwright, 7

Scott, 695. See ch. 16, sec. 110, n.; 4 Shepl.
212.

(3) Howard v. Ellis, 4 Sandf. 369.

(4) Bailey v. Delaplaine, 1 Sandf. 5.

(a) As to the effect of a surrender by the lessee after assigning the lease: See Beman v. Green, 1 Duer, 382.

(b) So if the lessor take possession. And if he promise money to the tenant, the latter may recover it. 10 Gill & J. 116. Any new agreement with the tenant, more especially if sanctioned by a decree in Chancery, is equivalent to a surrender. Scott v. Hawsman, 2 McLean, 180.

Thus, a parol agreement, that the land be given up, and no subsequent claim made for rent. Gore v. Wright, 8 Ad. & Ell. 18. The words "renounce and disclaim, and also surrender and yield up all right, &c., use, trust, term, &c., of years, &c., and possession, &c.," constitute a surrender, not a disclaimer. Doe v. Staggs, 5 Bing. N. 564. See Doe v. Cooper, 1 Mann. & G. 135. But where the tenant, under a parol demise, during the term agreed to give up possession for one month and then resume it, and accordingly quit, but the landlord would not re-admit him; held, the transaction was neither a surrender nor an eviction, and constituted no bar to a suit for rent. Dunn v. De Nuovo, 3 Mann. & G. 105.

not be construed as a surrender, so as to discharge the lessee from his covenants, and from liability for the acts of the assignee.(1)(a)

54. Tenant for years, unless specially restrained, may either assign or underlet;(2) the former, by transferring all his estate; the latter, by transferring the land for a less portion of time than his whole term, whereby a reversion is left in himself. In the latter case, he has the power of distraining for rent; but not in the former,—because he has no reversion. An under-lessee is not liable to the original lessor in an action of covenant, there being no privity between them. But his goods and chattels upon the land have been held liable to distress, for the rent in arrear.(b) An assignee of the lessee is liable to an action of debt by the landlord, or his assignee, upon the ground of *privity of estate*,(c) and even notwithstanding an agreement to pay the lessee;(d) while the lessee himself still remains liable upon his covenant, by *privity of contract*, notwithstanding acceptance of rent from the assignee.(e) But an assignment alters and transfers from the original parties the privity of contract, founded merely upon implication of law; so that the first lessee, after acceptance of rent from the assignee, it not liable to an action of debt, but only of covenant.(3)

(1) Jackson v. Brownson, 7 John. 227.

(2) 1 Cruise, 174. See Wooden v. Butler, 10 Miss. 716; Lawrence v. Williams, 1 Duer, 585; University, &c., v. Foslyn, 21 Verm. 52; McFarlan v. Watson, 2 Comst. 286; Graves v. Porter, 11 Barb. 592.

(3) Campbell v. Stetson, 2 Met. 504; 4

Bibb, 538; 4 Kent, 95; Holford v. Hatch, Doug. 183; Lekeux v. Nash, Str. 1221; Howland v. Coffin, 9 Pick. 52; Waldo v. Hall, 14 Mass. 487; Coles v. Marquand, 2 Hill, 447; Dewey v. Dupuy, 2 Watts & S. 556; Wollaston v. Hakewill, 3 Man. & G. 297.

(a) But where the lessor assented to the assignment, and verbally agreed to accept the assignee as his tenant, and took him for the rent; held, under the Revised Statutes of Michigan, 1833, sec. 9, a surrender of the lease, and that the lessee was no longer liable for the rent. Logan v. Anderson, 2 Doug. 101.

(b) *Contra*, Gray v. Rawson, 11 Illin. 527.

In New Jersey, he is made liable for the rent to the landlord, in proportion to the premises occupied by him. N. J. St. 1848, 224.

(c) Where a lessee assigns his term, and rent subsequently accrues, and the lessor gives the original lessee a release of all demands, such release will not bar an action against the assignee for the rent accrued subsequent to the assignment. McKeon v. Whitney, 3 Denio, 452.

It is no objection to the recovery, by a landlord, against the assignee of his lessee, of rent previously accrued, that the landlord had removed the defendant for non-payment, under the summary statute process. *Ib*.

It seems, that nothing but a surrender, a release, or an eviction, can, in whole or in part, absolve a tenant from the obligation of his covenant with his landlord. Per Gibson, C. J. Fisher v. Milliken, 8 Barr, 111.

Where one was interested in a lease belonging to a firm of which he was a member, and also as having received rent from an under-tenant, though the under-lease was not created by him; held, he was liable upon the covenants, as an equitable assignee in possession. Sanders v. Benson, 4 Beav. 250; acc. Astor v. L'Amoureux, 4 Sandf. 524.

(d) A parol promise to pay rent, made by the assignee of a lease under seal, with a surety, to the executor of a lessor, and indorsed on the lease, does not affect the liability of the assignee for the performance of the other covenants in the lease. Torrey v. Wallis, 3 Cush. 442. Where a lessor during the term sold the premises leased, and directed the rent to be paid to the vendee, and the lessee, with full knowledge of the sale and direction, paid the rent according to his obligation to a party other than the vendee; held, the vendee could not recover rent of the lessee in an action in his own name, without an express promise of the lessee after the assignment to pay to him. Marney v. Byrd, 11 Humph. 95.

(e) Where A leased to B, who afterwards assigned the lease to C, and A sold and conveyed the land to D, and D conveyed the same to E, without mentioning the lease; held, E could not maintain an action of covenant in his own name against B, upon an express covenant for the payment of rent. Crawford v. Chapman, 17 Ohio, 449.

54 *a.* A party holding the legal title of land in trust is not liable for the ground rent in arrears, if, previously to the time the rent accrued, he has conveyed or assigned, by way of gift, the equitable interest to another, who is in possession and enjoyment of the land at the time the rent accrued, and was during the time for which it is due.(1)

54 *b.* Where the assignee of a lease, which he has taken in trust for another, ceases to have any beneficial interest, and has yielded the possession to the beneficiary, the privity of estate between him and the lessor is dissolved, and he is no longer liable upon the covenants of the lease.(2)

54 *c.* Thus, where A bid off a lease at a judicial sale, and received an absolute transfer of the same, and then agreed that B should have the lease on paying the price, and B immediately took and always kept possession of the demised premises, and subsequently paid A in full; held, after such payment, A was no longer liable to the landlord as assignee of the lease, although he did not transfer it to B, and was nominally assignee.(3)

54 *d.* A party in possession, (not being the lessee,) in subordination to the lease, is presumed to be an assignee in favor of the lessor.(4)

54 *e.* But the presumption is rebutted, by proof of a surrender of the lease by the lessee to the lessor during such party's possession.(5)

54 *f.* If the lessor produce the surrender, he thereby admits the tenancy of the lessee at the time of its date.(6)

55. The ordinary distinction between an assignment and an under-lease is, that the former transfers the land for the whole term; the latter, for only a part of it. But it has been held in Ohio, that a transfer of only a part of the lands, though for the whole term, is an under-lease, and the assignee or under-lessee not liable for rent to the lessor. On the other hand, in Kentucky, such transfer is an assignment; and, for subsequent rent, the assignee is liable in covenant to the lessor.(7)(*a*)

55 *a.* In New York, the following cases have occurred upon the same subject.

(1) *Wickersham v. Irwin*, 2 Harris, 108.

(2) *Astor v. L'Amoreux*, 4 Sandf. 524.

(3) *Ib.*

(4) *Durando v. Wyman*, 2 Sandf. 597.

(5) *Ib.*

(6) *Ib.*

(7) *Fulton v. Stuart*, 2 Ohio, 216; *Cox v. Fenwick*, 4 Bibb. 538. See *Wheeler v. Hill*, 4 Shepl. 329; *Trustees, &c. v. Clough*, 8 N. H. 22; *Daniels v. Richardson*, 22 Pick. 565; *Simpson v. Clayton*, 6 Scott, 469.

(*a*) A woman, having a life estate in certain land, leased it for her life, reserving an annual rent, but without a clause of re-entry for non-payment thereof. The lessee having conveyed the land in fee, and his grantee having taken possession; held, such grantee, his executor or administrator, was liable to the lessor in an action of debt for the rent. *Daniels v. Richardson*, 22 Pick. 565. Such grantee having conveyed a part of the land, held, the rent should be apportioned to each part according to its annual value. *Ib.* Where a feoffment was made to A and B, to the uses, &c., that the plaintiff C should have a yearly rent, which A covenanted that A and B, their heirs, &c., should pay; held, that A stood, in relation to C, like the assignor of a lease as to the landlord, and was not liable to an action of debt. *Randall v. Rigby*, 4 Mees & W. 130.

If a lessee underlets a part of the demised premises, and the sub-tenant is recognized as such, and rent demanded of him, by the lessor, the lessee and sub-tenant are not jointly liable to the lessor, for the mesne profits of the whole premises. *Fifty Associates v. Howland*, 5 Cush. 214.

Where A erected a nuisance, and leased the premises to B, who sub-let to C, and he sub-let to D; it was held, that A, B, C and D should be made parties to a bill to restrain the nuisance; but, if B had assigned his whole interest to C, B would not be a proper party. *Brady v. Weeks*, 3 Barb. R. 157.

55 *b.* In covenant against the assignee of the lessee, for non-payment of rent, the declaration alleged, that all the estate of the lessee in the premises leased had come to and vested in the defendant by assignment. Issue being joined upon this averment; held, the point of such issue was, whether the defendant was assignee of the whole of the estate of the lessee in any part of the land; and, it being proved that he was lessee of the whole estate in a part only of the land; held, further, that there was no variance, and that the plaintiffs could recover such part of the rent reserved, as the defendant was liable to pay in respect to the part of the premises held by him.(1)

55 *c.* Where a lessee parts with the residue of his term to another person, with the right of re-entry reserved to the lessee, it is not an assignment, but a sub-lease, and the lessee has the right to re-enter for a breach of the conditions.(2)

55 *d.* The assignee of a lessee demised the premises for the residue of the term, reserving the delivery of possession at the end of the term, and the intermediate possession, in case of destruction by fire. Held, an under-lease, not an assignment.(3)

56. The assignment of a lease subjects the assignee to certain implied liabilities to the assignor, in regard to the payment of rent. Thus, if the form of assignment is "he (the assignee) paying" all past and future rent, and indemnifying the plaintiffs against their covenants, and the assignor is afterwards obliged to pay the rent; he shall recover it from the assignee, upon the promise in law arising from his acceptance of the assignment.(4)(*a*)

57. It is a principle of the English law, that a lease cannot be validly assigned without writing. Mere delivery of the instrument itself, it seems, passes no title. This provision has been expressly re-enacted in nearly all the States, (a transfer by operation of law only excepted).(5)

58. In New York, it has been held that the assignment of a lease need not be under seal. In Pennsylvania, a lease for less than three years may be transferred by parol. In Vermont, the assignment of a lease for more than a year must be by deed, acknowledged and recorded.(6)

59. No consideration is necessary.(7) Where the consideration is paid by one, and the assignment made to another, the whole legal and equitable title is vested in the latter, except as to creditors of the former.(8)

60. In Ohio, an assignment must be witnessed.(9)

(1) *Van Rensselaer v. Gallup*, 5 Denio, 454; *acc. Same v. Jones*, 2 Barb. 643.

(2) *Linden v. Hepburn*, 3 Sandf. 668.

(3) *Post v. Kearney*, 2 Comst. 394; *Kearney v. Post*, 1 Sandf. 105.

(4) *Fletcher v. McFarlane*, 12 Mass. 43.

(5) *Anth. Shep.* 245; *Ind. Rev. L.* 269;

Stat. of U. S. passim.

(6) *Verm. Rev. St.* 315; *Holliday v. Marshall*, 7 John. 211; *McKinney v. Reader*, 7 Watts, 23.

(7) *Noy*, 86, 90; 4 *Dane*, 135.

(8) *Ostrander v. Livingston*, 3 Barb. Ch. 416.

(9) *Bisbee v. Hall*, 3 Ohio, 465.

(*a*) On the other hand, the assignor may agree to indemnify the assignee against all back rents. In such case, if the former refuse to pay them, the latter may do it voluntarily, and enforce his claim for indemnity. *Vechte v. Brownell*, 8 Paige, 212. Where the assignee agrees to pay rent to the assignor, the executor of the assignee's executor will be liable to the lessor, though he has done no other act than proving the will. If the rent reserved to the assignor exceeds that in the lease, the surplus is a *rent-seck*. *Wollaston v. Hakewill*, 3 Man. & G. 297.

60 *a*. The following clause in a deed, "I do hereby rent and lease unto the said A, 100 acres, where he now lives, for the unexpired term of the general lease which I now hold, in trust for the use of B during her life, and to the heirs of A after the death of the said B;" was held to vest such a legal interest of the term in A, as to enable him to maintain an action of trespass to try titles, even several years after the death of B.(1)

61. The assignor of a term for years is liable to the assignee, upon any express covenants contained in the assignment; but no covenants will be implied between them against eviction by the lessor, or any one claiming under him.

62. A leases land to B, who afterwards, by a writing upon the lease, doth "grant, bargain, &c., to C, the whole of the premises, &c. To have and to hold during the term; he, the said C, performing all covenants," &c. C is evicted by a person claiming under a mortgage from A, and brings an action of covenant therefor against B. Held, C had a claim against A upon his covenants in the original lease, which were inherent, and went with the land, and even upon the covenant implied in the words "grant and demise;" but that the action would not lie against B. It would be otherwise with an under-lessee.(2)(*a*)

63. In an action of debt, by the assignee of the lessor against the assignee of the lessee, the latter cannot offer parol evidence that the rent exceeds the annual value of the premises.(3)

64. A liability to pay rent does not run with the land, so as to bind the assignee upon the covenant, unless there be: 1. Some estate or interest leased; 2. A rent reserved, properly so called—that is, not a sum in gross, as a personal debt, but a reservation out of the leasehold estate or interest; 3. A covenant of the lessee to pay such rent.(4)

65. Whether the assignee of a lease is liable for rent accruing before the assignment, seems to be a doubtful question.(5)

65 *a*. A conveyed to B, subject to a lease for years previously given by A to C, and also to an assignment to D of A's interest in the rents reserved by such lease, for a portion of the term, all which appeared upon the face of the deed, which was duly recorded. C assigned his lease to B; and B conveyed different portions of the estate respectively to E and F. C became insolvent. Held, that D, as assignee of the lessor, had a sufficient remedy at law against E and F, as assignees of the lessee, for the rent of the portions respectively occupied by them during the term for which they actually held the premises; but that he had no claim upon them for rent accruing before they acquired their title respectively, or after they in good faith parted with it; and that F was not liable for the rent of a portion of

(1) Johnson v. High, 3 Strobb. 141.

(2) Waldo v. Hall, 14 Mass. 486; Blair v. Rankins, 11 Miss. 440. See ch. 15, § 71.

(3) Howland v. Coffin, 12 Pick. 125.

(4) Croade v. Ingraham, 13 Pick. 35; acc.

Burden v. Thayer, 3 Met. 78. See Bordman v. Osborn, 23 Pick. 295; Flower v. Hartopp,

6 Beav. 476; Graves v. Porter, 11 Barb. 592.

(5) M'Murphy v. Minot, 4 N. H. 256;

Woodf. 274, 338; Child v. Clark, 3 Barb. Ch. 52.

(*a*) But where a lessee assigned by deed, containing the word *grant*, and the lessor disclaimed upon the land for rent due before the assignment; held, the assignee might maintain an action of covenant against the lessee; but not *assumpsit*, though there were a subsequent promise. Baber v. Harris, 9 Ad. & Ell. 532.

the premises of which he was merely a mortgagee, and on which he had not entered under his mortgage.(1)

66. An assignment need not always be positively proved, but may be inferred from acts and admissions of the parties.(a) And one in possession of leasehold premises, under circumstances which imply an assignment of the lease to him, is liable to the landlord on the covenant to pay rent during his occupation of the premises, by virtue of his privity of estate.(2)

67. The plaintiff leased land to A, in 1802. In 1812, A had ceased to occupy, and the defendant had entered and under-let. The plaintiff brings an action of covenant for rent against the defendant, as the assignee of A; and offers evidence that in 1810, he, the plaintiff, recovered a judgment against B, for rent of the land, as an assignee of the lease, and also, that in 1812 the defendant, having recovered a judgment against B, extended his execution upon the land, and acknowledged the delivery of seizin. Held, that the former part of this proof seemed sufficient to charge the defendant, as presumptive evidence of assignment; but moreover, that the latter part was admissible, as showing admissions of the defendant, and the person under whom he claimed. Nor did it change the case, that the defendant levied his execution as upon a fee-simple, since by this levy all B's interest passed.(3)

67 a. A lease contained a covenant of the lessee not to assign the lease, nor underlet the whole or any part of the premises, without the previous consent of the lessor in writing. The lessor gave his consent in writing, that the lessee might underlet. The lessee afterwards made an assignment of the residue of the term to the plaintiff, who thereupon took possession and occupied until he was ousted by the lessor, and then brought his action of covenant against the latter for a breach of the covenant for quiet enjoyment. After the assignment, and before the eviction, the defendant received and accepted rent from the plaintiff, and gave him the following receipt therefor: "Received from Mr. T. O'K. ninety-five dollars for rent, in full, as per lease. In advance. \$95. T. K." Held, whether the written consent extended to an assignment of the premises or not, the receiving of rent, with knowledge that the plaintiff had become possessed of the lease and premises by assignment, was a waiver of the restriction against assigning; and that the receipt, referring to the lease, was evidence(b) that the defend-

(1) Child v. Clark, 3 Barb. Ch. 52.

(2) Glover v. Wilson, 2 Barb. 264.

(3) Adams v. French, 2 N. H. 386.

(a) And a party in possession, not being the lessee, will be presumed to be an assignee, not an under-tenant. Acker v. Witherell, 4 Hill, 112. So, where one enters into possession of vacant demised premises by the consent or permission of the tenant, he will be considered, in respect to the landlord, as substituted in the place of the tenant, although he disclaims all privity with him. Howard v. Ellis, 4 Sandf. 369; acc. Carter v. Hammett, 12 Barb. 253. But whether an assignee of property, generally, shall be regarded as assignee of a lease belonging to the assignor, thereby incurring the liabilities incident to that relation, depends upon his own election. Ib.

(b) Where a lessor sues an assignee of his lessee in covenant for rent, the premises may be referred to as "certain premises particularly described in said indenture." Van Rensselaer v. Bradley, 3 Denio, 135. So where the assignment is of a part, the premises may be described as "70 acres of the southerly side of the demised premises." Ib. But not as "the said demised premises, or some part thereof." And a count, stating that a certain

ant had knowledge of the assignment and received the defendant as his tenant.(1)

68. While a lessee may assign his lease, the landlord may also assign the reversion, and thereby render the former liable to pay rent to the assignee. The general principles of law upon this subject have been thus well stated in Massachusetts by Mr. Justice Wilde.(2)

69. At common law, the assignment of a reversion was incomplete without the *attornment* of the tenant—a formal process of acknowledging or adopting the transfer. If he refused to attorn, he was not liable to the assignee for the rent. But this principle was found inconvenient, as the tenant might unreasonably refuse to attorn, which was a great clog upon transfers. By St. 4 & 5 Anne, c. 16, assignments of reversions were made valid without attornment; but provision was made, that all payments of rents to the lessor, made before notice to the tenant of the assignment, should be held good.(a) I have always understood that attornment was never considered necessary under the provincial government. It was a doctrine of the old feudal law, and was not applicable to our tenures. But probably *notice* was required here, before the statute of Anne, as a substitute for attornment; or if it were not so, as the provision of the statute is founded on a principle of universal equity, it must be supposed to have been adopted here, unless the contrary can be shown. On general principles, also, we should hold notice necessary in a case like this, (where seven quarterly instalments had accrued.) For, if the assignee of a reversion will lie by and suffer the lessee to pay rent to the lessor, as it falls due, he has no ground for complaint, although he may suffer by his neglect.(b)

70. These observations were made in a case where there was a cross-demand due from the lessor to the lessee, which it was agreed between them should go in payment of the rent. Whether, *after notice* by the assignee, this agreement would be a good defence against him in a suit for the rent, was not distinctly decided or considered; though the remarks above cited would seem to imply that such defence would not be allowed. In South Carolina, by special statute, no payment of rent

(1) O'Keefe v. Kennedy, 3 Cush. 325.

(2) Farley v. Thompson, 15 Mass. 25. See Bowser v. Bowser, 8 Humph. 23; Kirk v. Taylor, 8 B. Mon. 262.

Doe v. Forwood, 3 Ad. & Ell. (N. S.) 627;

sum is due "for the said demised premises," is bad. *Ib.* A count, alleging that a certain portion of rent for the assigned premises is due and in arrear, is sufficient, without an averment that it has not been paid by the lessee. *Ib.*

(a) With this protection, however, the tenant is considered to have attorned at the time of assignment. The notice *relates*. Hence, the assignee is entitled to the back rents due at the time of notice. *Moss v. Gallimore*, Doug. 275; *Birch v. Wright*, 1 T. R. 384. See *Keay v. Goodwin*, 16 Mass. 4; *Fitchburg, &c. v. Melven*, 15 Mass. 269.

(b) Where one enters on land without title, and the tenants surrender their possession and attorn to him, the attornment is void, and not the commencement of an adverse possession. *Jackson v. Delancey*, 13 John. 537. Acquiescence on the part of a landlord, in the payment of rent by his tenant to a stranger, constitutes a valid attornment. *Jackson v. Brush*, 20 John. 5. But in ejectment against a tenant by the landlord, the former cannot show in defence a parol acknowledgment by the latter of title in another. *Jackson v. Davis*, 5 Cow. 123. Nor will a tenant's secret agreement to attorn destroy the possession of the landlord. *Rankin v. Tenbrook*, 5 Watts, 386. See *Doe v. Cooper*, 1 Man. & G. 135; *Harris v. Goodwyn*, 2, 418, n.

in advance, for more than twelve months, shall be valid against third persons.(1)

71. A landlord, having received rent in advance, sold the land before the expiration of the time for which rent had been paid. The purchaser brings an action for money had and received against him. Held, this action did not lie, even if it was agreed that the plaintiff should receive such rent.(2)

72. Where rent is paid in advance, and the land afterwards conveyed without notice of such payment, subject to the lease; the tenant is not liable for the rent to the grantee.(3)(a)

73. In New Jersey, Delaware, Kentucky and Alabama, statutes expressly provide that no attornment shall be necessary, but that any payment of rent to the lessor, before notice of an assignment, shall be valid against the assignee. In those States where an execution may be levied upon the rents, the officer may require the tenant to attorn, or, if he refuses, deliver possession to the creditor. This provision is made by statute in Maine. In Vermont, it is extended to perpetual leases in fee, or for so long time as the lessee shall perform his covenants.

74. In Virginia, an assignee of the reversion is placed in all respects, with regard to his claims upon the lessee and his assigns, upon the footing of the original lessor.(b) A lessee and his assigns, also, have all rights and remedies against an assignee of the reversion which they would have against the original lessor, excepting a recovery in value upon a warranty. This is substantially a re-enactment of the Statute of Hen. 8. The same law prevails in North Carolina, New York,(c) Kentucky and Delaware; and, it is said, the provision of the English act is so reasonable and just that it has doubtless been generally approved and adopted as a part of our American law.(4)

75. In Missouri, attornment to a stranger is void and shall not affect the possession of the landlord, unless made with his consent, under a judgment or decree, or to a mortgagee after forfeiture. Similar provision is made in Kentucky, New Jersey, New York and Virginia. Where execution has issued upon a *dormant* judgment, the attornment of the tenant is void.(5)

76. In Indiana, if a lessor assign the lease itself, without the reversion, the assignee acquires no right of action against the lessee, upon covenants which run with the land; as, for instance, to pay rent, re-

(1) S. C. St. Mar. 1817, p. 36; Willard v. Tillman, 19 Wend. 358. See ch. 15.

(2) Stone v. Knight, 23 Pick. 95.

(3) Stone v. Patterson, 19 Pick. 476.

(4) Anth. Shep. 244; 1 Ky. Rev. L. 444; Aik. Dig. 93; 1 Smith, 351; Verm. L. sec. 326, 1835, 9-10; Ib. 476; 2 Ky. Rev. L. 1109; 1 N. C. Rev. St. 259; 1 N. Y. Rev. St. 747-8; Dela. St. 1829, 370; 4 Kent. 119; Willard v. Tillman, 2 Hill, 274; Dela. Rev. Sts. 421.

(5) Misso. St. 377; 1 Ky. Rev. L. 444; 1 N. Y. Rev. St. 744; 1 Vir. Rev. C. 159; Hoskins v. Helm, 4 Litt. 311.

(a) A purchased from B lands which a few days before B had leased to C for three years, C being in possession, with the right of cutting all the timber on the land; taking notes for the rent. Held, the lease was valid against A, but that he might claim payment of the notes, unless they had been *bona fide* transferred to a third person, in which case, he would have a claim for the amount of them against B. Beebe v. Coleman, 8 Paige, 392.

(b) In the same State, in case of *partition*, a lessee shall hold of the party to whom his portion of the divided premises is assigned. Vir. Code, 525.

(c) The provision applies to grants *in fee*, reserving rent.

pair, &c. But in New York it is held, that although in such case there is no privity between the assignee and the lessee, yet the former may sue in his own name for subsequent rent. More especially where his title has been recognized by payment of rent.(1)(a)

77. If a tenant conveys or devises generally, his whole interest will pass.(2)

78. Tenant for years, coming under the denomination of a *particular tenant*, forfeits his estate, by attempting to convey a greater interest than he has, if freehold. But not by attempting to convey a *longer term*; for the latter is a mere contract, and has no effect upon the reversioner or remainder-man. If a husband forfeits a term held *in jure uxoris*, the forfeiture binds the wife, because he would have power to dispose of it.(3)(b)

CHAPTER XV.

LEASE.

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1. IN immediate connection with *Estate for Years*, the subject treated in the last chapter, it seems proper to consider that particular form of transfer or assurance, called *lease*, by which this estate is created.

(1) *Allen v. Wooley*, 1 Black. (Ind.) 149; *Willard v. Tillman*, 2 Hill, 274; *Moffat v. Smith*, 4 Comst. 126.

(2) *Jackson v. Van Hoesen*, 4 Cow. 325; Co. Lit. 42 a, n. 9.

(3) Co. Lit. 251 b; *Eastcourt v. Weeks*, 1 Salk. 187; 1 Rolle Abr. 851.

(a) The assignment of the rent, without the reversion, gives the assignee a right to sue in his own name for rent subsequently accruing. *Kendall v. Carland*, 5 Cush. 74. A suit against a lessee, to recover possession on account of the non-payment of rent, &c., is properly brought by the lessor in his own name, although he has assigned the future rent. *Chamberlin v. Brown*, 2 Doug. 120. Where a lessor assigns the reversion, the assignee's right to the whole rent for the current quarter cannot be controlled, by a contemporaneous verbal agreement to divide it between him and the assignor. *Flinn v. Calow*, 1 Man. & G., 589.

A, by virtue of a levy, acquired an estate in certain land, and leased the same for one year, for a rent payable quarter-yearly, the lease to terminate if the premises should be redeemed in that time. A assigned the lease, and the land was redeemed from the levy at the end of six months, the lessee having paid three quarters' rent to the assignee of the lease. Held, that A was not entitled to recover of the assignee the amount of the rent received by him for the third quarter. *Southard v. Parker*, 26 Maine, 214.

(b) Any disaffirmance of the landlord's title, by the lessee, operates as a forfeiture, and makes the latter a trespasser. *Newman v. Rutter*, 8 Watts, 51.

2. A lease is a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or other income on the other; or a conveyance of lands, &c., to one for life, for years, or at will, in consideration of a rent or other recompense.(1)(a)

3. With regard to the form of a lease, it has been remarked,(2) that in this country very great ignorance prevails, as to the legal effect of the covenants contained therein, owing to the general use of printed forms, or copies from books of forms, or from some old instrument in print.

4. A lease for years, must, in general, be *in writing*, parol leases passing only an estate at will.(b) Leases are usually *sealed*, as well as signed; and Mr. Dane suggests, that where, by statute, as is generally the case, leases for more than a certain length of time are required to be recorded, it is to be implied that they must be under seal. But, ordinarily, no seal is necessary to the validity of a lease.(3) In Delaware, no lease shall operate for a longer term than one year, unless made by deed. In Virginia and Kentucky, a conveyance for more than five years, in Vermont and Rhode Island, for more than one year, in Maryland, Michigan, New Hampshire, Maine and Massachusetts,(c)

(1) 4 Cruise, 51. See 4 Ad. & Ell. N. 367; (3) 4 Dane, 126; Hunt v. Hazleton, 5 N. H. U. S. v. Gratiot, 14 Pet. 526. 216; Kinzie v. Trustees, &c., 2 Scam. 188.
(2) Per Parker, Ch. J., * 16 Mass. 239. See Unionie &c., v Joslyn, 21 Verm. 52.

* The same learned judge remarks, that the printed form of lease sold at the shops was originally drawn up by some unskilful person, and ought to be discontinued. Brewer v. Knapp, 1 Pick. 335.

(a) There may be a lease, without any reservation of rent. Failing v. Schenck, 3 Hill, 344; Hunt v. Comstock, 15 Wend. 667. If payment of rent is the only proof offered of a tenancy, it may be rebutted by other evidence. Doe v. Francis, 2 Carr. & K. 57. Mere participation in profits, with a joint occupation, does not amount to a tenancy; as where a person contracted with a hotel company, that he should reside in the hotel, free of charge for board, conduct and have the exclusive management of it, and, at the end of the term, the furniture be restored to the company. State v. Page, 1 Spear, 408.

A grant of franchises, for a limited time, after which they revert to the State, is not a lease. Bridge &c. v. The State, 1 New Jersey, 384. Lease to A. Annexed to the lease, was an undertaking signed by B and C, and sealed with one seal opposite the name of B, in the following words: "In consideration of one dollar in hand to me paid by A, I hereby covenant and agree to become surety for the faithful performance of said A's covenant, as expressed in the aforesaid lease." In an action of covenant upon this instrument by the lessor against B and C; held, although it did not expressly appear to whom the covenant was made, yet, reference being made therein to the lease, both instruments must be read together, to ascertain the contract; that, taken together, they were equivalent to an express covenant to the plaintiff; that, even if this were not the rule, the fact of executing the covenant under the plaintiff's lease, and delivering it to the plaintiff, would enable her to recover thereon; that the consideration mentioned in the writing was sufficient to make the covenant valid, on the ground of mutuality; that the obligation of the defendants was joint and several; that they were both jointly liable in covenant, although there was but one seal, and that was opposite the signature of the first signer; and that, the declaration averring the covenant declared on to be "sealed with the seals of the said defendants," and the truth of that averment being admitted by the demurrer, the court must regard the seal as affixed by both parties. Van Alstyne v. Van Slyck, 10 Barb. 383. See McLaren v. Watson, 19 Wend. 557, 26, 425.

(b) See *Estate at Will*. Whether certain premises are parcel of the premises demised, if not ascertained by the written contract, is always a question open to extrinsic evidence. Crawford v. Morris, 5 Gratt. 90. But a written agreement to pay a certain rent, cannot be varied by parol evidence of a subsequent verbal contract for a smaller sum, and the actual payment thereof. Crowley v. Vittey, 9 Eng. L. & Equ. 501.

(c) In Tennessee, an agent may lease for seven years, though his authority is not in writing. Johnson v. Somers, 1 Humph. 268.

A recent English statute, (7 & 8 Vict., c. 76, sec. 4.) provides, that all leases must be by

for more than seven years, is invalid, unless sealed and recorded. In Vermont, *acknowledged* and recorded. Between the parties, recording, it seems, is unnecessary. In Indiana, leases for more than three years, to be valid against third persons, must be recorded. In Connecticut, leases for more than one year are good only against the lessor and his heirs, unless attested by two witnesses, acknowledged and recorded. In Ohio, an unsealed writing is good, as a lease, after entry and enjoyment. Before, it is only a contract.(1) In North Carolina, no registration is necessary.

4a. A statute provided, that "no bargain, sale, mortgage or other conveyance of houses and lands, shall be good, &c., against any other person but the grantor, &c., unless the deed, &c., be acknowledged and recorded," &c. Held, the act did not apply to a lease for years of land and a right of way.(2)

5. Leases may be *presumed* from long possession, not otherwise to be explained.(3)

6. The words appropriated to this kind of contract, are "demise, lease, and to farm let;" but any other expression, indicating an intent on the one side to quit, and on the other to take, possession for a given time, is sufficient to constitute a lease; more especially where there is a certainty as to the time when the term shall commence and terminate, and the amount of rent to be paid. So, although in the form of a license, covenant or agreement.(a) It is enough, if there be express words of present demise, or equivocal words accompanied with others, to show the intention of the parties not to have a future lease, especially if possession be taken; and their intention may be gathered, not only from the instrument, but from their concurrent or subsequent acts.(4)

7. "It is covenanted and agreed between A and B, in these words: First, that A doth let said lands for five years, to begin at the M. feast next ensuing; provided, that B should pay A annually during the term £120. Also the said parties do covenant, that a lease shall be made

(1) 1 Md. L. 26; Del. St. 1829, 368; Ind. Rev. St. 232; Virg. Code, 507; Conn. St. 350; 1 Ky. Rev. L. 432; 1 Va. Rev. C. 156; N. H. Rev. St. 243; Taylor v. Bailey, Wright, 646; Mass. Rev. St. 407; Anderson v. Critcher, 11 Gill & J. 450; Barney v. Keith, 4 Wend. 502; Me. Rev. St. 374; Chapman v. Bluck, 4 Bing. N. 187; Verm. Rev. St. 312; Taylor L. & T. 19; Burnett v. Thompson, 3 N. C. 379, Doe v. Keiv, 3 Bing. 181.

(2) Stone v. Stone, 1 R. I. 425.

(3) 4 Pet. 1.

(4) Co. Lit. 45 b; Bac. Abr. Lease, K;

Wright v. Trevesant, 3 C. & P. 441; Moore v. Miller, 8 Barr. 272; Jenkins v. Eldredge, 3 Story, 325; Moshier v. Reding, 3 Fairf. 478; Merrick v. Lewis, 3 McC. 211; Right v. Proctor, 4 Burr. 2208; Tooker v. Squier, 1 Rolle's Abr. 817; Whitlock v. Horton, Cro. Jac. 91; Hall v. Seabright, 1 Mod. 14; Doe v. Ashburner, 5 T. R. 163; Pineo v. Judson, 6 Bing. 206; Chipman v. Bluck, 1 Arn. 27; Doe v. Benjamin, 9 Ad. & Ell. 644; Alderman v. Neate, 4, 704; Cushing v. Mills, 6 Mann. & G. 173.

deed, but any written agreement to let shall be valid, and a party occupying under such agreement may, from payment of rent or other circumstances, be construed as a tenant from year to year.

(a) On the other hand, the word *let* is a comprehensive term, which does not necessarily pass a mere term for years, but may convey the fee. "A hath let to B, his legal heirs and representatives, at the rate of \$15 per acre, to be paid by B, or his legal heirs, annually to A, his heirs and assigns." This passes the fee, subject to a ground-rent in fee. Krider v. Laffery, 1 Whart. 303.

Leases are to be construed like other contracts, so far as intention and custom are to govern in their construction. Iddings v. Nagle, 2 Watts & S. 24.

and sealed, according to the effect of these articles, before the next feast of S." Held, the words "doth let," made this a present lease, and that the following expressions of prospective import merely contemplated the making of further assurance.(1)(a)

8. By articles between A and B, A covenanted, granted and agreed, that B should have *and enjoy* the land for six years, in consideration of which, B covenanted to pay an annual rent to A and *his heirs*. Held, a good lease.(2)

9. A and B agreed with C that they would, with all convenient speed, grant him a lease of, and they did thereby set and let to him certain land, to hold for 21 years, at a certain rent, payable semi-annually. The lease to contain the usual covenants, and certain special ones, one of which spoke of "this demise." Held, these words, with the words *set and let*, made this a present lease, with an agreement for a more formal one thereafter.(3)

10. A hath let, and by these presents doth demise, &c., unto B for 21 years, to commence after A hath recovered said lands from C. Leases, with powers of distress and clauses for re-entry, &c., to be drawn and signed at the request of either party, as soon as A recovers, &c. Held, a present lease.(4)

11. A bargained, covenanted and agreed with B, by articles, that he would lease to B a farm, for six years from April 1, 1807, on condition B should pay \$250 on April 1, each year during the term. B covenanted to pay accordingly. Before April 1, 1807, A sold the farm. Held, without paying \$250, B had a vested estate as lessee, and might maintain ejectment.(5)

12. A and B entered into a sealed contract, which, after reciting a covenant by A to finish a certain building then erected, for the manufacture of cotton, furnish water power and machinery therefor, by a certain day, and keep the machinery in repair for one month, proceeded thus—"And A does hereby lease said building to B for the term of 10 years," from the day before named, but B is to have the use of the building, &c., after they are completed, free of rent, from a day prior to the date of the instrument, until they shall be ready for operation; "and B shall also use said building free of rent, for the purpose of storing cotton and machinery and making repairs, from the date of this instrument;" and B covenants to keep the running machinery in repair after the expiration of one month. B took possession under the contract. Held, the instrument created a present demise, to commence *in futuro*, not merely an agreement for a lease.(6)

13. On the other hand, it has been repeatedly held, that notwithstanding words of present demise, an instrument shall not operate as

(1) *Harrington v. Wise*, Cro. Eliz. 486; *Jackson v. Keisselbrach*, 10 John. 436; *Poole v. Bentley*, 12 E. 168; *Hallett v. Wylie*, 3 John. 44.

(2) *Drake v. Munday*, Cro. Car. 207; *Tisdale v. Essex*, Hob. 34.

(3) *Baxter v. Brown*, 2 Black. R. 973.

(4) *Barry v. Nugent*, 5 T. R. 165.

(5) *Thornton v. Payne*, 5 John. 74.

(6) *Bacon v. Bowdoin*, 22 Pick. 401.

(a) So, where an instrument contained an agreement for a subsequent lease and demise, when a fence, &c., should be finished, but also a clause for re-entry, upon breach of covenant; and the proposed tenant entered and paid rent; held, a lease, not a mere agreement for one. *Alexander v. Bonnin*, 6 Scott, 611.

an actual lease, if there is a manifest intention, appearing on the whole paper, that it should operate otherwise.(a) This intention may be inferred from strong circumstances of inconvenience, connected with a different construction; such as a forfeiture. Thus, A and B entered into the following articles: "A doth demise, &c., to B, to have it for 40 years," with a rent reserved, and a clause of distress. A memorandum was afterwards written in the same paper, that these articles were to be ordered by counsel of both parties, according to due form of law. A lease was afterwards drawn by counsel, but not sealed, the parties differing as to *fire-bote*. Held, no lease.(1)

13 a. An instrument contained words of present demise, but also an agreement by the owner to make alterations and improvements, and by the other party, to take a lease when they should be made. Held, a mere agreement for a lease.(2)

13 b. Agreement between A and B, that A should *enjoy the mills, &c.*, and that B would give him a lease for a certain time, and at a certain rent, and purchase an additional piece of land and add it to that demised. Held, a mere agreement.(3)

13 c. A agreed "to let premises to B, on lease, with a purchasing clause, for 21 years, at £63 per year;" B to enter any time on or before a certain day. Held, a mere agreement, there being no words of demise, the commencement of the tenancy being left uncertain, and the words as to purchasing showing that the letting was to be by a particular instrument, containing such lease.(4)

13 d. An agreement provided, that out of the rent mentioned, a proportionate abatement should be made, in regard to certain excepted premises, and the tenant hold *under all usual covenants, &c.* Held, not a lease, because it might be disputed what are *usual covenants*.(5)

13 e. The defendant entered into a contract with A, in writing, not under seal, "to let" to A a certain farm, to commence on the first of April, 1842, and continue from year to year for five years, or so long as the parties should agree and be satisfied, reserving to either party the right to terminate the contract by giving one month's notice in writing; the produce of the farm "to be equally divided by weight or measure, between the parties." Held, although this gave A an interest in the land, and a right to occupy it without molestation from the defendant, while he continued in the performance of the contract, yet

(1) *Sturghion v. Painter*, Noy R. 128; *Tenny v. Childs*, 2 M. & S. 225; *Pleasants v. Higham*, 1 Roll. Abr. 848. See *People v. Gillis*, 24 Wend. 201; *Jones v. Reynolds*, 1 Ad. & Ell. (N. S.) 506; *Rawson v. Eicke*, 7 Ad. & Ell. 451; *Bicknell v. Hood*, 5 Mees. & W. 104; *Chapman v. Towner*, 6, 100; *Brashier v. Jackson*, Ib. 549; *Helser v. Pott*, 3 Barr, 179; *Jackson v. Moncrief*, 5 Wend. 26;

— *v. Myers*, 3 John. 388; *Tempest v. Rawling*, 13 E. 10; *Fenner v. Hepburn*, 2 Y. & C. 159.

(2) *Jackson v. Delacroix*, 2 Wend. 433.

(3) 5 T. R. 163.

(4) *Denk v. Hunter*, 5 B. & A. 322, 1042.

(5) *Morgan v. Bissell*, 3 Taun. 65. But see *Doe v. Benjamin*, 1 Per. & Dav. 440.

(a) Where the instrument referred to a parol agreement, and did not state the commencement or duration of the tenancy; held, a mere agreement, not a lease. *Gore v. Lloyd*, 12 Mees. & W. 463. Such agreement may operate as a license to enter, and give a right to claim specific performance or damages. *Price v. Williams*, 1 Mees. & W. 6. An express proviso, that the instrument shall operate only as an agreement, not a lease, will be carried into effect, though other clauses indicate a different intent. *Perring v. Brooke*, 1 M. & R. 510. But not the mere use of the word *agreement*. *John v. Jenkins*, 1 Cr. & M. 233.

it did not constitute a lease, but A was a *quasi* tenant at will, while the contract continued in force, and the defendant and A were tenants in common of the growing crops, and of the produce of the farm before severance.(1)(a) Held, also, the interest of A in the growing crops, before severance, was assignable, and the plaintiff, having received from A a legal assignment of his interest, became tenant in common with the defendant, in place of A, and might sustain an action of account against the defendant, to recover his just proportion.

14. A doth hereby agree to let, and B agrees to rent and take, &c., all his estate, &c. It is agreed that said B shall enter immediately, but not commence payment of rent till, &c. It is further agreed that leases, with the usual covenants, shall be made on or before, &c. Held, no lease; but only an agreement for immediate possession, till a lease could be drawn.(2)

15. A certain instrument recited that A, if he should have a title to certain land upon B's death, would immediately lease it to C, and declared that he did thereby agree to demise the same, with a subsequent covenant to procure a license, &c., to do it. Held, only a contract for a lease.(3)(b)

16. A agreed to let her house to B during her life, supposing it to be occupied by B, or a tenant agreeable to A, and a clause was to be added in the lease, to give A's son an option to possess the house when of age. Held, only a contract, not a lease.(4)

17. A town, by vote, directs that a lease of certain land may be made, "which shall vest in the lessee all the right of said town to enter upon said quarries and remove stones, and do any other lawful act for and in behalf of said town, in relation thereto." This vote, and a lease made in pursuance of it, give to the lessee a perfect right of entry and possession, with all the powers of the town in relation to the subject. The lessee becomes a legal owner, and may maintain trespass either against a stranger or the agent of the town. But the mere vote of a town, that their agent may let certain land for a year, is no lease, and, if he let without writing, the lessee has only an estate at will.(5)

18. "It is hereby agreed between A and B, that A will let to B the use of the county house in L, from December, 1817, to April, 1818, and B agrees to pay A therefor \$250, provided a majority of the county court agree thereto. November 13, 1817." Held, no lease, but an agreement upon condition precedent; and, in assumpsit by A for the rent, B was allowed to prove by parol that he occupied as tenant of the county.(6)

19. Articles of agreement between A and B contained the following clause: "that the said mills, &c., he shall enjoy, and I engage to give

(1) Aiken v. Smith, 21 Vt. 172.

(2) Goodtitle v. Way, 1 T. R. 735.

(3) Doe v. Clare, 2 T. R. 739. See 10 John. 336; 4 Dane, 132.

(4) Doe v. Smith, 6 E. 530.

(5) Todd v. Hall, 10 Conn. 559-60; Hingham v. Sprague, 15 Pick. 102.

(6) Buell v. Cook, 4 Conn. 238.

(a) So, though the defendant, subsequent to the assignment, had caused an undivided half of the produce to be attached and sold on execution, as the property of A, and himself become the purchaser. *Ib.* [In this case, the case of *Hurd v. Darling*, 14 Vt. 214, 16 Vt. 377, was examined, and the correctness of the decision was questioned, by Bennett, J.]

(b) The two last cases turned in part upon the point, that the proper *stamp* was wanting.

him a lease in for 31 years from, &c., at the rent, &c., and that I will purchase one yard in breadth to be laid to the race, &c. And if it be bought, and the purchase is more than £200 per acre, said B to pay" the additional cost. Held, the words *he shall enjoy*, and *I engage to give him a lease*, showed an unequivocal intention for a future lease; and this construction was confirmed by the consideration, that A was to obtain other land to be laid to the mill, before the lease should be made. If B should seek to enforce the instrument, as a contract, in Chancery, he would not be turned round with the objection, that he had already a legal, executed estate, but a lease would be decreed to be made.^{(1)(a)}

19 a. The question may also arise, whether a particular transaction constitutes a lease or a sale.

19 b. Sale of a house by written agreement, for a certain sum, and in the meantime a weekly rent reserved. The purchaser afterwards married the defendant, the purchase-money was paid, and the seller died. The executors proceed in the county court against the defendant to recover possession. Held, on application for a prohibition, that the relation of landlord and tenant did not exist, and a prohibition was granted.^{(2)(b)}

20. So, the question may arise, whether an occupant of land is a lessee, or merely a servant, of the owner.

21. The defendants, owning a manufactory and a pond above it, and having purchased of the plaintiff the right to draw off water from the pond through his land, made a written contract with one B, by which B was to run the defendants' mill one year, and manufacture for them at a certain price cotton furnished by them, and to keep the mill in good running order at his own expense, except the main gearing, which was to be repaired by the defendants, if necessary. No rent was to be charged by the defendants, and they were not to be called on for any expense, unless the main gearing should fail or some injury arise to the dam. Six or seven acres of land, where the factory stood, with the factory houses, blacksmith shop, &c., were to be used by B. In an action against the defendants for an injury to the plaintiff, caused by

(1) *Doe v. Ashburner*, 5 T. R. 163; 4 Kent, 298. (2) *Banks v. Rebbeck*, 5 Eng. L & Equ. 105, and authorities.

(a) The question sometimes arises, whether a transaction is an actual *assignment*, or only a contract for assignment, of a lease. The latter construction was given, where money was subsequently to be paid, though in the meantime the assignee was to pay rent, perform the covenants, and indemnify the lessee against them; with a condition of re-entry. *Line v. Stephenson*, 7 Scott, 69.

(b) The lessor of a farm, for three years, covenanted to furnish ten cows with hay sufficient to winter them, to be kept for the use and benefit of the lessee during the term; to risk them against all unavoidable accidents; and to pay all taxes upon them. The lessee covenanted to deliver to the lessor, at the expiration of the three years, the same ten cows, or others worth as much in all respects, with hay sufficient to winter them through. Held, this did not pass the absolute property in the cows to the lessee, but was a lease merely, with the right in the lessee, in case any of the cows were lost by accidents, not unavoidable, to return other cows of equal value. *Smith v. Niles*, 20 Vt. 315.

In February, 1842, A agreed with B to sell him a farm for a certain sum, \$375 to be paid, part in June following, and the balance the next April, whether B should decide to take a deed or not. B was to have immediate possession, and decide in July, 1842, whether he would keep the premises under the contract. Held, the agreement was a sale, not a demise, and the \$375 not *rent*, for which a distress could be made. *Moulton v. Norton*, 5 Barb. 286.

B's letting off the water from the pond so rapidly as to overflow the plaintiff's land; held, B was a lessee, not a servant of the defendants, and therefore they were not liable to this action.(1)

22. Agreement between A and B, that B and his wife should work for A one year, B upon the farm of A, and his wife in the house connected therewith. B and his wife having taken possession, A afterwards ordered them to quit, and, upon their refusing, ejected them. Held, A and B stood in the relation of master and servant, and an action of trespass did not lie.(2)(a)

22 a. The defendant, owning a farm and ferry, leased them verbally for a year, the profits and proceeds to be equally divided between him and the lessee, the lessee to keep and manage the ferry at his own expense of labor, the defendant to put the boat in good order at the commencement of navigation, and the expense of repairs to be divided between the parties; the lessee to pay the defendant half the receipts weekly; the lessee to conduct all his business as such tenant, and manage the said "farm and premises" so leased to him, carefully, &c., and allow no one but a suitable man to attend the ferry, and be responsible to the defendant for "damages occasioned by wilful misconduct or neglect in the management of the said farm and premises, and in the management of the ferry, and the scow and boat." Held, the lessee was tenant of the defendant, both as to the farm and ferry, and the defendant not liable to a passenger in the boat, for an injury caused by the lessee's negligence in the management of the ferry.(3)

23. A further question might possibly arise, whether a lessor, who is to receive for rent a certain portion of the profits of the land, does not thereby become a *partner* of the lessee. To guard against this construction, it is provided in North Carolina, that a lessor of property for gold mining purposes shall not be held as a partner, though he is to receive a sum uncertain of the proceeds, or any other consideration which is uncertain, but may be made certain.(4)

23 a. Lease of a ferry for a year; the lessee to take charge of the business, pay expenses, and pay the lessor half the gross receipts. Held, the parties were not partners, even as to third persons.(5)

24. A mere contract with the owner of land, to raise a crop *upon shares*, does not constitute a lease. Thus, A agreed with B to sow and raise on B's land a crop of wheat, B to find the team and one half of the seed, and A to do the labor: the wheat, when harvested, to be put in B's barn, threshed and divided between them. The wheat, while cut and standing, was attached as A's. Held, A had no lease of the land, and no exclusive interest in the wheat, but it belonged to the parties jointly. But if A agree with B to raise a crop upon B's land, and pay

(1) Fiske v. Framingham, &c., 14 Pick. 491.
See Anderson v. Nesmith, 7 N. H. 167.

(2) Haywood v. Miller, 3 Hill, 90.

(3) Felton v. Deall, 22 Verm. 170.

(4) 1 N. C. Rev. Stat. 426; Putnam v. Wise, 1 Hill, 234.

(5) Heimstreet v. Howland, 5 Denio, 68.

(a) A, the proprietor of a school, employing B as the steward, &c., assigned to him for lodgings a house within the curtilage, but not connected with A's dwelling-house, by any common covering or roof, and without rent. Held, it was in law the dwelling-house of A. State v. Curtis, 4 Dev. & B. 222.

him one-third of it, *as rent*, this is a lease, and A may have trover against B for taking the crop.(1)(a)

25. In Delaware,(2) any *contract* or *consent*, pursuant to which a tenant enters into or continues in possession of lands, &c., under an agreement to pay rent, is a *demise*. The term is one year, unless the instrument specify a different term, or the property have been usually let for a shorter time.(b)

26. Where a writing is given for a lease, though not properly executed as such, (as, in Connecticut, by sealing, acknowledgment and recording,) it may be used as evidence that the defendant occupied with permission of the plaintiff.(3)

27. Where a lease is made, the general presumption is, that it is beneficial to the lessee, and therefore accepted by him. But this benefit is to be judged of, not merely by the terms of the lease, but by all the circumstances of the case. If the lessee has himself a perfect title to the land, and the lessor no title, this is not a beneficial lease, and no acceptance will be presumed.(4)(c) (See *infra*, 70.)

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| <p>(1) (4 Kent. 95;) Bishop <i>v.</i> Doty, 1 Verm. 17; Hoskins <i>v.</i> Rhoades, 1 Gill. & J. 266. See ch. 16, secs. 4-7. Jackson <i>v.</i> Brownell, 1 John. 267.</p> | <p>(2) Del. St. 1829, 368; Rev. Sts. 422.
(3) Cornwall <i>v.</i> Hoyt, 7 Conn. 420.
(4) Camp <i>v.</i> Camp, 5 Conn. 291.</p> |
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(a) Where a transaction of this kind is a mere contract for *personal services*, which would expire with the death of the party occupying, it is no lease. *Maverick v. Lewis*, 3 McCord, 211. In Pennsylvania, *landlord and cropper* is a phrase familiarly known to the law. *Iddings v. Nagle*, 2 W. and Serg. 24. Contract between A and B, that B should cultivate A's farm for one season, and deliver him one-half the crops, the grain to be threshed and then divided; and should have the use of a part of the barn to put his grain in. Held, before a division, the parties were tenants in common of the crops. *Walker v. Fitts*, 24 Pick. 19; acc. *Putnam v. Wise*, 1 Hill, 234. See *Chamberlin v. Shaw*, 18 Pick. 278; *Caswell v. Districh*, 15 Wend. 379.

By an indenture, A, the plaintiff, "demised, granted and to farm let" to B and C his farm with the buildings thereon, reserving for his own use certain rooms and privileges in the kitchen, &c., *habendum* for one year, they covenanting to carry on the farm in a husband-like manner, to furnish one cow and other stock, one-half the seed, &c., and divide the grain, &c., and deposit A's portion in his part of the granary and cellar; and A agreeing to supply certain farming implements, to be kept in repair by B and C; 12 cows, &c., whose product should be equally divided; the winter manure to be put on the land at A's direction; the hay to all be fed out on the farm; half of the calves to be reared, if suitable and promising for that purpose, and the other half killed for veal. The hay and calves having been attached by creditors of B and C, A brings an action against the officer. Held, the above agreement did not so vest in B and C the hay and calves to be reared, produced on the farm during the term, as to render them liable to attachment; but the effect of it was, that all the hay should be consumed on the farm, and such calves kept on the farm till the term expired, when the division was to take place. *Lewis v. Lyman*, 22 Pick. 437.

Lease of a farm, with the cows and sheep thereupon, for five years, at a certain annual rent, with a provision that cows of equal age, &c., should be returned at the end of the term, and also sheep. Held, the cows and sheep, as also others substituted for them, belonged to the tenant, and might be levied upon as his. *Carpenter v. Griffin*, 9 Paige, 310. (See ch. 16, sec. 4.)

A agreed by parol with B to clear and sow B's land and receive the crop. B sold the land to C, with notice of this agreement. Held, C was bound by it, and A might enter to take the crop. *Davis v. Brocklebank*, 9 N. H. 73.

(b) In the city of New York, a lease not limited in duration continues to the first of May next, after possession taken; and the rent is payable at the usual quarter days for payment of rent in that city, unless otherwise expressed. 1 Rev. Sts. 744.

(c) It has been held, that a lessee may abandon his contract, if the lessor refuse to give possession on the day fixed. *Spencer v. Burton*, 5 Blackf. 57.

28. Every lease must have a certain beginning and ending. It may begin from a day past. If made to commence from an *impossible* date, as the 3th of February—or from the end of another lease, which does not exist, or is void, or misrecited, it takes effect from delivery; but if from an *uncertain* date, as where the month is mentioned, but not the year, it is void.(1) But it may commence or end upon a contingency which *must happen*, as from the lessor's death, running to a certain day.(2)

29. So a lease for 21 years, to commence after the termination of a life, is good; because the commencement, though at first uncertain, is rendered certain by a subsequent event. So, A may grant to B, that when B grants him a certain sum, he shall have and occupy the land for twenty-one years; and this is a good lease to commence on payment of such sum.(3)

30. As to the legal import of the words "from the date," "from the day of the date," &c., it was the old rule, that either expression would make the lease to commence the day after the date. But the modern doctrine is, that there is no general rule on the subject; that, in reckoning from an act or event, the day is to be inclusive or exclusive, according to the reason of the thing and the circumstances of the case; but ordinarily, the day is inclusive, the words being used, not by way of computation, but of passing an interest, and because this construction is most favorable to the lessee.(4) In several cases, the rule is laid down, that where the computation is from *an act done*, the day is included; as where it is "from the making hereof," or "from henceforth."(5)

31. Where the expression is "from the date," the rule seems to be, that if a present interest is to commence from the date, the day of the date is included; but if merely used to fix a *terminus*, from which to compute time, the day is excluded.(6)(a)

32. The word "lease," as well as "term," seems to be of somewhat equivocal import. (*Supra*, ch. 14, s. 3.) Thus, instead of applying to the instrument itself, it may be held to refer to the time for which it was to run.

33. The owner of land, containing a quarry, leases the quarry for ten years, and then conveys the land, "reserving the use of the quarry until the expiration of *the lease*." By mutual consent, the lease was cancelled within the ten years. Held, the reservation still remained in force, till the ten years expired.(7)

34. Where a statute requires registration of "any lease for more

(1) Co. Lit. 46 b, and n. 10. 1 Mod. 180; *Moore v. Hussey*, Hob. 18.

(2) *Goodright v. Richardson*, 3 T. R. 462; *Child v. Bayley*, Cro. Jac. 459.

(3) *Dyer*, 124; *Goodright v. Richardson*, 3 T. R. 463; *Bishop of Bath's case*, 6 Rep. 34 b; Co. Litt. 45 b. See ch. 14, sec. 6—11.

(4) 4 Kent, 95 n. b, and authorities. See *Farwell v. Rogers*, 4 Cush. 460; *Thomas v. Afflick*, 16 Penn. 14; *Bigelow v. Willson*, 1 Pick. 485; *Arnold v. U. S.*, 9 Cranch, 104; |

Jacobs v. Graham, 1 Blackf. 392; *Wilcox v. Wood*, 9 Wend. 346; *Webb v. Dixon*, 9 E. 15.

(5) Co. Lit. 46 b; *Blake v. Crowninshield*, 9 N. H. 304; *The King v. Justices, &c.*, 4 Nev. & Man. 375; *Brainard v. Bushnell*, 11 Conn. 17; *Glassington v. Rawlins*, 3 E. 407.

(6) *Arnold v. U. S.*, 9 Cranch, 104; Co. Litt. 46 b, n. 8, 9.

(7) *Farnum v. Platt*, 8 Pick. 339.

(a) Under an agreement to quit on notice of 10 days, the day on which notice is given must be excluded. *Aiken v. Appleby*, 1 Morris, 8.

than seven years from the *making thereof*;" a lease to commence *in futuro*, though for a term less than seven years, is within the act, if the time be more than seven years from the making of the lease to the end of the term.(1)

35. Where a lease is made for different periods, in the alternative—as, for instance, for seven, fourteen or twenty-one years; although not, as has been contended, void for uncertainty, the legal construction seems to be somewhat doubtful. Thus it has been held, in one case, that the duration of the lease, for one or the other of the times named, might be determined either by the lessor or the lessee, after due notice; but in a later case, that the latter alone could exercise his election. By continuing over one period, he extends his tenancy to the next.(2)

35 *a*. Lease of a dwelling and other buildings, used for manufacturing, meadow and pasture lands, with all water courses, &c., to commence, as to the meadow, from the 25th of December last past; as to the pasture, from the 25th of March following; and as to the houses, mills, and other premises, from May 1st. Held, this last was the substantial time of entry, the houses, &c., being the principal subject, to which the other premises were merely auxiliary.(3)

35 *b*. A executed to B a lease for one year, containing these words: "B to have the privilege to have the premises for one year, one month, and twenty days longer; but, if he leaves, he is to give four months' notice before the expiration of this lease." Held, the term did not terminate until the expiration of two years, one month, and twenty days, in case the tenant did not give notice of his intention to quit four months previous to the expiration of the first year.(4)

35 *c*. Lease dated March 25, 1783, to hold from the 13th of March last past. It was proved that the lease was executed some time after date. Held, the term commenced March 25th, 1783.(5)

36. A lease for one year, so for two or three years, as the parties shall agree, from the first year, is a lease for two years; and after the beginning of every subsequent year, is not determinable till the end of it.(6)

36 *a*. A demise "not for one year only, but from year to year," constitutes a tenancy for at least two years, not determinable by a notice to quit at the end of the first year.(7)

36 *b*. So a lease *for years* continues two years.(8)

37. A lease may be made to terminate before its natural expiration, by proviso or condition. Of this nature, is the usual condition of re-entry upon non-payment of rent.(*a*)

38. But such proviso is construed strictly, and its terms must be literally complied with.

39. Lease for twenty-one years, provided that either party, or their

(1) Chapman *v.* Gray, 15 Mass. 439.

(2) Ferguson *v.* Cornish, 2 Burr. 1034; Goodright *v.* Richardson, 3 T. R. 462; Dann *v.* Spurrer, 3 B. & P. 399-442; Leo, &c. *v.* Merritt, 21 Wend. 336. See Waring *v.* King, 8 Mees. & W. 571.

(3) Doe *v.* Watkins, 7 E. 551.

(4) Chretien *v.* Doney, 1 Comst. 419.

(5) Steels *v.* Mast, 6 Dow. & R. 392.

(6) Harris *v.* Evans, 1 Wils. 262; 4 Dane, 133.

(7) Den *v.* Cartright, 4 E. 29.

(8) Bac. Abr. Leases, (L.) 3.

heirs or executors, might terminate it at the end of seven or fourteen years, by giving six months' notice in writing, under his or their respective hands. The lessor died, having devised the lands to three executors, as joint-tenants. Two of them gave notice, as for the whole. Held, this was insufficient, it not appearing that the termination of the lease would be a benefit to them; and that neither a subsequent ratification by the non-signing executor, nor his joining in a suit for the land, was sufficient to bind the lessee.(1)

39 *a*. With regard to the *parties* to a lease, it is held, that one disseized can deliver a lease only as an *escrow*, to take effect after his entry, and it will pass his right of entry.(2)

40. By St. 32 Hen. 8, c. 28, *tenants in tail* are empowered to make leases for life or for years, which will bind their issue, but not the reversioner or remainder-man. A lease conformable to this statute, though made by *feoffment* and *livery*, will not operate as a *discontinuance*.

41. It has been already stated, (ch. 3,) that, in several of the United States, tenants in tail are empowered to convey in fee, and thereby bar the entailment. It has been questioned, whether such power involves the right of creating lesser estates. In Delaware alone, it seems, tenant in tail is expressly authorized to convey a fee or *any less estate*. The English statute is said not to be in force in Massachusetts.(3)

42. By the same English statute, all leases made for years or for life, by those having an inheritance *in right of their wives*, or jointly with their wives, of any estate of inheritance before or after coverture, shall bind the wife; provided the lease be by indenture, in their joint names, sealed by her, and the rent reserved in such manner as to follow the estate itself. And the husband shall have no power over the rent beyond his own life, but by joining the wife in a fine.

43. Where a lease is made not conformably to this statute, the wife, or, if she die before the husband, her heirs, may avoid it.(4)

44. The act above referred to, so far as it relates to husband and wife, has been substantially re-enacted by a statute of North Carolina, which, however, seems to leave it doubtful whether a lease, to be valid, must be an *indenture*. The wife is privately examined. The act is expressly declared not to apply to a grant of the reversion, or a lease without impeachment of waste, or for more than three lives or twenty-one years.(5)

44 *a*. The husband may lease lands owned in fee by the wife for a term of years, during the coverture at least; and an agreement to give such a lease, if not otherwise objectionable, may be enforced in Chancery.(6.)

44 *b* Land was conveyed to husband and wife, who executed articles, reciting a sale by them in consideration of a certain sum, and of certain quantities of grain yearly, during their joint lives, with two acres of land for the same term, in consideration whereof, the husband

(1) *Right v. Cuthell*, 4 Dane, 133.

(2) *Doe v. Watts*, 9 E. 19.

(3) 4 Cruise, 57; Vaugh. 383; *Walter v. Jackson*, 1 Rolle Abr. 633; *Wheelright v.*

Wheelright, 2 Mass. 450; Dela. St. 1829, 197; 4 Dane, 126-7.

(4) 4 Cruise, 57.

(5) 1 N. C. Rev. Sts. 261.

(6) *Eaton v. Whitaker*, 18 Conn. 222.

leased, demised, &c. The wife, not having acknowledged the articles under the statute, survived the husband, and received the stipulated returns for two or three years, when she was ejected from the two acres, and the returns were not paid. Held, she was entitled to recover in ejectment, from those having no other title than under the articles, and denying her right.(1)

44 c. A husband leased his wife's land for one year, and died. Held, his life estate ceased at his death, and the rent belonged, not to his administrator, but to the wife.(2)

45. A *tenant for life* cannot make a lease, to continue beyond his own estate. One coming in as tenant to a tenant for life does not, upon his death, become the tenant of the remainder-man, without his assent, express or implied. And if A, tenant for the life of B, lease for years to C, and B die before the end of the term; A may re-enter, though he have since purchased the reversion in fee. So the leases of tenants by the curtesy and tenants in dower become void with their death, (*supra*, s. 44, c.) Where the tenant for life and the reversioner or remainder-man join in leasing; during the life of the former, it shall be his lease, and the *confirmation* of the latter; and afterwards, *vice versa*.(3)

45 a. In South Carolina, where a tenant for life of land or slaves dies after the 1st of March in any year, having leased the land or slaves to another, the lessee shall not be disturbed in his possession during the year, but he shall secure to the remainder-man the rent or hire which shall accrue after the death of the tenant for life.(4)

46. A *guardian* in socage, in England, having an *interest* as well as a *power*, may lease the ward's land in his own name. But the lease expires upon the ward's coming of age.(5)

47. In Virginia, a *testamentary* guardian may make a lease, reserving the best annual rent and most beneficial covenants, for any term, ending when the ward shall be of age, or continuing longer at the ward's election. So he may take or make a surrender of an old lease. The *committee* of an insane person are invested with the same power. In North Carolina, a guardian may lease slaves and land, the latter only in writing, during the minority of the ward, with special provisions as to the preservation of the estate, and to guard against waste. In Illinois, a guardian may lease for such time and on such terms as the court may direct, but not beyond the ward's minority, which in females is eighteen years.(a) In Connecticut, the *conservator* of an idiot cannot lease his land.(6)

(1) Clark v. Thompson, 2 Jones, 274.

(2) Arnold v. Hodges, 10 Humph. 39, (*infra* s. 45.)

(3) Co. Lit. 47 b; 4 Cruise, 62; Co. Lit. 45 a; Treport's case, 6 Rep. 14; Horsey v. Horsey, 4 Harring. 517.

(4) Freeman v. Tompkins, 1 Strobb. Eq. 53.

(5) Bac. Abr. Lease, 1, s. 9. (See Roe v. Hodgson, 2 Wils. 129, 135; 2 Rolle's Abr. 41.)

(6) Anth. Shep. 477; 1 Vir. R. C. 322, 235; 1 N. C. Rev. St. 311; Treat v. Peck, 5 Conn. 280; Illin. Rev. L. 455; Illin. St. 1835, 36.

(a) In the same State, a *testamentary* guardian, appointed by deed or will by father or mother, has charge of the estate.

48. If a guardian lease by parol for a year, and during the year the ward die, his heir cannot recover the rent.(1)(a)

49. In Massachusetts, a lease by the father or mother, as guardian by nature, of the child's land, is void; upon the principle, that such guardian is under no bonds for the faithful performance of his trust. In Connecticut and Missouri, the father, as guardian by nature, has control of the child's estate, subject to an account in Connecticut, and also in Missouri, unless the estate is derived from the father. The father's power extends to land which descended *ex parte materna*. In Missouri, a mother has the same authority, where there is no lawful father, or where the father is dead.(2)

50. *An executor or administrator* may lease lands, in which the deceased owned a term for years; and the rents will be assets.(3)(b)

51. *An heir* may lease before entry, but not after an abatement by the entry of a stranger.(4)

52. *Joint tenants, parceners, and tenants in common* may lease their undivided shares, jointly or severally.(c) And where one leases, the lessee has the same rights in relation to the others, which the lessor before had. So one may lease to another—this being a mere contract, by which the latter shall take the whole instead of half the profits.(5)

53. If two tenants in common lease the land, and one of them die, the other cannot maintain an action alone, for rent accruing after the death of the former.(6)

54. If there be two parceners, owners of three acres of equal value, and one of them lease his interest, and upon partition only one acre be assigned to the lessor; the lessee may still have an additional half acre. But if two parceners own two acres, and one of them lease one acre, and upon partition the other is assigned to him, the lease becomes void.(7)

54 a. Where there are several trustees, a part of them cannot exclude the others from possession; and a lease given by a part, although a majority, can give the lessees no better right to possession than the minority have.(8)

54 b. One of three trustees has no authority to put an end to a lease of the property of the charity.(9)

55. If *an infant* lease his lands, the lease, it seems, is not void, although sometimes so held, but only voidable, whether with or without

(1) Welles v. Cowles, 4 Conn. 182.

(2) May v. Calder, 2 Mass. 55; Foster v. Gorton, 5 Pick. 185; Dut. Dig. 23; Bacon v. Taylor, Kirby, 368; Kline v. Beebe, 6 Conn. 494; Misso. St. 293.

(3) 4 Cruise, 62.

(4) 4 Dane, 135; Tayl. L. & T. 53; Shep. Touch. 269.

(5) Ib. 2 Ohio, 293; Keay v. Goodwin, 16 Mass. 4.

(6) Burne v. Cambridge, 1 M. & Rob. 539; Jurist, (Jan. 1818,) 413.

(7) Co. Lit. 46 a, and n. 5.

(8) Cox v. Walker, 26 Maine, 504.

(9) Kingsley v. School Directors, &c., 2 Barr, 28.

(a) It is said in this case that a guardian has an authority only, not coupled with an interest.

(b) In Missouri, he may lease for a term not exceeding three years; St. 1843, 3, 4. In Alabama, at auction, (Clay, 199.)

(c) Where several persons become bound for the payment of rent, in contemplation of law the lease is to all, where there is nothing in the body of the instrument to negative that conclusion. Magee v. Fisher, 8 Ala. 320.

Under a joint lease to two tenants, the occupation of one is sufficient to make both liable for the rent. Kendall v. Carland, 5 Cush. 74.

rent; inasmuch as the infant cannot plead to an action upon it "*non est factum*," but must plead his infancy specially. If such rent is reserved as to make the lease a beneficial one, it is *prima facie* binding; but may be avoided by the infant when he comes of age, or by his heir, if he die in minority. If an infant make a lease, and after coming of age mortgage to the lessee, the mortgage referring to the lease, this is a confirmation of the latter. So, if an infant receive rents, he cannot demand them again when of age.(1)(a)

56. A lease may *become void*, or *be forfeited*, by various causes. In some points of view, this subject will be considered hereafter.(b) So far as this consequence follows from some act or neglect of the lessee, it is said to be doubtful, whether a lease can be forfeited by a mere neglect of the lessee to perform his contract. A sub-lessee certainly cannot allege such forfeiture, until it has been claimed by the party interested.(2)

57. Where a lease made by any particular tenant is merely *voidable*, if, after his death, the heir, reversioner or remainder-man accept or sue for rent from the lessee, or do any other act recognizing the existence of the lease; this operates as a confirmation of it. But if it were void, there can be no confirmation.(3) In order to have the effect above referred to, the act of the party entitled must be done with a knowledge of his title at the time; or he must have lain by, and suffered the tenant to make improvements.(4)

58. Both these principles are illustrated in the case of a lease by tenant in tail, not conformable to St. 32 Hen. 8. If *the issue* receive or sue for the rent, or sue for waste, this is a confirmation. But as to *the reversioner or remainder-man*, the lease is *void*, and no act of his will make it good.

59. A lease by husband and wife, not conformable to the statute, is *voidable* merely, and may therefore be confirmed by the wife, after the husband's death. Whether a lease by the husband alone is absolutely void, seems an unsettled point.(5)

60. All leases made by tenants for life, (unless by virtue of a *power*,) become absolutely void by their death. Thus, where such lease was

(1) Bac. Abr. Lease B.; Co. Lit. 45 b, n. 1; Zouch v Parsons, 3 Burr. 1806; Stody v, Johnson, 2 Y. & Coll. 586; Parker v. Elder, 11 Humph. 546.

(2) Todd v. Hall, 10 Conn. 559-60.

(3) Noy's Max. 88.

(4) Jenkins v. Church, Cowp. 482.

(5) Doe v. Weller, 7 T. R. 478; Bac. Abr. Lease C.; Wotton v. Hele, 2 Saun. 180, n. 9; Doe v. Butcher, Doug. 52.

(a) In England, the subject of leases by *ecclesiastical persons*, is an important one, and has been regulated by *enabling* and *restraining* statutes, the construction of which has given rise to many nice questions. In the United States, these acts are not in force, and the subject itself is of little importance. I have met with no statutory provisions relating to it. In Vermont, (1 Ver. L. 234,) lands appropriated or granted for the use of the ministry or "social worship of God," may be leased by the selectmen of the town where they lie. In the same State, *glebe rights*, granted by the Crown to the Church of England, are declared to be public reservations, and to have vested in the State; and they are granted to the towns where they are located, with power to the selectmen to lease them, the rent to be applied in aid of *schools*. See Pawlet v. Clark, 9 Cranch, 292; Cheever v. Pearson, 16 Pick. 273; Verm. Rev. St. 403. A lease of a benefice, by which it is provided that certain tithes shall be collected by the lessee, and appropriated to the payment of the debts of the rector of the parish, is void under the 13 Eliz. c. 20. Walthew v. Crofts, 4 Eng. L. & Eq. 504.

(b) See *Rent. Condition*.

made for twenty-one years, and the remainder-man, after the death of tenant for life, allowed the lessee to occupy four or five years, and regularly received rent from him; held, he might still, after notice to quit, maintain ejectment.

61. So where the remainder-man, after the death of tenant for life, sold the land at auction, and both in the conditions of sale and the deed to the purchaser the lease was mentioned, and excepted from the covenant against incumbrances; and the purchaser made a mortgage, in which the same notice was taken of the lease, and the mortgagee received rent from the tenant: still the lease was held void.(1)

62. Nor will the circumstance of the tenant's laying out money upon the land operate at law as a confirmation, where there seems to have been no intention to confirm the old, or grant a new lease; but both parties acted under the mistaken belief, that the original lease was good.(2)

63. But where a remainder-man receives rent, and allows improvements to be made, knowing the defect in the lease, Chancery will compel him to execute a new lease.

64. A tenant for life leased under a power, but not conformably to it. After his death, an assignee of the lessee erected buildings, and the remainder-man received rent for six years. The latter then brings ejectment, and recovers the premises; and the tenant prays, in equity, for an injunction against proceedings at law, and that he may be quieted. The defendant, in his answer, did not deny notice. Held, he should execute a new lease.(3)

65. In New York, a lease is avoided by conviction of the tenant of using the premises for a bawdy-house.(4)

66. Where a lease contains the proviso, that if the rent shall not be paid at a certain time, the lease shall be void, and the rent is not paid at that time; a subsequent acceptance of rent will not operate as a waiver of the lessor's right to avoid the lease, or as a confirmation thereof. Thus, where the condition was, that upon non-payment within forty-days, the lease should be void; and the rent was not thus paid, but afterwards the lessor accepted it, and made an acquittance as if it had been paid at the day, and afterwards for several years continued to receive the rent; held, the above proviso was a *limitation to determine*, not merely a *condition to undo*, the estate; that, upon non-payment, the land became discharged of the contract; the tenant held neither at will nor at sufferance; and the lessor might re-grant the land.(5) But if there be a proviso in a lease, that *upon alienation* the lessor may re-enter; acceptance of rent after breach of condition will be a waiver, if the lessor had knowledge of such breach; more especially where such rent has subsequently accrued.(6) (See *infra*, c. 16.)

67. So it has been held in New Hampshire, that where a lessor re-enters for non-payment of rent under a condition for re-entry, accept-

(1) Doe v. Archer, 1 Bos. & P. 531.

(2) Doe v. Butcher, Doug. 50.

(3) Stiles v. Cowper, 3 Atk. 692.

(4) 2 N. Y. R. S. 702.

(5) Finch v. Throckmorton, Cro. Eliz. 221. Poph. 53. In this case, however, Queen Elizabeth was the lessor, and the non-payment of rent was found by office before the

second grantee entered. Co. Lit. 215 a, & n. 117; Symson v. Butcher, Doug. 51; Gwynn v. Jones, 2 Gill & J. 183.

(6) Pennant's case, 3 Rep. 64; Roe v. Harrison, 2 T. R. 425; Goodright v. Davids, Cowp. 803; Chalker v. Chalker, 1 Conn. 79; Jackson v. Brownson, 7 John. 234.

ance of the instalment due, as well after entry as before, is a waiver of breach, and the tenant is not a trespasser for entering and gathering vegetables on the land.(1)(a)

68. A lessee covenants to plant a certain number of trees, and always to keep that number on the land. After the breach, the lessor receives rent. He may still re-enter for any subsequent breach.(2)

69. In some cases, a lease, though avoided in part by a party having a right so to do, will afterwards revive. Thus, where a widow avoids a lease made by the husband during marriage, it shall be in force again after her death.(3)

70. The law presumes a lease to be beneficial to the lessee. (See *ante*, 27.) Hence, idiots, infants and married women may be the lessees. They may disclaim, upon the removal of their disabilities; but a subsequent occupancy will give validity to the lease.(4)

71. A lease usually contains *covenants*, both on the part of the lessor and the lessee. If the lessor alone signs the lease, he cannot maintain an action of covenant. But the assignee of a lease has been held to be bound in equity by the covenants, though he did not sign any instrument.(b)

71 a. Where it is agreed that a lease shall contain the *usual* covenants, the question "what are usual covenants" depends upon circumstances, such as the usage of the place and the nature of the property; but is always for the jury.(5)

71 b. Thus a lessor cannot, as matter of right, demand a covenant from the lessee not to assign or underlet without license; or not to carry on a particular trade on the premises; or to keep them insured or pay taxes; nor will he be bound to covenant that he will rebuild in case of fire, with a stipulation that the rent shall cease on his failure to do so. But a covenant for the lessee's quiet enjoyment, without interruption from the lessor or those claiming under him, is said to be *usual*.(6)

71 c. Equity will restrict a lessee to the specific performance of his covenants. So, where a lease contained a clause, restricting the use of the premises to "the regular dry goods jobbing business," and the lessee commenced selling goods at auction therein; held, although there was no damage or irreparable injury done to the lessor, nor any nuisance at law, yet it was a breach of covenant, and the lessor could restrain the tenant by injunction.(7)

71 d. With regard to covenants affecting the *title* to the demised premises, it has been held, that no implied covenant against eviction arises from the mere relation of landlord and tenant.(8) So in New Hamp-

(1) *Coon v. Brickett*, 2 N. H. 163.

(2) *Bleecker v. Smith*, 13 Wend. 530.

(3) Co. Lit. 46 a.

(4) 4 Cruise, 67.

(5) *Bennet v. Womack*, 7 B. & C. 627.

(6) *Church v. Brown*, 15 Ves. 258; *Van v. Corp*, 3 My. & K. 269, 280, 282; *Bennet v. Womack*, 7 B. & C. 627; *Doe v. Sandham*,

1 T. R. 705; *Tayl. L. & T.* 27. See *Page v. Broom*, 3 Beav. 36.

(7) *Steward v. Winters*, 4 Sandf. Ch. 587.

(8) *Jackson v. Cobbin*, 8 Mees. & W. 790; *Granger v. Collins*, 6 Mees. & W. 458. See 6 Scott, 447; *Piston v. Cater*, 9 Mees. & W. 315; *Walker v. Hatton*, 10, 249.

(a) "It is unjust, that a lessor should receive both the penalty and the rent; accept performance of the condition, and retain the forfeiture for non-performance." 2 N. H. 164.

(b) See *Trustees, &c. v. Spencer*, 7 Ohio, 149; *Wilson v. Leonard*, 3 Beav. 373; *Duffield v. Whitlock*, 26 Wend. 55; *Gardner v. Keltetas*, 3 Hill, 330.

shire, it has been held, that the words "let and lease" do not make a covenant in law, or implied covenant.(1) But the word *demise* implies a covenant of the right to lease and for quiet enjoyment.(2)(a) So, in Ohio, the words "have rented."(3)

71 *e.* A covenant, that the lessee shall quietly enjoy the premises "free from all eviction, interruption, or molestation from or by any person," is not broken by a forcible disturbance and injury committed by a mob, against the will of the covenantor, although the mob were exasperated by some of his previous acts.(4)(b)

71 *f.* The words, "doth agree that the lessee shall hold and occupy" during the term, amount to a general covenant for quiet enjoyment, but it does not apply to disturbances made by virtue of subsequently acquired rights. As, for instance, the subsequent location of a town-way over the land; the establishment of which, at the time of making the lease, was a mere naked possibility; and for which, moreover, the lessee, as *owner*, has a perfect constitutional remedy against the public, to the extent of the damage sustained by him. Upon these grounds, the case is held to be in principle like a *tortious* eviction.(5)(c)

71 *g.* So, where the lessor covenants against all claiming under him, it is no breach, that the tax collector enters and seizes goods for arrears due even prior to the lease.(6)

71 *h.* But where a landlord covenanted to repair all external parts of the premises leased, and the corporation, by virtue of an act subsequently passed, took down an adjoining tenement, leaving the partition and wall without support, which thereby gave way; held, an action would lie upon the covenant, notwithstanding a provision in the statute for compensation. He was bound immediately to make the necessary repairs.(7)

71 *i.* For breach of the covenant for quiet enjoyment, the damages consist of the costs incurred by the lessee, in defending against the suit of an adverse claimant, with the rent paid the lessor since eviction, for a period not exceeding six years.(8)

(1) *Lovering v. Lovering*, 13 N. H. 513.

(2) *Cranch v. Fowle*, 9 N. H. 219.

(3) *Young v. Hargrave*, 7 Ohio, 63.

(4) *Surget v. Arighi*, 11 S. & M. 87.

(5) *Ellis v. Welch*, 6 Mass. 246; see *Wilson v. Anderson*, 1 Carr. & K. 544; *Frost v. Earnest*, 4 Whart. 86; *Wainwright v. Ramsden*, 1 Nicholl, &c., 714; *Patterson v. Boston*,

23 Pick 425; *Lister v. Zobley*, 7 Ad. & Ell. 124; *Queen v. London, &c.*, ib. 717.

(6) *Stanley v. Hays*, 3 Ad. & Ell. (N. S.) 105.

(7) *Green v. Eales*, 2 Ad. & Ell. (N. S.) 225.

(8) *Kelly v. Dutch, &c.*, 2 Hill, 105. See *Dexter v. Manley*, 4 Cush. 14; *Smith v. Howell*, 6 Eng. L. & Equ. 490.

(a) Otherwise where there is an express covenant for quiet enjoyment. *Line v. Stephenson*, 4 Bing. n. 678; *Cranch v. Fowle*, 9 N. H. 219.

(b) So, in case of a written unsealed agreement between A & B, that B shall have the sole and uninterrupted use and occupation of A's land; if at the commencement of the term C, a former tenant, but whose term has expired, is in possession; A is not liable for breach of his contract. *Gardner v. Keteltas*, 3 Hill, 330.

(c) For the reason stated in the text, the taking of part of a leased lot by the government of a city, to widen the street, does not annul the lease, or discharge the liability for rent during the term. *Parks v. Boston*, 15 Pick. 198; *Wainwright v. Ramsden*, 5 Mees. & W. 602.

A covenant to pay assessments, in a lease of land in the city of New York, executed in 1799, was held to extend to assessments imposed for opening streets pursuant to statutes passed subsequently, and imposing them in a mode unknown to the laws existing when the lease was executed. *Kearney v. Post*, 1 Sandf. 105.

72. A lease often contains covenants on the part of the lessor or lessee, to put or keep the premises *in repair*.(a)

72 a. In an action of covenant, by a lessor against two lessees, for rent due upon a lease, containing a covenant on the part of the lessor to repair, the plaintiff need not prove that the premises were put in repair before possession was taken, nor that both defendants went into possession, the taking possession by one being in law a possession by both, and a waiver of the condition to repair, and the fact that the premises were out of repair being a matter of defence, to be proved by the defendants.(1)

72 b. In an action against a tenant upon his covenant to repair, the breach alleged was, that he *suffered and permitted* the premises to be out of repair; but the proof, that windows were voluntarily removed. Held, a variance.(2)

72 c. A covenant by the landlord to *pay* all repairs does not bind him to *make* them.(3)

72 d. Where a tenant himself agrees to make certain repairs, and others become necessary in order to make the premises habitable, he cannot leave because the landlord fails to make them.(4)

72 e. The mere removal and sale by a tenant, during the term, of fixtures, which he does not immediately replace, but which can be replaced before the end of the term, is not in itself a breach of his covenant to repair and uphold the demised premises, and to deliver up the same at the end of the term, together with all things affixed thereto, though such removal may be made in such a way as to amount to non-repair.(5)

(1) Harger v. Edmonds, 4 Barb. 256.

(2) Edge v. Pemberton, 12 Mees. & W. 187.

(3) Loomis v. Reetler, 9 Watts, 516.

(4) Arden v. Pullen, 10 M. & W. 321.

(5) Burrell v. Davis, 1 Eng. Law & Equ. 403.

(a) As to the question, whether a landlord *impliedly* undertakes that the premises shall be *tenantable*, see Smith v. Marrable, 1 C. & Mar. 479; 11 Mees. & W. 5; a case where the house was infested with *bugs*, and it was held that the tenant might quit for that cause; and a similar later case, (Hart v. Windsor, 12 Mees. & W. 68,) where the same nuisance existed, but the tenant had agreed to keep in repair, and a garden was let with the house. In this case the tenant quit before any rent was due, and without having had any beneficial occupation. Held, (overruling prior cases,) that the facts furnished no defence to a suit for the rent.

So where a *wharf* was leased, and, before entry of the tenant, a large portion of it was destroyed by natural decay, of which the lessee gave notice to the landlord, requesting him to repair; but he neglected to do it, and the lessee then refused to enter or pay rent; held, he was still liable for the rent. Hill v. Woodman, 2 Shepl. 38. See Hinde v. Gray, 1 Man. & G. 195; Cleves v. Willoughby, 7 Hill, 83.

Where a lease is in writing, parol evidence cannot be given that the landlord, at the time of executing it, promised to repair. Cleves v. Willoughby, 7 Hill, 83; City, &c. v. Price, 3 Fost. N. H. 542.

Where there is no agreement on the part of the lessor to repair, the lessee cannot, when sued for the stipulated rent, set up the want of repairs, either as a defence or in reduction of the claim. Moffatt v. Smith, 4 Comst. 126.

So it is held, that tenants have no right to charge their landlords for repairs, unless by express contract; and this rule applies, *a fortiori*, where the tenant knew that the premises were out of repair, and covenanted to return them in the order in which they were received. City Council v. Moorhead, 2 Rich. 430.

But a tenant making new repairs and erections on the farm, under a promise to give the farm to the tenant and his wife, (the daughter of the landlord,) may recover the value of such repairs and erections, if the landlord devise the farm to another. Cornell v. Vanartsdalen, 4 Barr, 364.

72 *f.* It has been held, that, in assumpsit for rent, the tenant may avail himself of a breach of the landlord's agreement to repair, by way of *recoupment*, though not as a set-off.(1)

72 *g.* So, in replevin, after a distress for rent, although it seems that the defendant may avail himself of a breach of the landlord's agreement to repair, by way of *recoupment*, yet he cannot by way of set-off, nor under a plea of eviction, nor can the *recoupment* be pleaded in bar.(2)

72 *h.* So, it has been held that damages occasioned to a tenant by great, unnecessary and tortious negligence, and delay of the landlord's servants in making repairs during the term, and by the unworkmanlike manner of doing the work, cannot be set up as matter of *recoupment* in an action for the rent.(3)

72 *i.* Where a lessor agreed to put the barns on the premises in repair, but neglected to do so; held, the damages of the lessee, which he was entitled to *recoup* in a suit for rent, were the amount it would cost to put the barns in repair, and not the detriment which he suffered by their remaining out of repair during the term.(4)

72 *j.* In an action of covenant for rent, the defendant cannot *recoup* for damages arising from violation of a covenant by the plaintiff since the commencement of suit,(5) even though they exceed the amount of rent.(6)(a)

72 *k.* If a lessee covenant to repair, he is bound upon his covenant, although the premises are burned down without his fault; nor can he legally quit, though the premises become untenable. So, where he covenants to keep in repair, "saving and excepting the natural decay of the same," and to surrender up at the end of the term in as good condition, &c., reasonable use and wearing thereof excepted.(7)(b)

(1) *Whitbeck v. Skinner*, 7 Hill, 53.

(2) *Nichols v. Dusenbury*, 2 Comst. 283.

(3) *Cram v. Dresser*, 2 Sandf. 120.

(4) *Dorwin v. Potter*, 5 Denio, 306.

(5) *Hargen v. Edwards*, 4 Barb. 250.

(6) *McCullough v. Cox*, 6 Barb. 386; *Kendall v. Moore*, 30 Maine, 327.

(7) *Bullock v. Dommitt*, 2 Chit. K. B. 608; *Phillips v. Stevens*, 16 Mass. 238; *Arden v. Pullen*, 10 Mees. & W. 321. See *Belcher v. M'Intosh*, 8 Carr. & P. 720; *Doe v. Rowlands*, 9, 734.

(a) With regard to the respective liabilities of landlord and tenant to third persons, for neglect to repair, it has been held, that the tenant is liable for an injury resulting from the want of repair of the grate over a vault, under the highway, in front of his premises; and the landlord is not liable, if the premises were let in good repair, and he was not bound by the lease to keep them in repair. *Bears v. Ambler*, 9 Barr, 193.

Where a town was compelled to pay damages for an injury resulting from a defect in a highway, occasioned by the want of repair of a cellar-way constructed in the sidewalk, and leading to a building adjoining thereto, which was in the occupation of a tenant; held, the occupant and not the owner was liable to the town for such damages. But if, in such case, there were an express agreement between the landlord and tenant, that the former should keep the premises in repair, then, to avoid circuitry of action, the landlord would be liable in the first instance. *Lowell v. Spaulding*, 4 Cush. 277.

A tenant for years in the occupation of the premises, and not the landlord, is liable for the penalty incurred by a violation of the ordinance of the city of New York against any persons suffering any sink, &c., to run upon or within three feet of any wharf, &c. *City, &c. v. Corlies*, 2 Sandf. 301.

(b) A covenant to leave all buildings now on the land binds a lessee to repair, in case of fire. *Pasteur v. Jones*, Cam. & Nor. 194. But where a lease contains a covenant, to deliver up the premises at the end of the term in as good order and condition as at the date of the lease, ordinary wear and tear excepted, but not to repair or rebuild, and the buildings are destroyed by fire; the lessee is not bound to rebuild. *Warner v. Hitchins*, 5 Barb. 666.

73. If a penalty is annexed to the covenant to repair, inevitable accident will excuse from the former, though not from the latter. As where one covenanted to sustain and repair the banks of a river, under pain of forfeiture of £10. The banks being suddenly destroyed by a great flood, held, the party was bound to repair, but not subject to the penalty.(1) It is to be observed, however, that this was a case of loss by *act of God*.

74. In New Jersey, by statute, no action lies against any person, on the ground that a fire began in a house or room occupied by him. But this provision does not impair the effect of any covenant. In Missouri, if a building is burned or injured without fault of the tenant, his servants, agents or family, he is not responsible, unless the lease so provides; and a covenant to repair will not require a tenant to rebuild.(2)

74 a. Sometimes the lessor and lessee covenant respectively to pay different charges connected with the estate. Thus, a lessor agreed to pay all taxes,(a) and the lessee all other costs, expenses, &c., and it was further agreed that the lessee might make any additions and repairs not injurious to the estate. The city having assessed the lessor for paying the footway in front of the estate, under the Massachusetts statute of 1795, c. 31, s. 2, and he having paid the same, held, he could not recover it from the lessee under the covenants.(3)

75. If a lessee covenant with several lessors jointly, that he will pay to each lessor severally a specified proportion of the rent, the interest of each lessor will be several, and each may maintain a separate action for his part of the rent.(4)

76. A lessor of a steam mill covenanted to furnish so much power every day in the year, and that the rent should cease during any failure to do so. Held, the suspension of the rent was not a liquidation of damages for such failure.(5)

77. A covenant in a lease to pay rent during the term, and for such

(1) 1 Dyer, 33 a.

(2) 1 N. J. St. 210; Misso. St. 1840-1, 26.

(3) Torrey v. Wallis, 3 Cush. 442.

(4) Gray v. Johnson, 14 N. H. 414.

(5) Fisher v. Barrett, 4 Cush. 381.

But where fixtures attached by the lessee are severed by the fire, and are carried away by the lessee, the lessor may recover their value in an action on the lease. *Ib.* In Pennsylvania, seizure and eviction by public enemies is a defence to the obligation of giving up the premises in repair. Pollard v. Shouffer, 1 Dall. 210. A covenant to repair binds the tenant only to suffer no further dilapidation than results from natural causes. If the house is old, he is merely required to keep it up as such. Harris v. Jones, 1 Moo. & R. 173. Not to give the landlord a new house. Young v. Morton, 6 Scott, 227; Stanley v. Tuesgood, 3 Bing. N. C. 4. In general, a tenant, in neglecting to repair, is guilty of *permissive waste*. But a tenant *from year to year* is only bound to make ordinary tenantable repairs, which will keep the house wind and water tight, and to replace what he breaks or injures. But, if the house is substantially out of repair or untenable, it is said the tenant is not bound to repair, but may quit without paying rent. 4 Kent, 110 and n.; Pindar v. Ainsley, 1 T. R. 312; Mumford v. Brown, 6 Cow. 475; Edwards v. Hetherington, 7 T. R. 117; Collins v. Barrow, 1 Moo. & R. 112; Long v. Fitzsimmons, 1 W. & S. 532; Belcher v. McIntosh, 2 Carr. & K. 186. See Aldis v. Mason, 6 Eng. L. & Equ. 391; Beach v. Crain, 2 Comst. 66.

Upon covenant to deliver up the premises at the end of the term in as good order, &c., as they then are, or may be put into by the lessor, the lessee is bound to make the repairs necessary for this purpose. Jaques v. Gould, 4 Cush. 384.

(a) A lessor of land, the taxes upon which are assessed against his lessees, is liable to a vendee, who pays the taxes under levy for the amount so paid, in the absence of any contract between the lessor and lessees, by which the latter were bound to pay them. Caldwell v. Moore, 1 Jones, 58.

further time as the lessee shall occupy, binds him to pay rent accruing after the expiration of the time stipulated; and a surety for the lessee incurs the same liability. (a) Thus, a lease was made for one year, the lessee paying a certain rent per annum, and at the same rate for any shorter period. The lessee covenants to pay said rent in quarterly payments, and to pay the rent as above stated, and all taxes and duties levied and to be levied thereon, during the term, and for such further time as he shall occupy. On the back of the lease, the defendant guarantied performance of the within covenants, and the lessee by another writing agreed to quit on reasonable notice, if the lessor should wish to sell or pull down the house. Held, the covenants bound both the defendant and the lessee, so long as the latter occupied, even beyond the year; and that the defendant was liable for several quarters' rent, although not notified at the end of each quarter, having suffered no damage from the want of such notice. (1)

78. In this connection may properly be considered the subject of the *renewal* of leases. It is said, in case of church leases, or those made by trustees of charities, which are usually renewable for a fine or increased rent, although the lessors are not legally bound to renew, yet the tenant has in equity a transferable interest in this privilege. (2) A landlord is not bound to renew the lease without an express covenant to do it. And covenants for *continual* renewal are not favored, for they tend to create a perpetuity, and have been said to be equivalent to an alienation of the inheritance. Hence, in the case of trustees of a charity, they have been held invalid in Chancery. But, if explicit, the weight of authority is in favor of their validity. Covenants of renewal run with the land, and bind a grantee of the reversion. A covenant to renew implies the same term and rent, and perhaps the same conditions. But a covenant to renew, upon such terms as may be agreed on, is void for uncertainty. An agreement made while the tenant is in possession, for a subsequent increased rent, does not constitute a new tenancy. (3) (b)

(1) *Salisbury v. Hale*, 12 Pick. 416.

(2) *Phye v. Wardell*, 5 Paige, 268.

(3) 4 Kent, 108; *Geeckie v. Monk*, 1 Carr. & K. 307; *Rutgers v. Hunter*, 6 John. Cha. 215; *Whitlock v. Duffield*, 1 Hoffm. 110;

Simpson v. Clayton, 4 Bing. N. 758; *Simpson v. Clayton*, 6 Scott, 469; *Harney v. Harney*, 5 Beav. 134; *Richards v. Richards*, 2 Y. & Coll. Cha. 419. See *Cottee v. Richardson*, 8 Eng. L. & Equ. 498.

(a) A tenant holding over is bound by all covenants applicable to his new situation. *De Young v. Buchanan*, 10 Gill & J. 149. And in case of a lease which is void, the law implies a similar parol contract as to the rent. *Anderson v. Critcher*, 11. 450. So where the assignee of a void lease holds through the term, paying the rent reserved; *assumpsit* lies against him upon an implied promise to repair, conformably to the covenants. *Beale v. Sanders*, 5 Scott, 58.

But a tenant holding over does not of course hold on the same terms as before. *Elgar v. Watson*, 1 C. & Mar. 494. In case of lease to A and B, if A holds over with B's consent; both are liable for the rent. Whether, if without such consent, *qu.* *Christy v. Tancred*, 9 Mees. & W. 438.

(b) The renewal of a lease, with an agreement for performance of certain work stipulated for in the former lease, is not a waiver of damages for non-compliance with the former lease. *Walker v. Seymour*, 13 Mis. 592. A covenant to renew a lease at a certain rent does not carry with it any of the covenants in the old lease. *Willis v. Astor*, 4 Edw. Ch. 594.

Demise by A to B, for 55 years, in consideration of £530, subject to a yearly rent of £84 covenant to repair, &c. The consideration being unpaid, B assigned to A, by way of mortgage, the whole of the residue of the term, subject to the rent and covenants, and with a power of sale. Notice of sale having been given by A, pursuant to the power, in con-

79. In Ohio,(1) it is said, *perpetual leases*, renewable forever, are very common, but are mere chattels. But, by a late statute, they are invested with all the incidents of estates in fee, in respect to descent, distribution, and sales upon legal process. But in Pennsylvania, where a lease was made for twelve months, and so from year to year, at the pleasure of both parties, with a covenant by the lessee not to assign without permission under seal, and a proviso that the lessor should reimburse money laid out in improvements; held, this passed no freehold.(2) It would be otherwise, it seems, where, upon a long lease, the landlord covenants to pay for improvements, or, if not, to convey in fee.(3)

80. Where a lease is made to a person, his heirs and assigns, to continue while he pays the rent, and he covenants for himself and his heirs; on failure to perform the covenants, the lessor may treat the lease as forfeited, but not the lessee.(4)

81. How far a tenant himself may cause the implied renewal of a lease, by holding over after his term, will be more particularly considered hereafter.(a) In Connecticut it is held, that if a lessee for one year hold over, this is a renewal of the lease, (of course at the option of the lessor) for the same term. The same consequence follows where a sub-tenant occupies; or, having occupied, abandons the possession.(5)

81 a. Where a lease for ten years contained a covenant of renewal for ten years, if the parties could agree upon the rent, and the lessor covenanted, in case they did not so agree, to pay for improvements which the lessee should place upon the premises; and the lessee covenanted in the like case, that at the end of the term, "upon the lessor's paying for the improvements as aforesaid," he would peaceably surrender possession to the lessor and his assigns; held, the lessor's right to demand possession at the expiration of the term was not qualified by the obligation to pay for the improvements, and therefore, that his assignee, (there being no renewal of the lease,) could recover in ejectment, al-

(1) Walk. Intro. 278; Swan's Dig. 289.
See Loring v. Melendy, 11 Ohio, 355.

(2) Krause, 2 Whart. 398.

(3) Eli v. Beaumont, 5 S. & R. 124.

(4) Folts v. Huntley, 7 Wend. 210.

(5) Bacon v. Brown, 9 Conn. 338. See, also, Dorrill v. Stephens, 4 M'Cord, 59.

sideration of £500, he by deed "bargained, sold, assigned, transferred and set over" to the defendant, the premises described in the lease, to hold for all the residue of the term, discharged from the mortgage debt, but subject to the payment of the yearly rent and to the covenants in the lease; and the defendant covenanted to pay the rent and perform the covenants. The defendant then entered. Held, although the term was merged by the mortgage, the effect of the conveyance was to create a new term of the same duration as the unexpired part of the old term, and that the defendant was liable upon the covenants to pay the rent, and to perform the repairs. *Cottee v. Richardson*, 8 Eng. L. & Equ. 498.

Where trustees leased a part of the estate, with a covenant to renew the lease, or to pay for certain erections, which the lessee covenanted to make, on the termination of the lease; held, on refusal of the trustees to renew, the trust estate was liable to pay for the erections. *Robinson v. Kettletas*, 4 Edw. Ch. 67.

In Delaware, (Rev. Sts.) a lease is considered as renewed, unless three months' notice be given before its termination.

On a lease at an annual rent of \$550, was indorsed an extension of the term at a rent of \$600, and, during the extended term, another indorsement was made, providing that the "within lease" be "extended the further period of one year without alteration." Held, the terms "within lease" referred to the prior indorsement as well as the original lease, and that a yearly rent of \$600 was thereby reserved. *Cram v. Dresser*, 2 Sandf. 120.

(a) See ch. 19. In Kentucky, if a tenant holds over, he is liable to the same rent. *Whittemore v. Moore*, 9 Dana, 315.

though the improvements were not paid for; and that the words, "upon the lessor's paying, &c.," did not constitute a condition precedent to the lessor's right to have possession, after the lease had expired.(1)

81 *b*. Where premises were leased to two partners for a year, with a right of renewal, and before the year expired the partnership was dissolved, and one partner remained in possession, held over after the expiration of the lease, and applied for a renewal, which was refused by the landlord; held, an action for possession might be maintained by the landlord against the partner in possession, without joining the other.(2)

81 *c*. It was agreed, that the tenant should get the house at the price herein stated, for one year after his present year expires, and is to have the preference each succeeding year thereafter. Held, this did not create a tenancy from year to year, entitling the tenant to a legal notice to quit.(3)

81 *d*. Where, simultaneously with the execution of a lease for years, the landlord stipulates, that at the end of the term he will renew the lease or pay for the buildings erected by the tenant, and at the end of the term he tenders a renewal, which the tenant refuses to accept; the landlord may recover possession without paying for the buildings.(4)

81 *e*. An extension of a term, subject to the covenants in the original lease, will apply such covenants to subjects within their scope existing at the extension, although they were unknown when the term was created.(5)

82. It is the general rule, that in any action between landlord and tenant, the latter is precluded or *estopped*(*a*) by his lease or occupation, from disputing the title of the former to the land, or setting up the adverse title of another, acquired by him since the lease, either in pleading or by evidence. The principle is said to be not a technical one, but founded in good faith as well as public policy, and so firmly established, that "you may as well attempt to move a mountain." As a consequence, or perhaps more properly a part, of the same rule, a third person, having title to the land, paramount to that of the lessor, cannot recover rent of the tenant, until he has actually entered, or made an effectual claim under his title. An action for rent does not lie in favor of a stranger for the purpose of trying his title, or by one of two litigating parties claiming the land; such action not depending on the validity of the plaintiff's title, but on a contract between the parties, express or implied. It is said, the only exception to this principle of estoppel, is where it would work a fraud upon the lessor or the commonwealth. It applies not merely to a *tenancy*, strictly so called, but to any occupation *by permission* of another. So, it applies alike to an action for rent, for recovery of the premises on the ground of forfeiture or otherwise, or for mesne profits. So, though the lease be void, and so appear upon the plaintiff's own evidence; as, for instance, where it is executed by attorney, but not in the name of the principal. So also

(1) Tallman *v.* Coffin, 4 Comst. 134.

(2) Geheebe *v.* Stanley, 1 La. Ann. 17.

(3) Crawford *v.* Morris, 5 Gratt. 90.

(4) Pearce *v.* Colden, 8 Barb. 522.

(5) Kearney *v.* Post, 1 Sandf. 105.

(*a*) An estoppel is a restraint or impediment, imposed by the policy of the law, to preclude a party from averring the truth. Gibson *v.* Gibson, 15 Mass. 110.

it is applicable, not only to the lessee or lessor himself, but to any one claiming under him, or in continuation of his estate; as to an assignee, sub-lessee, or purchaser; or the wife of a deceased tenant; or an assignee or the heir of the lessor. So, as between heir and administrator. (a) So if a man take a lease of *his own land*, or land of which he has possession, he is concluded, though it would be otherwise, in the former case, if the lease were merely of the *herbage*. So, by agreeing to hold under the true owner, the adverse possession of an occupant ceases. By disclaiming the landlord's title, the lessee forfeits his lease or becomes a trespasser, and is not entitled to notice to quit. But the principle has been held not applicable to a *parol* disclaimer. On the other hand, the tenant cannot show a parol admission by the landlord of an adverse title. (1)(b)

83. Land of the plaintiff, in the occupation of the defendant as lessee,

(1) Cook v. Loxley, 5 T. R. 4; Balls v. Westwood, 2 Camp. 11; De Lancey v. Ga Nun, 12 Barb. 120; Binney v. Chapman, 5 Pick. 127; Galloway v. Ogle, 2 Binn. 468; Codman v. Jenkins, 14 Mass. 93; Marley v. Rodgers, 5 Yerg. 217; Ankeny v. Pierce, 1 Bre. 202; Love v. Dennis, Harp. 70; Boyer v. Smith, 5 Watts, 55; Co. Lit. 47 b, 48 a & n. 12; Congregational, &c. v. Walker, 18 Verm. 600; King v. Murray, 6 Ired. 62; Greeno v. Munson, 9 Verm. 37; Phelan v. Kelly, 25 Wend. 389; Doe v. Barton, 11 Ad. & Ell. 307; Lunsford v. Alexander, 4 Dev. & B. 40; Failing v. Schenck, 3 Hill, 344; Cooper v. Smith, 8 Watts, 536; Duke v. Harper, 6 Yerg. 280; Jackson v. Davis, 5 Cow. 123; Cobb v. Arnold, 8 Met. 398; McIntyre v. Patton, 9 Humph. 447; Burke v. Hale, 4 Eng. 328; Newman v. Mackin, 13 Sm. & M. 383; University, &c. v. Joslyn, 21 Verm. 52; Kinney v. Doe, 8 Blackf. 350; Doe v. Challis, 6 Eng. L. & Equ. 249; Lansdell v. Gower, 8, 317; Falkner v. Beers, 2 Doug. 117; Byrne v. Beeson, 1, 179; Kinge v. Lachenour, 12 Ired. 180; Lockwood v. Walker, 3 McL. 431; Kendall v. Carland, 5 Cusb. 74; Blantin v. Whitaker, 11 Humph. 313; Gray v. Johnson, 14 N. H. 414; Hill v. Hill, 4 Barb. 419; Sharpe v. Kelley, 5 Denio, 431; Read v. Thompson, 5 Barr, 327; Fortier v. Bellance, 5 Gilm. 41; Sued v. Jenkins, 8 Ired. 27; Dolby v. Iles, 11 Ad. & Ell. 333; Doe v. Long, 9 Carr. & P. 773; Woodward v. Brown, 13 Pet. 1; Walden v. Bodley, 14, 156; Mann v. Gwinn, 8 Gratt. Index; Dela. Rev. Sts. 366.

(a) Where an administrator leased the mansion-house of his intestate, while the heirs were minors, and after the lease expired the tenant held over, under a claim of an agreement with the administrator to purchase; held, the lease, though made without authority, was to be assumed to have been made for the benefit of the heirs,—the right of action for for use and occupation was in them; and they were not to be affected by the tenant's claim of title, until they were proved to have had notice of it after their majority. *Burk v. Osborn*, 9 B. Mon. 579.

The principle has also been held applicable, as between trustee and *cestui que trust*. *Walden v. Badley*, 14 Pet. 156.

So a party whose land is sold by *execution*, while in possession, is a *quasi* tenant of the purchaser, and cannot dispute his title. *Aliter* where he is not in possession. *Wood v. Turner*, 7 Humph. 517–18, 685. So, where land is sold on execution, and after the sale the original owner, who was not in possession at the time of the sale, rents the land to a third person; the relation of landlord and tenant exists between the parties, and the tenant, who purchased the title of the purchaser at execution, cannot set up such title against the original owner. *Ib.*

So a purchaser, entering under an executory contract, becomes a *quasi* tenant, and, upon cancelling the contract, is estopped from setting up a title under another, hostile to that of his vendor. *Kirk v. Taylor*, 8 B. Mon. 262. See *Hall v. Stewart*, 2 Jones, 211; acc. *Hill v. Hill*, 4 Barb. 419.

(b) In Connecticut, the plaintiff in a summary process against a tenant need not prove himself even to have been *owner* of the land. And, though a grantee of the lessor may maintain such action, especially if the tenant has *attorned*; yet, if brought by the lessor, his conveyance of the reversion will be no defence. *White v. Bailey*, 14 Conn. 271. The principle of estoppel applies to one who is admitted to defend against an action of ejectment with the tenant in possession. *Belfour v. Davis*, 4 Dev. & B. 300. Where a lease purports to be made by virtue of a power contained in a will; the lessee is estopped to deny the execution of such will. *Bringloe v. Goodson*, 8 Scott, 71.

was levied upon by a creditor of the plaintiff, and the defendant evicted. The defendant afterwards occupied, as lessee of the creditor, and then purchased the fee from him. The land was afterwards levied upon by another creditor, the former levy being defective and void. The plaintiff brings an action, for the rent accruing between the two levies. Held, as the defendant had occupied, either as lessee of the first creditor, or as owner, there was no contract, express or implied, between him and the plaintiff; that the remedy of the latter was against the first creditor; and this action would not lie.(1)

84. A having leased land, with a building upon it, to B, entered into a negotiation with C for a sale of the land alone to him. It was left to referees to settle the price, and A put into their hands a deed, to be delivered to C with the award. A was to remove the building by a certain day. The referees, having awarded a certain price, delivered the deed to C, which was recorded; but A excepted to the award, refused the price, tendered the penalty agreed on, and denied that the deed passed any title. C never notified A to remove the building, but notified B to quit, at the time fixed for removing the building, or pay rent to him subsequently. B continued to occupy, and expressly promised to pay rent to A, A indemnifying him against C's claim, and actually paid rent to A for a period subsequent to the award; but paid a subsequent instalment to C, receiving from him an indemnity against A. For the latter rent, A brings an action against B. Held, the above facts furnished no defence to such action.(2)

85. A had agreed to become tenant to C until a certain time, at such rent as the arbitrators should award. In an action for use and occupation by C against A; held, A was not bound by an implied contract to pay rent to C, after the time stipulated; and that the title could not be thus tried.(3)

85 a. A demised land to B, who paid him rent. C afterwards disputing A's title, it was left to arbitrators, who awarded in C's favor. A then gave up the title-deeds, and by his authority C directed B to pay rent to himself, which he did. A then distrains for the rent. Held, he had no claim to it, being estopped by the acts above stated.(4)

86. A, holding a lease of certain land, took possession from B of a house which B had erected before A had a lease, upon adjoining waste land, to which B had no title. A leases the house to C. In ejectment for the house by A's landlord against C; held, C was estopped to deny the plaintiff's title.(5)

87. Complaint under the Massachusetts Statute, 1825, c. 89, by a landlord against his tenant, to recover possession of a piece of land. Held, the tenant could not set up as a defence, that the landlord was dis-seized by his refusal any longer to pay rent.(6)

87 a. A, having been in peaceable and adverse possession of land for twenty years, by way of compromise of a claim made upon him for rent, gives a note to B. In a suit thereupon, held, the above facts constituted no legal defence.(7)

(1) *Allen v. Thayer*, 17 Mass. 299.

(2) *Binney v. Chapman*, 5 Pick. 124. See *Jackson v. Welden*, 3 John. 283; ——— *v. Davis*, 5 Cow. 123.

(3) *Boston v. Binney*, 1 Pick. 1.

(4) *Downs v. Cooper*, 2 Ad. & Ell. N. S. 256.

(5) *Doe v. Fuller*, 1 Tyr. & G. 17.

(6) *Sacket v. Wheaton*, 17 Pick. 103.

(7) *Cobb v. Arnold*, 8 Met. 403.

87 *b*. The land of A being levied on by an attachment at the suit of B, A conveyed the same to C, under circumstances supposed to indicate an intention to defraud his creditors. C rented the land to D; B then obtained a judgment against A, and the land was sold to satisfy it. C brought an action against D to recover possession. Held, if D showed no title acquired subsequent to the commencement of his tenure, he could not defeat by setting up such fraudulent conveyance.(1)

88. Inasmuch as a tenant cannot even defend against an action at law, by denying the title of the lessor; a *fortiori* equity will not aid him in such a denial. Thus A took possession of land, as the tenant of B. B, the term having expired, demanded possession, and brought a process of forcible entry, upon which, however, A was finally acquitted. B then brought ejectment against A, who purchased an adverse title of C. A files a bill in equity for an injunction against the suit. Held, the acquittal of A proved nothing as to the title of the land; that the purchase of an adverse title, or disclaimer of that of the lessor, was a forfeiture, from which the statute of limitation would run; but, until the legal time of limitation expired, A could not dispute the landlord's title at law, nor have relief in equity.(2)

89. The principle of estoppel does not apply, if waived by the landlord, for whose benefit it is adopted. So it does not apply, if a tenant has in any way ceased to stand in that relation. The principle is said to have a *present*, not a *future* operation; not being enforced, for instance, where the lease is ended, or the landlord transfers the reversion, or the tenant has restored possession, or obtained a decree for the title; or where he disclaims the landlord's title,(*a*) and holds over; or a judgment in ejectment(*b*) has been rendered against him, or he has been evicted by an adverse claimant. But mere payment of rent to a stranger, claiming the land, will not be sufficient.(3)(*c*) It is said, "by

(1) *Randolph v. Carlton*, 8 Ala. 606.

(2) *Payton v. Stith*, 1 Pet. 486.

(3) *Jackson v. Rowland*, 6 Wend. 666; *— v. Davis*, 5 Cow. 123; *Presbyterian, &c. v. Pickett, Wright*, 57; *Avery v. Barnum*, Ib. 577; *Boston v. Binney*, 11 Pick. 8; *Johns v. Church*, 12, 561; 1 Mar. 99, 330; 2, 243; *Fowler v. Cravens*, 3 J. J. Mar. 429; *Logan v. Steel*, 6 Mon. 105; *Maverick v. Gibbs*, 3

M'Cord, 211; *Greeno v. Munson*, 9 Verm. 37; *Hall v. Dewey*, 10, 593; *Swift v. Dean*, 11, 323; *Nerhooth v. Althous*, 8 Watts, 427; *Newell v. Gibbs*, 1 W. & Ser. 496; *Belfour v. Davis*, 4 Dev. & B. 300; *Hough v. Dumas*, Ib. 328; *Bullard v. Copps*, 2 *Humph.* 409; *Agar v. Young*, 1 C. & Mar. 78.

(*a*) In which case, if the landlord has knowledge of such disclaimer, the possession is adverse, and the landlord cannot sell or lease the premises while so adversely held. *Stephenson v. Richmond*, 11 *Humph.* 591.

(*b*) In Illinois, Missouri and New Jersey, where a tenant is sued in ejectment by a stranger, he is required, under a penalty, to give notice of it to the landlord. *Illin. Rev. L.* 676; *Miss. Sts.* 376; 1 *N. J. L.* 192.

(*c*) Where a tenant pays the rent, after the expiration of the year, which was due at its close; in an action by the landlord for possession, such payment will not estop him from showing that the landlord's title was extinguished during the year. *Randolph v. Carlton*, 8 Ala. 606.

A parol agreement by a tenant in possession, at the death of the landlord, to pay rent to one claiming to be guardian of the remainder-man, does not estop him from denying the title of the latter. *Stokes v. McKibbin*, 1 *Harr. (Penn.)* 267.

In ejectment, evidence of former admissions of the defendant's father, that he was tenant of the plaintiff, accompanied by evidence that the defendant resided on the land with his deceased father, and had remained there ever since, will not estop the defendant, claiming merely by his own possession, from denying the plaintiff's title. *Emery v. Harrison*, 1 *Harr.* 317.

the making of the lease the estoppel doth grow, and consequently by the end of the lease the estoppel determines." It is also said, that whether one, who receives possession from another, is estopped from claiming title, must depend upon the inquiry, whether the claim attempted to be set up is consistent with the contract under which the possession was taken.(1) Nor does the principle apply to the case of a defective conveyance in fee.(2)(a) Nor where the estoppel is *mutual*. So a tenant may purchase the landlord's estate sold on execution. If he buy the whole, the rent is entirely extinguished; if a part, it is extinguished *pro tanto*.(b) So if A, being in possession, acknowledges the title of B, or attorns to him; A is still not estopped to show that he acted under a wrong belief as to B's title.(3)(c)

89 a. So, it has been held that in an action for rent, the tenant may prove a verbal promise of the plaintiff that he would claim no rent if the title was in another, and that such is the fact.(4)

89 b. Where a person is induced to accept a lease by false representations, promises and threats, he may afterwards dispute the lessor's title, especially when, at the time of accepting the lease, the lessee was in quiet occupancy of the premises.(5) And it makes no difference, in

(1) *Baskin v. Seechrist*, 6 Barr, 154. See *Isaac v. Clark*, 2 Gill, 1; *Miller v. Bonsadon*, 9 Ala. 317.

(2) Co. Lit. 47 b; *Claridge v. McKenzie*, 4 Scott, n. 796; *Ripley v. Yale*, 19 Verm. 156.

(3) *Hughes v. Trustees, &c.*, 6 Pet. 369; *Kenada v. Gardner*, 3 Barb. 589. See *Walton v. Newson*, 1 Humph. 140; *Chilton v. Nib-*

lett, 3, 404; *Love v. Edmondston*, 1 Ired. 152; *Page v. Hill*, 11 Mis. 149; *Dikeman v. Parish*, 6 Barr, 210.

(4) *Nellis v. Lathrop*, 22 Wend. 121; *Washington v. Conrad*, 2 Humph. 562; *Doe v. Brown*, 7 Ad. and Ell. 447. See *Doe v. Evrington*, 6 Bing. N. 79.

(5) *Wood v. Chambers*, 3 Rich. 150.

(a) A sold and conveyed to B, and remained in possession. After his death his widow also remained in possession. The estate, after the sale to B, was sold on execution to C, and A's widow took a lease from C. Held, the principal of estoppel applies only to the relation of landlord and tenant created by *contract*, and not to that created by *operation of law*; that the widow was the lawful tenant of C; and that, the possession of C having been therefore continuous for seven years, the Tennessee act of 1819, c. 28, vested in him the title. *Vance v. Johnson*, 10 Humph. 214.

Where one enters into possession under a parol contract of purchase, pays a portion of the purchase-money in advance, and is, by the contract, to receive a deed upon furnishing certain security for the remainder, which security is offered, but the vendor refuses to convey; the purchaser may claim adversely to the vendor; and his possession, if open and exclusive, accompanied by claim of title, will avoid a deed, executed by the vendor to a third person, subsequent to the performance of the contract on the part of the purchaser. *Ripley v. Yale*, 19 Verm. 156.

And, even if the purchaser could be considered as tenant at will to the vendor, until the completion of the contract; yet, if he offer to perform the contract on his part, and the vendor refuse to convey, and the purchaser thereupon give notice to the vendor that he shall "*hold on to the land*;" the possession of the purchaser becomes adverse, and will avoid a deed subsequently executed by the vendor to a third person.

A covenanted to make and deliver to B, at the end of a year, "a good and sufficient deed, with covenants of warranty," of a farm then in the possession of B; all the green grain growing in the ground at the time of executing the deed "to pass" to B. B covenanted to pay therefor \$35 per acre, with interest from a day prior to the date of the contract. A afterwards tendered the deed, pursuant to his covenant; but B refused to perform his covenant, and A brought ejectment against him. Held, that B, by his covenant, had recognized A's title, and agreed to hold under him for a year, and was therefore estopped from disputing A's title. *Tindall v. Den*, 1 New Jersey, 651.

(b) Where land is sold under a decree in Chancery, the party in possession stands in the relation of *tenant* to the purchaser, and is estopped to dispute his title. *Siglar v. Malone*, 3 Humph. 16.

(c) The attornment of a tenant to a stranger, though invalid against the landlord, is still binding upon himself. *Kenada v. Gardner*, 3 Barb. 589.

such case, that the false representations were made under a mistake of the lessor.(1)(a)

89 *c.* So the mere fact, that one had been in possession as tenant of his father-in-law, is not a bar to the proof of a parol sale and gift to him by his father-in-law, where he ceased to pay rent for several years, continued to hold the land under his contract, paid part of the purchase-money, made valuable improvements, and had the property assessed in his own name.(2)

90. A, having been tenant at will to B, remained in possession fifty-seven years after B's death. Held, the jury might presume that the land had been restored to B's heirs, and an actual ouster of them, and that A had acquired a perfect title.

91. So, in ejectment by the heirs or devisees of a lessor against the lessee, the latter may show in defence, that the lessor had only a life estate. Thus, a lessee covenants to pay rent, and to give up the land to the lessor, his heirs and assigns. A devisee of the lessor brings ejectment against an assignee of the lessee, after the expiration of the term. The lessee is not estopped to show that the lessor was but a tenant for life.(3)

92. The tenant in a real action conveyed the land to A; in 1813, A devised it to the demandant. In 1816, A reconveyed to the tenant, by an indenture for one year, "all the land, &c., which A held from the tenant by deed dated March 20, 1813, now improved by" the tenant. The term having expired, held, the tenant was not estopped to claim under the deed of 1816. Also, that if he were, the demandant, claiming under A, would be estopped by the deed of 1816 to say that A in 1822 held under the deed of 1813, and "estoppel against estoppel sets the matter at large."(4)

93. A hires land of B, and pays him rent. Afterwards, B having agreed with C to give him a long lease of the land, A pays rent to C. In an action by C against A for another quarter's rent, held, A was not estopped from showing that the above-named agreement has been rescinded, and that he had paid this rent to B.(5)

94. A *surrender* of the estate by a lessee to his lessor will not authorize him to deny the title of the latter, unless it be made fairly, and so as to give time to the lessor to take possession. Thus, if immediately after such surrender the tenant takes a lease from an adverse claimant, this proceeding will avail him nothing.(6)

95. An *infant* will not be estopped to deny the title of his landlord, though he has admitted that he held under him, and given a note for the rent.

96. A lessee is not estopped to aver a *mode of payment* of rent, varying from the literal import of the lease, and provided for by an inde-

(1) Wood *v.* Chambers, 3 Pick. 150.

(2) Aurand *v.* Wilt, 9 Barr. 54.

(3) Camp *v.* Camp, 5 Conn. 291; Heckhart *v.* McKee, 5 Watts, 385; Doe *v.* Seaton, 2 Crompt. M. & R. 728; Tilghman *v.* Little, 13 Illin. 239. See Heath *v.* Williams, 25

Maine, 209; King *v.* Murray, 6 Ired. 62; Byrne *v.* Beeson, 1 Doug. 179.

(4) Carpenter *v.* Thompson, 3 N. H. 204. See Warren *v.* Leland, 2 Barb. 613.

(5) Brook *v.* Briggs, 2 Bingh. N. C. 572.

(6) Boyer *v.* Smith, 3 Watts, 449.

(a) More especially if the tenant did not first enter under him. Carpenter *v.* Thompson, 3 N. H. 204.

pendent parol agreement. Thus, in an action by an assignee of the reversion, though the rent is by the lease to be paid quarterly, the lessee may plead, that before the time when the lease was made he loaned money to the lessor, the interest of which, it was agreed, should go to pay the rent.(1)(a)

97. In an action for rent, by an assignee of the reversion against an assignee of the lease, it appeared that upon the execution of the lease the lessee gave several promissory notes, not proved to be negotiable, equal in amount to the rent reserved, payable respectively as the rents would fall due, and stated in the deed of assignment of the reversion, to be given as collateral security. The notes were transferred with the reversion to the plaintiff. Held, it was a question for the jury, whether the notes were intended by the parties to be in payment of the rent.(2)

98. A contract, by which a tenant is induced to desert his landlord, is corrupt and void; and the person to whom he has attorned cannot maintain an action upon it. And, if an adverse claimant tampers with a tenant, and gets possession either by his consent or a collusive recovery, he is estopped to deny the landlord's title. So a tenant is estopped, though he has surrendered to a stranger.(3)

99. The purchaser of a term is bound to surrender it to the lessor, not to the original lessee.(4)(b)

100. The principle of estoppel may be applied to the lessor as well as the lessee. Thus, if the lessor at the time of leasing has no vested interest in the land, but subsequently acquires such an interest, it passes to the lessee or his assignee from the latter period, by estoppel; or rather, that which was before an estoppel is turned into a lease in interest. This rule applies where the lessor, at the time of leasing, has a future and contingent interest: as, for instance, where he is an heir apparent, or claims under a contingent remainder or executory devise; but not where any actual interest, however small, passes by the lease. Thus, if A, tenant for the life of B, lease to C for years, and then pur-

(1) Farley v. Thompson, 15 Mass. 18; McCoon v. Smith, 3 Hill, 147; Robins v. Kitchen, 8 Watts, 390. v. Adams, 18 Pick. 110; N. Y. Code, 1851, 33-4; Cravenor v. Bowser, 4 Barr, 259; Dela. Rev. Sts. 421.

(2) Howland v. Coffin, 9 Pick. 52.

(3) Morgan v. Ballard, 1 Mar. 558; Stewart v. Roderick, 4 Watts & S. 188. See Cushing

(4) Bruce v. Halbert, 3 Mon. 65; Byrne v. Beeson, 1 Doug. 179.

(a) But parol evidence is inadmissible that the rent was not to commence till a later day than that mentioned in the lease. Henson v. Coope, 3 Scott, N. R. 48.

So parol evidence is inadmissible that the land was part of a larger lot, taken from the plaintiff's by one A, and by agreement between them subdivided, and deeds of the several portions made to persons designated by A, including the defendant; and with the understanding that A should pay the whole rent. Buck v. Fisher, 4 Whar. 516.

(b) In regard to the estoppel of a tenant, the old law seems to have made a distinction between leases by indenture, and those by deed-poll. Littleton says (sec. 58) the lessee may plead that the lessor had nothing in the tenements at the time of the lease, "except the lease be made by deed indented;" and Lord Coke (47 b.) that by a deed-poll the lessee is not estopped, and may even plead *non dimisit*, and give the want of title in evidence. See Naglee v. Ingersoll, 7 Barr, 185. But the distinction seems to be now entirely exploded. The principle of the modern doctrine is, that the lessee is estopped, not so much by an express agreement on his part, as by his acceptance of the lease and occupation of the land. And the case seems analogous to that of rent reserved upon a feoffment by deed-poll, which is said to be reserved by the words of the feoffor, and not by the grant of the feoffee, and binds the latter. (Co. Lit. 143 b; and see Ingersoll v. Sergeant, 1 Whart. 350-1.)

chase the reversion in fee, upon the death of B he may still avoid the lease.(1)

101. Of the nature of a lease, is a *license* to occupy, use or take the profits of land. This, however, seems to pass no *estate*, but merely confer a certain *right* or *privilege*. It is a mere authority to enter upon the lands of another, and do an act or series of acts, without having any interest in the land; founded in personal confidence, not assignable, and valid, though not in writing.(2)(a)

102. Thus, an executory contract for the purchase of land, with leave to the purchaser to enter and possess until default in the payment of the purchase-money, without any fixed period or compensation, is a license, and not a lease; it is not an easement, nor a permanent interest in land, nor does the relation of landlord and tenant exist. The purchaser cannot be treated as a wrongdoer until default, without a demand of possession.(3)(b) So, where a parol contract, being for the sale of an interest in land, is void *as a contract*; it may still operate as a *license*, which will excuse the entry of the purchaser. But, in an action of trespass by the vendee, the vendor may justify under a revocation of the license by such re-entry, after default. So a deed invalid as a conveyance, for want of a witness, may be good as a license.(4)

102 a. The owner of wild land agreed with another person to go on and clear a part of it, and to fence, and to help the latter to build a house, reserving to the former the use of the timber, except what was needed for "house, rails and firewood." Held, a mere license to occupy the land, giving no right to dispose of any timber cut in clearing it.(5) So, in an agreement for the sale of land, the purchaser agreed not to cut, or suffer to be cut, any timber from the land, without the consent of the vendor in writing. In trover by the vendor against one claiming under the purchaser, to recover the value of timber cut from the pre-

(1) Weale v. Lower, Pollexfen, 54; Helps v. Hereford, 2 Barn. & A. 242; Co. Lit. 48 a n 11; Ib. 45 a, 47 b; 4 Kent, 97; Blake v. Tucker, 12 Verm. 39; Hubbard v. Norton, 10 Conn. 422; Logan v. Moore, 7 Dana, 76; Brown v. McCormick, 6 Watts, 60. See Bur-
chard v. Hubbard, 11 Ohio, 316.

(2) Mumford v. Whitney, 15 Wend. 380; Folsom v. Moore, 1 Appl. 252.

(3) Dolittle v. Eddy, 7 Barb. 74.

(4) Carrington v. Roots, 2 Mees. & W. 248; Sullivan v. Franklin, &c., 3 Ohio, 89; 7 Barb. 74.

(5) Callen v. Hilty, 2 Harr. (Penn.) 286.

(a) It amounts to nothing more than an excuse for the act, which would otherwise be a trespass. Cook v. Stearns, 11 Mass. 537; Whitney v. Holmes, 15, 152; Dolittle v. Eddy, 7 Barb. 74. See Whitmarsh v. Walker, 1 Met. 313. Hence a plea of *license* does not bring in question the title to real estate. Wheeler v. Romell, 7 N. H. 515. A license is sufficient to disprove any claim arising from adverse possession. Luce v. Corley, 24 Wend. 451. A distinction is made in a late English case, between a license of *profit*, or profit a *prendre*, and a *personal license of pleasure*; the former of which may be exercised by an agent. In this case, there was a grant to *heirs and assigns*. Wickham v. Hawker, 7 Mees. & W. 63. A license to search for metals, raise and carry them away, and convert them to the party's own use, is assignable. Musket v. Hill, 5 Bing. N. 694; 7 Scott, 855. A parol license to build and maintain a bridge on another's land is valid. Ameriscoggin, &c. v. Bragg, 11 N. H. 102.

(b) On the other hand it may be proved by parol, that a *grantor* was authorized to enter upon the land and remove certain property; this being a mere license. Parsons v. Camp, 11 Conn. 25.

A parol license, to enter on land and lay down aqueduct logs, for the purpose of conveying water from a spring to adjoining land, with liberty to enter from time to time to examine and repair the same, is not a sale of land, or an interest in land, within the statute. Sampson v. Burnside, 13 N. H. 264.

mises; held, the defendant could not give evidence of a parol license from the plaintiff to the purchaser to cut the timber.(1)

103. A parol license from A to B, to take trees from A's land so long as B pleases, expires upon A's death.(2) But where the defendant gave a written license to two persons to take logs from the land of the plaintiff, and one of the two died, but the other, under his license, and without any intimation by the defendant of a purpose to revoke the license, subsequently took the logs; held, the license was not revoked by the death of one of the parties, but the defendant was liable in trespass.(3)

104. A general parol license, to cut and carry away wood growing upon land, if available at all, must be acted on within a reasonable time; and applies only to the wood, as it is substantially at the time of giving the license. And what is a reasonable time, the facts being agreed, is a question for the court. Such license does not continue fifteen years, not being acted upon.(4)

104 *a*. Devise to A's children "of a plantation, to come into their possession, or into the hands of the executors for their benefit, at the testator's death, providing that A have the privilege of living on the place with his children during his life." Held, A did not take an estate for life, but his title was under a license, and of A's children only those took who were *in esse* at the testator's death.(5)

104 *b*. An unsealed lease provided as follows: "all the hedges, trees, thorn-bushes, fences, with lop and top, are reserved to the landlord." The landlord having entered the close, and drawn the trees, when cut down, over it, the tenant brings an action against him. Held, the above agreement might be shown under a plea of leave and license.(6)

105. By an indenture between the town of B and a mill-dam corporation, the latter granted to the former a certain proportion of a tract of land covered with water, "excepting the mill creek, and such other canals as may be agreed to be kept open for the passage of boats." By a subsequent indenture between the same parties, it was agreed that the town might put a covering over part of the creek or canal, "provided only, that no interruption or impediment shall be made or permitted below said covering, to boats on passing through or into said canal." Held, these provisions did not constitute a license to the abutters to navigate the creek.

106. The creek being kept open for boats, held, although there was an implied public license to navigate it, this was not such a perpetual license as could be pleaded as a grant, or a dedication to the public; and that no individual could acquire a prescriptive right, by the use of it while thus open.(7)

107. If a transaction between two parties amounts to the grant of a *permanent privilege* in the land, it will constitute a lease, not a license, though the words might seem to import the latter.(a)

(1) *Pierrepoint v. Bernard*, 5 Barb. 364.

(2) *Putney v. Day*, 6 N. H. 430.

(3) *Chandler v. Spear*, 22 Verm. 388.

(4) *Gilmore v. Wilbur*, 12 Pick. 120.

(5) *Calhoun v. Jester*, 1 Jones, 474.

(6) *Hewitt v. Isham*, 7 Eng. L. & Equ. 595.

(7) *Baker v. Boston*, 12 Pick. 184.

(a) That either construction may sometimes be given, see Year-Book, 5 Hen. 7, pl. 1; *Hall v. Seabright*, 1 Mod. 15. See, also, *Williams v. Morris*, 8 Mees. & W. 488.

108. A, in consideration of £5, grants to B the privilege of flowing certain land for twelve years without restriction, and for eighty years in the winter during one-half of the year. This is a lease.(1) But the grant of a mere license to flow passes no property. It does not create an easement, which can arise only by deed or prescription. It is a mere *remitter* of damages.(2)

108 *a*. Where A, under a license from B, the owner of land through which a watercourse flowed, erected a mill thereon, and ever afterwards held and occupied such mill as if it were his own; but it did not appear that there was any consideration for the license, or that it was to continue for any definite period, or that there was any agreement as to the nature of the occupation, or any mutual stipulations; in an action brought by A against C, the owner of a mill below, for setting the water back upon A's mill, by means of a dam erected by C, it was held that such license did not amount to a lease from B to A, nor create any privity of contract or estate between them.(3)

109. It is said that licenses which, in their nature, amount to the granting of an estate, for however short a time, are not good without deed, and are considered as leases, and must always be pleaded as such.(4) Thus, a license from the owner of land to make a dam, bank, or canal on his land, to raise water for working a mill, merely saves the other party from being a trespasser, in doing the particular act; but does not authorize him to enter upon the land afterwards for the purpose of making repairs.(4)

109 *a*. Where the proprietor of a wharf in a harbor was authorized by statute to extend it into the channel to the line of the harbor; and, before any extension thereof, in pursuance of such act, the legislature incorporated a railroad company, with authority to locate and construct a railroad across and over the flats between such wharf and the line of the harbor; held, the act operated as a grant, and was not a mere license, revocable at the pleasure of the legislature, and revoked by the act incorporating the railroad company.(5)

109 *b*. The declaration stated, that the plaintiff had been tenant to one A, and during his tenancy had put up certain fixtures; that, during the tenancy, A granted to the plaintiff leave and license to keep the fixtures on the premises after the expiration of the tenancy, in order that he might sell them to the incoming tenant, and to enter and recover them, if such tenant would not purchase them; that the defendant subsequently became tenant; that he would neither purchase the fixtures, nor allow the plaintiff to enter and remove them. The defendant traversed that A granted such license to the plaintiff. At the trial, the plaintiff gave in evidence the following letter written to him by A's attorney: "Mr. A has no objection to your leaving the fixtures on the premises and making the best terms with the in-

(1) *Smith v. Simons*, 1 Root, 318.

(2) *Clinton v. M'Kenzie*, 5 Strobb. 36. See
Woodward v. Seely, 11 Illin. 157.

(3) *Branch v. Doane*, 17 Conn. 402.

(4) *Cook v. Stearns*, 11 Mass. 537; *Whit-*

ney v. Holmes, 15, 152. See *Jamison v. M'Credy*, 5 Watts & S. 129.

(5) *Fitchburg, &c. v. Boston, &c.*, 3 Cush. 58.

(a) In trespass *quare clausum fregit*, a license cannot be given in evidence under the general issue. It should be specially pleaded. *Crabs v. Fetick*, 7 Blackf. 373.

coming tenant." Held, that this document, if it gave a license at all, gave one coupled with an interest in land; and, therefore, not being under seal, it could not be enforced against the incoming tenant.(1)

110. An *executory* is to be distinguished from an *executed* license. The former, where the authorized act has not been done, is revocable, and a mere transfer of the land, without express notice, has been held a revocation;(a) but the latter, where the act has been done, is irrevocable, so far as to exempt the party from any liability to the owner of the land.(2)(b)

110 a. S gave to J an oral license to erect and continue a mill-dam on S's land, and to dig a ditch, through said land, to convey water to a mill that J was about to build on his own land. J erected the dam and dug the ditch, and afterwards erected the mill, and continued them during the life of S. After S had granted the license, he conveyed his land to M, without any reservation. J continued the dam and ditch, after the decease of S, for the purpose of working the mill, and M requested him to remove the dam and fill up the ditch, and, upon J's refusal so to do, M attempted to remove the dam, and tore down a part of it, and J forcibly interposed, prevented M from proceeding further, and repaired the injury so done to the dam by M. M thereupon filed a bill in equity, praying that J might be enjoined and prohibited from any longer continuing the dam, which was alleged to be a nuisance, and that the same might be ordered to be abated. On an issue framed and submitted to a jury, they found that the dam was a nuisance. Held, that M was entitled to a decree for an abatement of the nuisance, and for a perpetual injunction against J, to prevent its renewal. Held, also, that J was not responsible for any acts done in pursuance of the license before it was countermanded, and

(1) *Ruffey v. Henderson*, 8 Eng. Law and Eq. 305. | *Wallis v. Harrison*, 4 Mees. & W. 538; *Woodward v. Seely*, 11 Illin. 157; *Sampson*

(2) *Cheever v. Pearson*, 16 Pick. 273; | *v. Barnside*, 13 N. H. 264.

(a) So, a license is to be distinguished from mere acts of assent or acquiescence, which constitute evidence of one. Thus, the defendant erected a dam, the plaintiff was present during such erection, made no objection, said he thought it would benefit his mill, and that he was satisfied with defendant's mode of using the water. Held, no license, but only evidence of one for the jury. *Johnson v. Lewis*, 13 Conn. 303. Even an *executory* license cannot in all cases be revoked. Thus, where A purchased goods sold upon the land of B, and a condition of sale, to which B was party, was, that the purchaser might enter to take them; but B locked his gates and forbade an entry; held, A was not liable for breaking the gates. *Wood v. Manley*, 11 Ad. & Ell. 34.

If one enter upon the land of another by virtue of a parol licens; given for a consideration, and erect *fixtures*, such license becomes irrevocable, and trespass will lie against the owner of the land for destroying them. *Wilson v. Chalfant*, 15 Ohio, 248.

Such license, executed, gives the right of possession to control, repair and protect the fixtures. *Ib*

What is the nature and extent of the estate or interest in him who erects the fixtures. *Quere. Ib.*

(b) Upon this ground, where a license is pleaded to *erect and maintain*, evidence of a license to *erect* only, does not sustain such plea. *Alexander v. Bonnin*, 6 Scott, 611.

Where a landlord had distrained for rent, and, in consideration of his giving up the distress, the tenant agreed to surrender the premises in a week, and accordingly removed his furniture, and after a week the lessor entered; held, he was not liable to an action of trespass, the facts showing a *license* from the plaintiff, which, it seems, was not revocable. At any rate, a revocation must be distinctly replied. *Feltham v. Cartwright*, 7 Scott, 695.

A license to build and maintain a bridge over another's land is not revocable, it seems; certainly not, without compensation. 11 N. H. 102.

therefore was not liable to pay any expenses incurred by M in removing the old dam; but that he was liable for building a new dam or repairing the old one, after the license was countermanded, and that M was entitled to have the same abated at the expense of J.(1)

111. A and B were joint tenants; and, although no partition had been made between them, it was understood that A should have the east, and B the west end of the tract. B agreed that A might build a mill on A's half, and cut as much timber off the west half, and overflow as much of the land, as was necessary for that purpose. Afterwards B sold to C, who agreed with A to abide by these stipulations. After the dam was partly erected, and timber collected for building the mill, C sold to D, who soon after notified A to discontinue the work; and, on his refusal, brought trespass for overflowing the land. Held, the action could not be maintained, and that the original parol agreement could not be revoked after it had been executed at the defendant's expense.(2)

112. For any abuse of a license, the party injured may maintain an action. Thus, the plaintiff, having a way over the defendant's land, gave him a license to build an arch over such way, but the defendant, in so doing, unnecessarily and unreasonably obstructed the way. Held, the plaintiff might maintain an action on the case for this obstruction.(3)

CHAPTER XVI.

RENT.

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| 1. Definition. | 29. To whom reserved. |
| 3. Must be certain. | 41. When payable. |
| 4. In what payable. | 46. To whom it passes upon the lessor's death. |
| 5. Effect of a reservation of part of the produce, and whether the landlord has a lien. | 52-3. Remedies for recovery of rent—distress. |
| 11. Kinds of rent. | 57. Re-entry. |
| 12. Rent-service. | 62. Debt and covenant. |
| 13. Rent-charge. | 63. Assumpsit. |
| 15. Rent-seck. | 65. Election of remedies. |
| 16. Fee-farm rent. | 68. Restoration of land after forfeiture; attachment for—before due. |
| 17. Seizin of rent. | 69. Suit in Chancery. |
| 18. From what it may issue. | 72. Estates in a rent. |
| 23. On what conveyance reserved. | 86. Not lost by non-user. |
| 24. Several rents reserved by one deed. | |

1. IN the natural order of topics, we now proceed to state the rules of law applicable to the most important incident of an *Estate for Years* and a *Lease*, which were respectively treated of in the two preceding chapters; viz., *Rent*. This, for the most part, though not exclusively, pertains to the two subjects above referred to, and therefore finds a proper place in immediate connection with them.

(1) *Stevens v. Stevens*, 11 Met. 251.
 (2) *Sheffield v. Collier*, 3 Kelly, 82.

(3) *Cushing v. Adams*, 18 Pick. 110.

2. *Rent* is a periodical return made by any *particular* tenant of land, either in money or otherwise, in retribution for the land.

3. A rent must be *certain*, or capable of being made so by either party.(1)(a)

4. The old doctrine is, that rent must *issue out of* the thing granted, and not be a *part* of the thing itself. Thus, it cannot consist of the annual vesture or herbage; for that should be repugnant to the grant.(2) It is often reserved, however, in a certain portion of the produce.(b) But it has been held, that the whole property in such produce remains in the lessee till it is divided, and the lessor's share delivered to him. So, also, that a creditor of the former may legally seize the whole. So, also, that upon his death it passes to his administrator.(3)(c)

5. And the same principle has been adopted where the lease provides that the lessor shall have a claim upon the produce as *security* for the rent.

6. A lease provided that the produce, whether growing or harvested, if deposited upon the land, should be held for the rent, and be at the lessor's disposal, who might enter and take it for rent in arrear. Before rent-day, previous instalments having been paid, a creditor of the lessee seized, by legal process, a quantity of corn raised upon the land. Held, no property had vested in the lessor, as against creditors, either by way of sale, mortgage or pledge, for want of delivery, and continued possession; and the agreement, giving the lessee an absolute title until the lessor should take possession, was fraudulent against creditors.(4)

(1) 3 Cruise, 186; Co. Lit. 142 a.

(2) *Ib.*

(3) *Stewart v. Doughty*, 9 John. 113; *Dockham v. Parker*, 9 Greenl. 137. See ch. 15, s. 24; also, *Rinehart v. Olwine*, 5 Watts & S. 157; *Morgan v. Moody*, 6

333; *Deaver v. Rice*, 4 Dev. & B. 431; U. S. v. *Gratiot*, 14 Pet. 526; *Turner v. Bachelder*, 5 Shepl. 257; *Whitcomb v. Tower*, 12 Met. 487; *Thompson v. Spinks*, 12 Ala. 155.

(4) *Butterfield v. Baker*, 5 Pick. 522.

(a) The maxim applies in this, as in other cases, "*id certum est, quod certum reddi potest.*" *Smith v. Fyler*, 2 Hill, 648.

A demise at will, in consideration of services rendered annually to a religious society, "as foresinger and organist," is not within the Pennsylvania act of 1772, for uncertainty in the rent. *Hobly v. German, &c.*, 2 Barr, 293. See *Glasgow v. Ridgeley*, 11 Mis. 34.

(b) Chancellor Kent considers this the most judicious mode of reservation in long leases, on account of the fluctuating value of money. He mentions the case of the N. Y. University, whose annual income is limited by law to 40,000 bushels of wheat. 3 Kent, 369. See *Van Rensselaer v. Jewett*, 5 Denio, 135; — *v. Gallup*, *Ib.* 454; *Tayl. L. & T.* 7.

Where the rent reserved is one-half of the crop, this entitles the landlord to one-half the straw. *Rank v. Rank*, 5 Barr, 211.

Where the rent of land leased for the cultivation of sugar is payable in a portion of the crop, it will be presumed, in the absence of any express stipulation, that the sugar is to be delivered in the usual manner, that is, in hogsheads or barrels, and the lessee cannot claim any allowance for the cost of the hogsheads or barrels. *Wilcoxon v. Bowles*, 1 La. Ann R. 230.

(c) The owner of land rented it to raise a crop of corn. Before the crop was gathered, the owner sold it, and the purchaser turned a number of hogs into the field. Held, this was a trespass to the lessee. *Rodgers v. Lathrop*, 1 Smith, 347.

If A make a parol agreement with B to clear and sow the land of B for the crop, and before harvest B convey the land to C, with notice of such contract, C will be bound by it. *Dewey v. Bellows*, 8 N. H. 278.

Rent may be reserved in *labor*, as well as produce. And, if a tenant agrees to pay in this way by the month, when he ceases to labor, his title comes to an end, without notice to quit. *McGee v. Gibson*, 1 B. Mon. 105.

Where a tenant agreed to cultivate and bag the hop crop in payment of the rent; held, such crop belonged to the landlord. *Kelley v. Weston*, 2 Appl. 232.

7. So, where a rent, is reserved in money, but the lessor reserves a right to take a portion of the produce at a certain valuation, in lieu of money, he acquires no property until he has elected and actually taken the produce; and, upon the lessee's death, the right of election ceases, and the whole existing produce vests in the administrator, leaving the lessor, in case of insolvency, only the rights of a general creditor. So, where a lease provided that, in case of non-payment of rent, the lessor should have all the crops, to dispose of as he pleased; held, until delivery of the crops, or possession taken, in payment of the rent, they remained the property of the lessee, liable to be sold by him or attached by his creditors.(1)

8. The contract between the parties may be of such a nature as to make them *joint owners* of the crop or produce.(a)

9. A rented a farm from B upon the following terms: A was to give B one-half of every thing that was made, to carry all the crops to market, and pay B one-half of the proceeds. A made a crop of tobacco, and assigned in writing all his interest therein to C, who was to have the crop prepared for market, and sold, and to pay over to B one-half of the net proceeds. The tobacco was left in the possession of B's agent, and A retained possession of no part thereof, after his agreement with C. Held, the contract between A and B created the relation of landlord and tenant, and vested in each a joint interest in the crop; that the sale to C, if effectual, could only constitute him a tenant in common with A; and that B could not, therefore, maintain replevin against A.(2)

10. The defendant entered into a contract with A, in writing, not under seal, "to let" to A a certain farm, to commence on the 1st of April, and continue from year to year for five years, or so long as the parties should agree and be satisfied, reserving to either party the right to terminate the contract by giving one month's notice in writing, the produce of the farm "to be equally divided by weight or measure." Held, although this gave to A an interest in the land, and a right to occupy it while he continued in the performance of the contract; yet, it did not constitute a lease, but A was a *quasi* tenant at will while the contract continued, and the defendant and A were tenants in common of the growing crops, and of the produce of the farm before severance.(3)

10 *a.* Contrary to the doctrine above stated, (secs. 4, 5,) it has been held in Vermont, that where stock and farming utensils worth \$1,000, were leased with the land, with a provision that they should remain the property of the lessor, and be security for the rent and covenants, as also other articles of the same kind and value, which might be substituted for, or added to them; held, a valid contract, and that the lessor had a good title to the property leased, and all purchased with its avails, or those of the products of the farm, to the amount of \$1,000.(4)

10 *b.* Held, also, that the property thus on the farm, to the amount

(1) Wait, &c., 7 Pick. 100; *Munsell v. Carver*, 2 Cush. 50.

(2) *Ferrall v. Kent*, 4 Gill, 209.

(3) *Aiken v. Smith*, 21 Verm. 172.

(4) *Paris v. Vail*, 18 Verm. 277.

(a) A landlord, entitled to one-half of the crops, when divided, cannot maintain trespass against the tenant for taking the hay which the landlord had in his possession, but which had never been divided. *Briggs v. Thompson*, 9 Barr, 338.

of \$1,000 in the whole, could not be attached by the creditors of the lessee, but that the right of the lessor extended only to that amount, and could not extend, under the terms of the lease, to the excess of property over that value, nor to property acquired by the lessee from the avails of his individual means.(1)

10 c. The creditors of the lessee, having attached and sold the stock and farming utensils on the farm, a part of which consisted of property placed upon the farm by the lessor at the commencement of the term, and the remainder of which was property purchased by the lessee, in place of stock, &c., sold by him, with the consent of the lessor; held, in absence of all proof of fraud, that the lessor was entitled to recover against the attaching creditors, to the amount of \$1,000, and interest from the time of the taking.(2)

10 d. So it has been held in the same State, that a lease of land, reserving rent, and which provides that all the crops are to be the property of the lessor until the rent is paid, is valid, and will entitle the lessor to hold such crops against the creditors of the lessee.(3)

10 e. A leased land to B for two years, reserving rent, B executing at the same time a promissory note for the first year's rent. The lease provided that the lessor was to have entire control and ownership of all the crops until the rent of each year was paid. A indorsed the note to C, and delivered to him the lease as security. Held, C would hold the crops raised the first year, as security against one who attached them, as the property of B, and became the purchaser of them upon the execution sale.(4)(a)

(1) *Paris v. Vail*, 10 Verm. 277.

(2) *Ib.*

(3) *Smith v. Atkins*, 18 Verm. 461.

(4) *Ib.*

(a) In connection with the somewhat contradictory doctrines stated in the text, (secs. 4-10,) it may be mentioned, that in many of the States express statutory provisions have given the landlord a claim or title to the produce of the land which he would not otherwise have. Thus, in Missouri, Tennessee, Illinois, Arkansas, Ohio, (it seems,) Iowa, Mississippi and Alabama, the landlord has a lien upon the crop for rent, usually for a specific time after it falls due. In Virginia, Kentucky, Alabama, Mississippi, Delaware, New York, Pennsylvania, he has the same lien upon the tenant's goods on the land. The word *property* is also sometimes used. In Maryland, he has a lien on the crop for rent, if payable in produce. In Delaware, if the rent is payable in produce of a certain kind, the lessor has a lien upon this amount of the crop; and if sold on execution, the purchaser succeeds to the tenant's liability for rent and good husbandry, and the crop is still liable to distress. But see *Bryan v. Buckholder*, 8 Humph. 561. In New York, the tenant may discharge the lien by giving a bond with surety for the rent. If the landlord claim and receive more rent than is due, he is liable to double damages. Tenn. Sts. 1825, ch. 21; Misso. Sts. 377; 5 Watts, 134; Dela. Sts. 1829, 366-7; 1 N. J. L. 187; Aik. Dig. 357; 1 N. Y. Rev. Sts. 746; 6 Yerg. 267; 4 Griff. 671; 3, 404; 1 Ky. Rev. L. 639; Md. L. 1831, ch. 171; Illin. Sts. 1842, 3, 142; Martin. 5 W. & S. 220; Clay, 506; Hardeman v. Shumate, 3 Port. 398; Bromley v. Hopewell, 2 Harr. 400; Thompson v. Spinks, 12 Ala. 155; Denham v. Harris, 13, 465; Iowa Code, ch. 82, sec. 1290; Va. Sts. 1840, 1, 77; Tift v. Verden, 11 S. & M. 153; Forman v. Proctor, 9 B. Mon. 124.

The following are some of the leading miscellaneous decisions in construction of these statutes:—

In Virginia, if an officer take the goods of the tenant without satisfying the lessor's claim, the measure of damages in a suit by the latter is not the value of the goods, but the amount of rent—the former exceeding the latter. *Crawford v. Jarrett*, 2 Leigh, 630. The landlord's lien, for a year's rent, on the goods and chattels of his tenant, does not protect them from an execution, except where they are in or upon the premises. *Geiger v. Harman*, 3 Gratt. 130.

In Tennessee, an action lies by the landlord against a purchaser of the crop, but not till he has recovered a judgment against the tenant for the rent. The landlord has a lien even against a sub-lessee, who has paid the original tenant. *Ballantine v. Greer*, 6 Yerg. 267; Rutledge v. Walton, 4, 458.

11. By the English law there are three kinds of rent, viz. : *rent-service*, *rent-charge*, and *rent-seck*. And this division has been recognized in New York ; although in that State a statute has done away with all distinctions as to *remedies*.(1)

(1) *Cornell v. Lamb*, 2 Cow. 652 ; 3 Kent, 368-9. (As to the rent called *rack-rent*, see *Simpson v. Clayton*, 6 Scott, 469.)

Under the act of 1840, in North Carolina, which gives to a landlord, whose rent is to be paid in a part of the crop, a certain interest in the crop ; if the tenant retains possession, and the whole crop is levied upon as his property, the landlord may bring an action on the case against the officer, but not trespass—having neither property nor possession. *Peebles v. Lassiter*, 11 Ired. 73. An execution against the tenant gives a lien upon the crop from its *teste*, paramount to any claim of the landlord under a subsequent transfer for the rent. *Deaver v. Rice*, 4 Dev. & B. 431.

In New York, where a sheriff, having in his hands an execution against a tenant, previous to a sale receives a notice from the landlord that rent is due to him, and requiring the sheriff to levy the amount of the rent and pay the same to the landlord ; the payment of the money collected by the sheriff into court will not be a bar to a suit against him by the landlord for the amount of such rent. *Acker v. Ledyard*, 8 Barb. 514.

Where an execution creditor, as well as the tenant, admits that there is a certain sum as rent due the landlord, the sheriff cannot discharge himself from liability to the landlord, by paying the money into court, in a suit in which the landlord is not a party. *Ib.*

Where an offence was committed against the New York statute, prohibiting the removal of goods from demised premises, to avoid the payment of rent, (2 Rev. Sta. 503, sec. 17,) so that the landlord's right to sue for the penalty imposed was perfect, before distress for rent was abolished by the act of 1846, (p. 369 ;) held, his right of action was not taken away by the latter statute. *Conley v. Palmer*, 2 Comst. 182.

Only one penalty can be recovered, and all who assist may be sued together. *Ib.*

In Pennsylvania, a sheriff, who sells land on execution which is subject to arrears of ground-rent, and distributes the fund to other persons, is personally liable to the owner of the ground-rent. *Mather v. McMichael*, 1 Harris, 301.

So, though he stipulates in the conditions of sale, that unless the claim for ground-rent is presented before he parts with the purchase-money, the arrears will be paid by the purchaser. *Ib.*

The preference of a landlord for one year's rent is not confined to the rent for the year immediately preceding the execution, although a new year has commenced, for which the rent accrued has been paid ; nor does it make any difference that the year's rent due accrued under a former lease, which has expired. *Richie v. McCauley*, 4 Barr, 471 ; *Parker's Appeal*, 5 Barr, 390.

Where the property of a tenant is levied on upon the premises, the landlord is entitled only to the rent due at the time of the levy, out of the proceeds of the sale. Nor can he set off the rent becoming due after the levy, against the tenant's book account against him, for which credit is asked, as a deduction from the rent, in a feigned issue between the landlord and the execution creditors, to try the amount of rent due. *Case v. Davis*, 3 Harris, 80.

Where the tenant was to pay taxes, the landlord is not entitled to the amount of taxes paid by him after the levy. *Ib.*

In Maryland, arrears of rent, of which the sheriff had notice by a due warrant of distress, before sale, cannot be retained for the use of the landlord by the sheriff out of the proceeds of the goods of a stranger levied upon, while on the demised premises, under a writ of attachment, to compel an appearance at law ; the same goods having been duly condemned, and afterwards sold by *fiery facias*, under the judgment of condemnation. *Fisher v. Johnson*, 6 Gill, 354.

In Kentucky, under the act of 1843, a tenant, after entering upon the premises, cannot defeat his landlord's lien upon his property by mortgaging it. *Beckwith v. Bent*, 10 B. Mon. 95.

The act of 1843, in Missouri, "concerning landlords and tenants in St. Louis county," gives no lien, unless the rent be due and certain ; but where a certain rent has been reserved for a house, and additional premises are rented at an uncertain rent, the whole rent is not thereby rendered uncertain. *Glasgow v. Ridgeley*, 11 Mis. 34.

As the converse of the landlord's lien, referred to in the text, in some cases the tenant may acquire a lien upon the land against the landlord. Thus, he shall have such lien in Kentucky, where he has been compelled to pay taxes upon the land beyond or against his contract. In Maryland, New Jersey and New York, the tenant is allowed to deduct the amount of such taxes from his rent. 2 Ky. Rev. L. 1364 ; 3 Md. L. 121 ; 1 N. Y. R. S. 419 ; 4 Griff. 1274. As to special remedies in case of landlord and tenant, see *Ward v. Wandell*, 10 Barr, 98 ; *McCaskle v. Amarine*, 12 Ala. 17.

12. *Rent-service*, the only one known to the common law, and the one chiefly in use in the United States, is thus defined: (1) "where a tenant holds his lands by fealty or other services, and a certain rent." The name *service* was applied to this rent, because it was a substitute for the feudal services, which in early times the tenant paid to his lord. To a rent-service the power of *distress* was inseparably incident. (*Infra*, s. 54.)

13. A *rent-charge* is a rent granted out of lands by deed. Such rent is not *in itself* subject to be enforced by distress, but is usually *charged* expressly with this right, and hence derives its name of *rent-charge*. It is said that rent-charges, though of great antiquity, were against the policy of the common law, inasmuch as they were commonly for the benefit of younger children, and rendered the grantor less competent to perform his feudal services, while they did not subject the grantee to such services. Hence, a rent-charge is *against common right*. But where a rent-charge is granted for valuable consideration,—as in case of partition between parceners, or in lieu of dower; it is said the owner may *distrain, of common right*.

14. A section of the statute of uses transfers to the *cestui que use* of a rent-charge the legal seizin and possession of such rent. (2)

15. A *rent-seck*, or barren rent, is one, for recovery of which by distress, at common law, no power is given either by law or by agreement. It does not differ from a rent-charge, except in this particular. Being connected with the power of distress, a rent-charge is regarded as an interest in, or specific portion of, the land—bound by a judgment, and subject to execution; while a *rent-seck* has none of these properties. Where a lessee assigns, reserving rent to himself, the excess over that reserved to the lessor is said to be a *rent-seck*. (3)

16. A *fee-farm* rent is a perpetual rent reserved on a conveyance in fee-simple. It is said that in England, since the statute of *quid emptores*,—by which tenure was to be always of *the chief lord*, instead of the immediate donor,—a fee-farm rent is impracticable, because a grantor in fee retains no reversion, which is essential to a rent. It seems, however, that such reservation, accompanied by a power of distress and re-entry on non-payment, might make a good rent-charge, and, in the United States, though unusual, it would undoubtedly be legal and valid. In Massachusetts, a rent of this description is sometimes known by the name of *quit-rent* (a) or *rent-charge*, and in New Jersey and New York as a *rent-charge*. In Pennsylvania it is termed a *ground-rent*, and is said to be a very common species of inheritable estates. In that State, the statute *quia emptores* is not in force; and a ground-rent is, therefore, as at common law, a *rent-service*, and not a rent-charge, as in England

(1) Litt. 213.

(2) Co. Lit. 143 b; 3 Cruise, 187; Lit. 252; Ingersoll v. Sergeant, 1 Whart. 352; Cornell v. Lamb, 2 Cow. 652.

(3) Cornell v. Lamb, 2 Cow. 652; People v. Haskins, 7 Wend. 463; Vechte v. Brownell, 8 Paige, 212; Wollaston v. Hakewill, 3 Man. & G. 297.

(a) It is said (Marshall v. Conrad, 5 Call, 364) that *quit-rents*, in England, were rents reserved to the king or a proprietor on an absolute grant of *waste land*, for which a price in gross was at first paid, and a merely nominal rent reserved, as a feudal acknowledgment of tenure; and that, inasmuch as no rent of this description can exist in the United States, where a *quit-rent* is spoken of, some different interest must be intended. See Sneed v. Ward, 5 Dana, 187.

since the statute. In a late case it is said by the court, in their very learned and elaborate opinion, that, before the statute *quia emptores*, a rent-charge could exist only where one man granted to another and his heirs a yearly sum charged on the land, with the right of distress; but this statute made a fee-farm or ground-rent a rent-charge, by construing the reservation by the grantor into a promise or grant by the grantee.(a) In New York, this view of the subject is not adopted; but every rent is a rent-charge, where the landlord has no reversionary interest.(1)(b) In Ohio, such a thing is hardly known as a rent-charge.(2)

17. *Seizin* of a rent can be had only by receipt of the whole or a part of it, except in case of a conveyance to uses, which, by the operation of the statute of uses, gives a *seizin* immediately, without any receipt.(3)

18. A rent can issue only from corporeal hereditaments, or, as Lord Coke says, an inheritance that is *manurable* or *maynorable*; because these alone are subject to distress; and incorporeal rights, being always granted originally by the crown, are created for particular purposes, foreign from the payment of rent, which would therefore be contrary to the intention of the grant.(4)

19. A rent cannot be reserved from a rent. Thus, if one lease lands

(1) Co. Lit. 143 b, n. 5; *Adams v. Bucklin*, 7 Pick. 121; *Farley v. Craig*, 6 Halst. 262; 1 Whart. 360; *Ingersoll v. Sergeant*, 1 Whart. 337; Lit. 217; (and see *Marshall v. Conrad*, 5 Call, 364; *Cornell v. Lamb*, 2 Cow. 652; *Kenege v. Elliot*, 9 Watts, 262; Penn.

St. 1840, 249; *Governors, &c. v. Harrild*, 2 Man. & G. 713, n; *Flower v. Hartopp*, 5 Beav. 476.)

(2) Walk. 265.

(3) 3 Cruise, 188.

(4) Co. Lit. 47 a; 142 a; Gilb. 20-22.

(a) Where land, on which a perpetual rent has been reserved, is conveyed either by indenture or deed-poll, to be held "under and subject to the payment of the said rent, as the same shall accrue, forever," the grantee is liable for the rent, only so long as the freehold remains in him, and not to indemnify his grantor for the payment of rent accruing after he has conveyed the premises. *Walker v. Physick*, 5 Barr, 193.

The payment, by an assignee of land, of a ground-rent which accrued while occupied by him, does not raise the presumption of payment of a judgment for the ground-rent against his assignor. *Wills v. Gibson*, 7 Barr, 154.

A purchaser of land sold on execution is not liable for a ground-rent accruing between the sale and the sheriff's deed. *Thomas v. Connell*, 5 Barr, 13.

A conveyance reserving a ground-rent to the grantor, with a covenant to convey in fee simple absolute on payment of a certain sum, is an executed contract. *Sahl v. Wright*, 6 Barr, 433.

In an action of covenant brought by the grantee of a ground-rent against the grantor, after the grantor has sold the land out of which it issues; it is not necessary to notify the vendee as *terre-tenant*; and the sale of the whole lot on execution on the judgment divests the title of such vendee, as well as of the defendant. *Charnley v. Hansbury*, 1 Harris, 16.

A took a lot on ground rent, and contracted with B to give him a deed on the performance of certain conditions; B was put in possession, subject to the ground-rent, and fulfilled the conditions; and A afterwards purchased the ground-rent. It seems, such purchase did not merge the ground-rent in fee, nor enure to the benefit of B. *Ib.*

Where tenants in common, one of whom held in trust, joined in a conveyance, reserving a ground-rent, the trustee having no power to make such conveyance, the grantee, who, at the time of the conveyance, knew of all the facts relative to the title, although mistaking the legal effect of the deed creating the trust, cannot, by tendering a reconveyance, recover back the ground-rent paid by him. *Kerr v. Kitchen*, 7 Barr, 486.

(b) A "sixth sale," or "quarter sale," reservation, contained in a lease in fee, is void; *aliter*, in a lease for years or for lives. *Overbagh v. Patrie*, 8 Barb. 28.

Where the payment of such sixth sale, or quarter sale, is made a condition subsequent, the condition is void. *Ib.*

for life, reserving rent, and then grant this rent, reserving rent; the latter reservation is void.(1)

20. But rent may be reserved, upon a lease of the vesture or herbage of land; because the beasts feeding there may be distrained. So, upon a lease of a remainder or reversion; because, when become an estate in possession, it will be subject to distress, and it is a *tenement*.(2)

21. Upon a lease to commence *in futuro*, rent may be reserved immediately; because, when the lessee takes possession, the lessor may distrain for the arrears.(3)

22. The preceding remarks, as to the kinds of property from which a rent cannot legally be reserved, are to be received with some qualifications. As a mere matter of *contract*, the reservation of a return or compensation for the use of any kind of real estate is binding, and may be enforced by action. But, unless the property is of the description above pointed out—first, there can be no distress; and second, by a grant of the reversion, the rent will not pass, not being incident thereto. It is said, however, that the rent reserved upon a lease of *tithes* will pass with the reversion. At common law, a reservation of rent, upon a lease *for life* of incorporeal property, is for all purposes void; no action of debt will lie for it. And whether St. 8 Anne, 14, applies to this kind of property, seems doubtful.(4)

23. Rent may be reserved upon every conveyance, which either passes or enlarges an estate. It is usually reserved upon a lease.(5)

24. Where several lands are let by one conveyance, distinct rents reserved, and a right of re-entry upon the whole provided for non-payment of the rent of one; the reservations create several tenures, demises, reversions and rents, and an entry upon one parcel for non-payment of the rent of another is illegal and void.(6)

25. And a third person may purchase the reversion of one of the parcels, and maintain ejectment for non-payment of the rent of that parcel.(7)

26. But, if the rent be at first reserved *in gross* or entire for the whole of the lands leased, and the rent of each parcel afterwards designated separately—as, for instance, for A, B and C £15, viz.: £5 for A, £5 for B, and £5 for C; the latter sums will be regarded as mere valuations, and for non-payment of one the lessor may re-enter upon the whole.(8)

27. Upon the same principle, if tenants in common join in making a lease upon condition; as they have several estates, the demise, the condition, and the rent will also be construed as several.(9)

28. Where a statute provides for re-entry on the *land*, and a sale of the lessee's right in *such lease*, upon non-payment of rent; the entry must be made upon the whole land, without regard to any sub-leases of a part.(10)

29. A *rent-service* can be reserved only to the owner of the land, or

(1) 2 Rolle Abr. 446.

(2) Co. Lit. 47 a.

(3) 2 Rolle Abr. 446.

(4) Windsor v. Gover, 2 Saun. 302; Co. Lit. 47 a; Ib. n. 3; 44 b, n. 3; 47 a, n. 4.

(5) Co. Lit. 144 a; Gilb. 22.

(6) Winter's case, 2 Rolle Abr. 448; Tanfield v. Rogers, Cro. Eliz. 340; Lee v. Arnold,

4 Leon. 27. See Wollaston v. Hakewill, 3 Man. & G. 297; Paterson v. Lang, 6 Beav. 590.

(7) Hill's case, 4 Leon. 187.

(8) Knight's case, 5 Rep. 54.

(9) Knight's case, Moo. 202.

(10) Hart v. Johnson, 6 Ohio, 88.

his legal representatives after his death, or to a party who is *privy* to the lease, as to one of two joint-tenants, who join in leasing by indenture; because it is a recompense for the use of the land, and should therefore belong to him from whom the land passes. If the lease is to commence after the death of the lessor, the rent may be legally reserved to his heirs, who will take it, not as purchasers, but by descent, as incident to the reversion. And hence the lessor may release the rent during his life.(1)

30. In such case, the law is strict in requiring the use of the word *heirs*. Thus, where a father, and his son and heir apparent, joined in making a lease, to commence from the father's death, and reserved the rent to *the son*; held, the reservation was void, and the son had no right to distrain for the rent, after the death of the father.(2) Upon the same principle, at common law, if a reversioner assigned over his estate, the assignee could not avail himself of any covenant or condition in the lease. The law upon this subject has already been considered, in treating of the assignment of estates for years.(a)

31. Where the rent is reserved to no one in particular, it shall be payable to the lessor during his life, and after his death shall pass with the reversion; and any doubtful word shall be taken in that sense which will best answer the nature of the contract. Thus, if the lessor is a tenant in special tail, and reserves the rent to himself, his heirs and assigns; the rent, upon his death, shall pass to the heir in tail.(3)

32. Lord Coke says, that if a lessor reserve rent generally, without showing to whom it shall go, it shall go to his heirs. But, in the sentence immediately preceding, he says, that if the rent be reserved to him, and not to him and his heirs, the rent shall determine by his death (4)(b)

33. How far an express reservation may control the legal disposition of a rent, seems to be somewhat doubtful. It is said, that where the law particularizes the persons, the agreement of parties prevents the construction of law, and, if the reservation is special, and to improper persons, the law follows the words. But yet, a rent reserved to the lessor *and his assigns* will terminate with his death. So, if the lessor, being owner of the inheritance, reserves the rent to himself and his executors; or if, having himself only a leasehold, he reserves the rent to his heirs; in either case, the rent will cease at his death: because the representatives to whom it is limited, having no reversion, cannot take the rent incident thereto, and the other class, to whom it is not limited, cannot take it, for the want of such limitation. But if, upon a lease made by the owner in fee, the rent is reserved to himself, his executors, administrators, and assigns, yearly, *during the term*; inasmuch as the

(1) Lit. 346; Co. Lit. 47 a, 143 b; 214 a.n. }
1; Gilb. Rents, 61; 2 Rolle Abr. 447; Sach- }
everell v. Froggatt, 2 Saun. 370.

(2) Oates v. Frith, Hob. 130.
(3) Cothier v. Merrick, Hard. 89.
(4) Co. Litt. 47 a.

(a) See ch. 15.

(b) It has been recently held, that where rent is reserved generally to be paid quarterly during the term, the lease does not terminate on the death of the lessor; but the rent is payable to his heirs, if he dies intestate, who may maintain an action of debt on the lease to recover the same. *Jaques v. Gould*, 4 Cusb. 384.

latter clause indicates a clear intent that the rent should not cease with his death, it will pass with the reversion to his heirs, or to a devisee.(1)

34. Where the owner of a freehold estate, as for instance a tenant *pour autre vie*, to him and his heirs, assigns his whole estate, leaving no reversion in himself, and reserves a rent to himself, his executors, administrators and assigns, which the lessee covenants to pay accordingly; the rent, upon the lessor's death, will pass to his personal representatives, notwithstanding a provision that, on non-payment, he and *his heirs* might re-enter; for the heirs would be mere trustees for the executor.(2)

35. If a tenant for life and the reversioner join in a lease, reserving rent generally, it will go to the former during his life, and then to the latter.(3)

36. Where a tenant for life, with subsequent limitations, leases, under a *power to lease*, reserving rent to those in reversion or remainder, it has been doubted what disposition the law would make of the rent after his death: because the lessee comes in under the original conveyance creating the power, and therefore a reservation of the rent to the heir of tenant for life, or the reversioner, or remainder-man, they not being the personal representatives of the tenant, would be void. But it has since been settled, that such reservation is good, and that a remainder-man, being a privy in estate, may distrain for the rent. In such case, the most clear and sure way is to reserve the rent yearly during the term, and leave the law to make the distribution, without an express reservation to any person.(4)

37. With regard to the persons to whom rent may be reserved, substantially the same remark may be made, that was made with reference to the property out of which rent may issue. A reservation to other persons than those above designated, though invalid as technically a *rent*, may be good as a *contract*. Thus, if the lessee covenant to pay the debts of the lessor, as rent, he becomes liable as a trustee, but no distress lies against him.(5)

38. From what has been said, it appears that rent is *incident* to the reversion. Hence, by a general grant of the latter, the former will also pass; though not the converse. The rent may be separated from the reversion, but there must be a clear intention, or a necessary implication, to that effect, in which case a subsequent grant of the reversion does not pass the rent. By a grant of the reversion, either absolute or conditional, the grantee becomes entitled to rents which fall due subsequently, and may maintain an action therefor, unless paid before notice of the sale to the vendor, in virtue of the assignee's privity of estate with the tenant. The assignor cannot maintain such action. Otherwise, with rents already due; and, although these be expressly assigned, the grantee cannot sue for them in his own name. An assignee of the reversion will be entitled to the whole rent of the current quarter, not-

(1) *Cother v. Essex*, Hard. 95; *Co Lit.* 47 a, and notes 8, 9; *Wooton v. Edwin*, 12 Rep. 36; * 1 Ventr. 161; *Sacheverell v. Froggatt*, 2 Saun. 367, and notes.

(2) *Jenison v. Lexington*, 1 P. Wms. 555.

(3) *Co. Lit.* 214 a.

(4) *Chudleigh's case*, 1 Rep. 139 a; *Harcourt v. Pole*, 1 And. 273; 2 Saun. 369, n 4. See *Lock v. De Burgh*, 6 Eng. L. & Equ. 65.

(5) *Ege v. Ege*, 5 Watts, 134.

* Marginal note. "This case will hardly be held for law at this day."

withstanding a parol agreement for apportionment. (See *ante*, ch. 14, sec. 68.)

39. A, and B his wife, lease land jointly owned by them, reserving rent. A dies, having devised the *reversion* to B. B marries C and dies, and then C dies. The heirs of C shall not have the rents accruing after his death, upon the ground of their being separated by the devise from the reversion, and therefore vesting absolutely in C.(1)(a)

40. Rent in arrear (as has been stated, sec. 38,) is a *chose in action*, not by law assignable, and upon which an assignee cannot sue in his own name. In Delaware, a statute provides, that such rent shall not be assignable *with the reversion*.(2)

41. With regard to *the time when rents are payable*, it is said, if there is no express stipulation, they are payable at the end of a year.(3)(b)

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| <p>(1) <i>Sampson v. Grimes</i>, 7 Blackf. 176; <i>Peck v. Northrop</i>, 17 Conn. 217; <i>Burden v. Thayer</i>, 3 Met. 76; <i>Condit v. Neighbor</i>, 1 Green, 83; <i>Miller v. Stagner</i>, 3 B. Monr. 58; <i>Flinn v. Calow</i>, 1 Man. & G. 589; <i>Childers v. Smith</i>, 10 B. Mon. 235; <i>Gibbons v. Dillingham</i>, 5 Eng. 9; <i>Beach v. Barons</i>, 13 Barb. 305.</p> | <p>(2) <i>Dela. St.</i> 1829, 370; <i>Demarest v. Wil- lard</i>, 8 Cow. 206.
(3) <i>Cole v. Sury</i>, Lat. 264; <i>Shuny v. Brown</i>, 3 Bulstr. 329; 3 Kent. 374; 3 Cruise, 194. See <i>Hopkins v. Helmore</i>, 8 Ad. & Ell. 463; <i>Allen v. Culver</i>, 3 Denio, 284; <i>Boyd v. McCombs</i>, 4 Barr. 146.</p> |
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(a) Where the owner of lands leased them for years, and gave the lessee the right to make certain improvements, upon obtaining authority from the legislature or city counsel, and also reserved a right of entry and distress; and afterwards sold his reversion, and the purchaser recovered the premises for non payment of rent; held, the right to enter, and make and hold the improvements, passed to the purchaser. *City of Baltimore v. White*, 2 Gill, 444.

A purchaser of land at sheriff's sale is entitled to rent from the day of sale. *Stayton v. Morris* 4 Harring. 224.

Where land thus sold is in possession of a tenant, the purchaser has a remedy by distress, or attachment to recover rent against a person occupying by actual demise; and he may recover from any occupant a reasonable compensation, in the action for use and occupation. *Ib.* Such purchaser is not liable for a *ground-rent*, accruing between the time of sale and the time of taking the deed. *Thomas v. Connell*, 5 Barr. 13.

Where a lessor assigns all his real estate in trust for the payment of his debts, the trustee is the proper person to bring an action for rent accruing subsequent to the assignment. *Ryerss v. Farwell*, 9 Barb. 615.

Where a surety of a lessee, by a separate covenant, guaranties the payment of the rent and the performance of the covenants of the lease, such separate covenant passes to the grantee of the reversion, and enables him to maintain an action against the surety in his own name for a breach of his covenant. *Allen v. Culver*, 3 Denio, 284; *Peck v. Northrop*, 17 Conn. 217.

(b) More especially, in case of a lease for *one year*. *Menough*, 5 Watts & S. 432. Lease for three years, "at the rent of \$300, yearly," which was to be paid semi-annually. Held, an annual rent; and that the sum of \$400, paid after six months, must be considered as a portion of such annual rent. *Irving v. Thomas*, 6 Shepl. 418.

Where a lease contains a stipulation for a rent *in kind*, without specification of the day of payment, it is payable at the expiration of the year; and an assignment of the rent by an order on the tenant, accepted by him, will not pass the right to the rent, as against the purchaser from the sheriff's vendee of the landlord's estate, under a judgment prior to the lease. *Boyd v. McCombs*, 4 Barr. 146

Payments made by a tenant to his landlord on account of rent, generally, will, in the absence of any direction or agreement, be applied by law on the rent due at the time, and not on the rent then accruing. *Hunter v. Osterhoudt*, 11 Barb. 33.

Where, as between lessor and lessee, the right existed to quarry and take away granite stone, and a payment was made, under an agreement that the same should be applied to the quarry rents thereafter to become due, and the lessor retained the money; held, he could not set up, in opposition to the application of such payment of rent, another claim

But usage will control this presumption, and render them payable semi-annually or quarterly. In the city of New York, rents are made payable quarterly.

42. And this legal implication will be controlled by any express agreement.

43. If the rent is made payable *annually during the term*, the first payment to begin two years after, the latter clause shall prevail.(1)

44. If rent is reserved to be paid at two certain periods, an equal portion of the whole shall be paid at each.(2)

45. If rent is made payable at two certain times, or within thirteen weeks thereafter, the latter clause is for the benefit of the tenant, and the rent is not due till the end of the thirteen weeks. Hence, if the lessor were a tenant for life and die before this time, his executors cannot sue for the rent. But if it were merely provided that, unless the rent were paid within thirteen weeks from the time fixed, the lessor might re-enter; this would be only a dispensation of the entry, and the rent would be due at the appointed day. And the extension of time above mentioned is granted, only during the continuance of the contract, and for the instalments of rent prior to the last. The last instalment is payable on the day specified, upon which the lease itself terminates.(3)

46. It has been stated that a rent, before it is due, is incident to the reversion, and, therefore, real estate. But after it is due, it is personal estate. In the former case, as has been seen, (sec. 38,) it passes to a grantee of the reversion. So, upon the death of the landlord, it goes to his heir. But in the latter case, it does not thus pass; and, upon the landlord's death, goes to his executor or administrator. It seems, at common law, neither the heir nor executor of a lessor could recover rent after his death, which was due in his lifetime; but Statute 2 Henry VIII., c. 37 (3 Ruff. St. 297,) provided otherwise.(a)

(1) Ib.

(3) 2 Rolle's Abr. 450.

(2) Clun's case, 10 Rep. 127; Glover v.

Archer, 4 Leon. 247; Barwick v. Foster, Cro. Jac. 233, 310; Biggin v. Bridge, 3 Leon. 211; Morris v. Kiffin, 3 Keb. 534.

as for rubble stone, though connected with the quarry, due from the lessee to him. *Giles v. Comstock*, 4 Comst. 270; *Emery v. Owings*, 6 Gill, 191.

(a) Rent falling due after the lessor's death, has been called a *chattel real*. *Green v. Massie*, 13 Illin. 363. In Pennsylvania, a tenant may bequeath, as personalty, any rent or other periodical payment which is due. *Park & J.* 467. In New York, a purchaser of the land cannot claim rent for a year prior to the purchase; but only from the next preceding quarter-day; unless it be otherwise agreed. *Ruckman v. Astor*, 3 Edw. 373. It has been held in Maine, that all the rents and income of an estate, which have accumulated, and not so disconnected as to become personal property, pass by a conveyance of the land. *Winslow v. Rand*, 29 Maine, 362.

Where, by a lease in perpetuity, the lessee covenanted to pay all taxes that might be thereafter assessed upon the premises, or upon the lessor, his heirs, &c., by any act of the legislature, for and in respect of the said premises, or any part thereof; held, the tenant was not liable, under this covenant, to pay to the landlord the amount of a tax on the rents reserved in the lease, which the latter had been compelled to pay under an act passed May 13, 1846, entitled "an act to equalize taxation;" such tax being a tax on rents issuing out of the granted premises, properly declared by the act to be for the purpose of taxation of personal estate. *Van Rensselaer v. Dennison*, 8 Barb. 23.

An administrator cannot, by a bill in equity, procure a sum due for rent of land of the intestate, accruing, after his death, from a creditor, to be set off against a judgment obtained by such creditor against himself as administrator; for the administrator has nothing to do

47. Rent is said to pass *prima facie* to the heir, unless the lessor had a mere chattel interest. Hence, if the executor claims it, he is bound to prove his title.(1)

48. Rent, in general, is not due till the last minute of the natural day on which it is made payable. Hence, if the lessor die during that day, the rent passes to his heir. This rule applies, however, only to leases by owners in fee, or under a power. Where a lease is made by a mere tenant for life, if he die at any time during the day when the rent is payable, it passes to his executors. Though, for the benefit of the lessee, he has till the last instant of the day to pay the rent, yet, it is said, as soon as that day begins, he is at his peril to take care that it be paid. And more especially does the principle apply, where the tenant for life dies after sunset of that day; because he is bound then to pay, under penalty of forfeiting his lease after demand.(2)(a)

49. In case of a lease by tenant for life under a power, it has even been held, that where the tenant had received the rent before sunset on the day when it was payable, his executors should pay it over to the remainder-man. This decision, however, has been doubted.(3)

50. At common law, there could be no apportionment of rents *as to time*, either in law or equity. Hence, when a lessor, tenant for life, died before rent day, the rent was lost. But the Statute 11 Geo. 2, ch. 19, provides otherwise. (See ch. 17, s. 28, *supra*, s. 32, n. b.) And in New York, New Jersey, Michigan, Missouri and Delaware,(b) statutes provide, that if a tenant for life, lessor, die on the rent day, his execu-

(1) 1 Cruise, 195-7; 2 Ky. Rev. L. 1349; *Williamson v. Richardson*, 6 Mon. 595; *Burden v. Thayer*, 3 Met 76; *ford v. Wentworth*, 1 P. Wms. 180; *Prec. in Chan.* 555; *Dunn v. Di Nuovo*, 3 Mann. & G. 105.

(2) *Duppa v. Mayo*, 1 Saun. 287, n. 17; *Southern v. Bellasis*, 1 P. Wms. 179; *Strafford v. Penrice*, 1 P. Wms. 178.

with the realty of his intestate, unless his estate has been declared insolvent. *Bullock v. Sneed*, 13 S. & M. 293.

Where an administrator leases lands of the deceased, the tenant cannot resist payment of the rent on the ground that the premises were sold to pay a debt of the intestate, if the tenant occupied the premises until the end of the term. *Life v. Secrest*, 1 Smith, 319.

Where a testator left his estate to remain undivided until the death of his wife, and the income, in the meantime, to be divided between her and her son and daughter, equally, and at her death the estate to be divided between the son and daughter; held, before the death of the widow, the daughter's husband could not distrain for rent due the estate; and that the executor only could do so. *Reid v. Stoney*, 1 Strobhart, 182.

A *devisee* of one who has granted land in fee, subject to rent, cannot maintain ejectment for rent in arrear, which became payable in the lifetime of the testator, but only for such as has accrued since the will took effect in his favor; and, if he bring ejectment, under the statute, in New York, for rent which became due since his title as devisee accrued, he must show that there was no sufficient distress to pay such rent at the time of bringing the action. It will not be sufficient to show that the property on the premises was inadequate to pay that rent, together with other rent in arrear, which accrued during the testator's lifetime. *Van Rensselaer v. Hayes*, 5 Denio, 477.

If the lessor leave more heirs than one, the rent is apportioned among them, and the tenant is bound to pay each his share. *Crosby v. Loop*, 13 Illin. 625; *Cole v. Patterson*, 25 Wend. 456.

(a) If a lease for years, which terminates by the death of the lessor, contains a covenant, on the part of the lessee, to pay the rent reserved, and for such further time as he may hold the premises, and he holds over after the death of the lessor; he will be liable to pay the rent subsequently accruing. *Jacques v. Gould*, 4 Cush. 384.

(b) Tenant for life, or *upon any contingency*. In this State, if rent have been paid in advance, so much as applied to that part of the term which is destroyed by the lessor's death shall be refunded.

tors may recover the whole rent; if before, a proportional part of it. In Missouri, Kentucky, (a) Delaware and New York, where one is entitled to rents depending on the life of another, he may recover them, notwithstanding the death of the latter. In Delaware, Virginia, Missouri and Kentucky, it is specially provided that a husband, after the death of his wife, may recover the rents of her lands. (1)(b)

51. Rent, before the appointed day of payment, is not *debitum in presenti, solvendum in futuro*, but is a *contingent* claim, liable to be wholly defeated by many intervening acts or events. (2)(c)

52. For the recovery of rents, the law has provided several remedies.

53. The first is a *distress*. At common law, this was applicable only to a *rent service*; but it has been extended by statutes to the other kinds of rents; and, also, to the executors or administrators of the proprietors, after the determination of their leases. (3)

54. Distress is the seizure of a tenant's cattle or other personal property upon the land, for non-payment of rent, for the purpose and with the right of selling them to obtain payment.

55. It is said (4) there never has been a process of distress for rent in Massachusetts, and probably the right does not exist. The latter remark is true of the other New England States, and the States of Alabama, Mississippi, North Carolina and Ohio. (d) In Kentucky, a distress lies only for *pecuniary rent*, which is actually due. (5)(e)

56. A reversion is necessary to the remedy of distress. Hence, if a lessee assign, reserving rent, he cannot distrain, unless it is so agreed. Otherwise, where he underlets. (6)(f)

(1) 3 Kent, 376; Misso. St. 376; 1 N. J. Rev. St. 186-7; 1 N. Y. Rev. St. 747; 1 Vir. Rev. C. 156; 2 Ky. Rev. L. 1351; Dela. St. 1829, 365. See *infra*, c. 17, sec. 28.

(2) Wood v. Partridge, 11 Mass. 493; Bank, &c. v. Wise, 3 Watts, 402.

(3) 3 Cruise, 197.

(4) 4 Dane, 126; Wait, &c., 7 Pick. 105; Aik. Dig. 357. 4 Griff. 1143; 3, 404.

(5) Owen v. Boyle, 9 Shepl. 47; Mayor, &c. v. Pearl, 11 Humph. 249; Howard v. Dill, 7 Geo. 52.

(6) Ege v. Ege, 5 Watts, 134.

(a) Another statute provides, that where a lessor, having a life estate or other uncertain interest, dies before the rent is due, it shall be divided between his executor or administrator, and the heir, devisee, reversioner or remainder-man. A similar provision in Virginia. 1 Ky. Rev. L. 668; 1 Virg. Rev. C. 166. In North Carolina, the common law rule is recognized. *Gee v. Gee*, 2 Dev. & B. 113.

(b) A similar statute to those above mentioned exists in Arkansas. Rev. St. 519. By St. 4 & 5 Wm. 4, ch. 22. where any lease determines on the death of the lessor, though not strictly a tenant for life, or on expiration of the life or lives for which he was entitled, a proportion of the rent shall be recoverable by him or his representatives. 1 Steph. Comm. 244. The provision as to apportionment does not apply, where the death of a party does not end his estate; or as between his heir and executor. *Browne v. Amyot*, 3 Hare, 173.

(c) If a rent falls due after delivery of a writ of *elegit* to the officer, but before *inquisition*, he is not entitled to it. *Sharp. v. Key*, 8 Mees. & W. 379.

(d) In New York, it has been recently abolished. Sts. 1846, 369. This act does nothing more than change the *remedy*, leaving the obligation of the *contract* unimpaired, and a substantial remedy still existing; and is not liable to any constitutional objection. *Guild v. Rogers*, 8 Barb. 502. See *Williams v. Potter*, 2 Barb. 316.

(e) Under the Kentucky Statute of 1748, giving damages in double the amount of the goods distrained, where a distress is made before the rent falls due; to entitle the party to recover such damages, there must have been a sale under the distress before the rent becomes due. *Fry v. Breckinridge*, 7 B. Mon. 31.

(f) Numerous cases are found in the books, relating to the remedy of *distress*; but, as it is in the United States, to a great extent, superseded by other forms of action, only a few of the later decisions need be cited.

A distress for rent does not lie where the tenant's contract is to deliver a certain number of bushels of wheat, corn, oats, &c., for each acre of ground cultivated in those kinds of

57. A lease, or grant of a rent-charge, or conveyance in fee, re-

grain; nor can the landlord in such case claim rent out of the proceeds of a sale, on another person's execution of the tenant's goods. *Bowser v. Scott*, 8 Blackf. 86.

A tenant contracted to pay annually, for the rent of certain real estate, \$96, in Indiana scrip. Held, the remedy by distress did not lie on such contract. *Purcell v. Thomas*, 7 Blackf. 306.

Under the statutes of Mississippi, an equity of redemption, and any limited interest of the tenant, is liable to be distrained, and to be sold in satisfaction of the rent due from him. *Prewett v. Dobbs*, 13 S. & M. 431.

The goods of a stranger found on demised premises are liable to be distrained, unless specially exempted by the common law, or by statute. *Stevens v. Lodge*, 7 Blackf. 594.

Goods were mortgaged by a tenant, and left in the tenant's possession, by an agreement in the mortgage. Held, the facts that the mortgage was recorded, and that the landlord had made no objection to the goods remaining on the premises, were no evidence that the goods were on the premises with the landlord's consent. *Ib.*

It seems that, before the statute of New York abolishing distress for rent, a landlord might distrain for rent after administration granted on the estate of the tenant, although he could not before, and after the death of the tenant. *Hovey v. Smith*, 1 Barb. 372.

A landlord, by accepting administration of the tenant's estate, waives his right to distrain. *Ib.*

A distress for rent can be made only in the day time, between sunrise and sunset, that the tenant may have opportunity to tender the rent. *Ib.* *Fry v. Breckenridge*, 7 B. Mon. 31.

A landlord, in order to distrain, may open the outer door in the ordinary way. Where, therefore, the door of a stable was kept closed by a padlock attached to a movable staple, and the owner and other persons usually opened the door by pulling out the staple; held, a distress upon goods in the stable was legal. *Ryan v. Shilcock*, 8 Eng. Law and Eq. 503. *Quare*, whether a distress is void when the outer door is improperly broken. *Ib.*

A landlord has no authority to break open, forcibly, a door which is barred or bolted, for the purpose of levying a distress, though the property be fraudulently deposited in the house to prevent a distress. *Dent v. Hancock*, 5 Gill, 120.

When the relation of landlord and tenant existed to the end of the year 1843, the rent was in arrear, and the landlord, in 1844, had rented the premises to another person, but the first tenant had locked up a quantity of tobacco in a barn on the premises, which the landlord, by breaking into the barn, had taken as a distress; held, the fact that the first tenant was not in possession when the distress was levied, would not make the entry for the purpose of a distress lawful. *Ib.*

Although, to levy a distress, a landlord, for the purpose of making it, and not acting in conformity to the statute, is not authorized to break open and enter the door of a barn which is barred or bolted, with a view to prevent from without an entry thereat; yet, if the door is simply shut or latched, with the ordinary means of raising the latch left on the outside, an entry is lawful; and, if a door so bolted or barred is forcibly broken open by a person not acting under the authority or sanction, or at the instance, of the landlord or his bailiff, the person required to make such distress is authorized to enter for that purpose at the door thus forcibly broken open. *Ib.*

The right of distraining is lost by a surrender of the term, although with the surrender there is a stipulation to pay rent. The Pennsylvania statute of 1836, secs. 83 and 84, relating to executions, does not protect a landlord in such case, and a surrender, after a levy of an execution against the tenant on his property found on the demised premises, destroys the right of the landlord to such property by distress, by the statute or otherwise. *Greider's Appeal*, 5 Barn. 422.

But a surrender of the premises after distress does not avoid such distress. *Nichols v. Dusenbury*, 2 Comst. 283. See *Webber v. Shearman*, 2 Denio, 362.

The Kentucky statute of 1842, concerning the action of replevin, does not restrict a tenant, who has been distrained upon, to his remedy against the landlord; and he may sue the officer who served the distress warrant also. *Powell v. Triplett*, 6 B. Mon. 420.

An officer, in making a distress for rent under a landlord's warrant, does not act in his official capacity, but merely as the bailiff of the landlord; and the landlord is in effect the distrainer. *Moulton v. Norton*, 5 Barb. 286.

A sheriff, therefore, is not responsible for the acts of his deputy. *Ib.*

The legislature of New York, in making it necessary to employ certain officers to serve such warrants, did not make the service of them an official act of such officers. *Ib.*

To justify in making a distress, the officer serving the warrant must go back of it, and show an actual demise and rent due. *Ib.*

In trespass against the sheriff, by one whose goods have been taken on a distress warrant, the landlord is incompetent to testify on behalf of the defendant, on account of interest;

serving rent, usually contains a condition, (a) that if the rent shall not be paid when due, the lessor or grantee may re-enter, and either determine the lease, or hold till he shall be satisfied, or receive the profits in satisfaction. (b) In the first case, the entry absolutely defeats and determines the lessee's estate; in the second, the lessor is entitled to the profits of the land for his own use, until the rent be paid—the object of such provision being merely to hasten payment; and in the last, the profits shall be applied in payment of the rent, and when paid, or after tender upon the land of what remains due, the lessee shall have the land restored to him. A court of equity, however, makes no distinction between the two last mentioned cases, but compels the lessor to account for the surplus received from the land, after paying the rent and charges. Where the lessor enters to take the profits, he acquires no freehold, but an interest in nature of a distress, which on his death passes to the executor, not to the heir, though expressly reserved to the latter. And a proviso for such entry is not strictly a condition, which, as will be seen hereafter, must determine the *whole estate*; but a

there being an implied contract on the part of the landlord, to indemnify the person to whom he directs his warrant, if he had no authority to distrain. *Lord v. Brown*, 5 Denio, 345.

In trespass, where the defendant justifies under a distress warrant, for rent in arrear, and the plaintiff held under a lease, such lease must be produced by the defendant; and it will not be sufficient for him to show that the plaintiff had recognized the person who issued the distress warrant, as assignee of the lessor, and had paid him rent prior to the accruing of that for which the distress was made. *Ib.*

See further *Ridgway v. Stafford*, 4 Eng. L. & Equ. 453; *Nichols v. Dusenbury*, 2 Comst. 283; *Moulton v. Norton*, 5 Barb. 286; *Stone v. Matthews*, 7 Hill, 428; *Butts v. Edwards*, 2 Denio, 164; Delaware Rev. Sts. ch. 120, (where distress lies for any rent which may be reduced to a certainty, but is limited to two years;) New Jersey Sts. 1851, 347.

(a) In Georgia, a statute provides, that when the rent becomes due and is unpaid, the lessor may re-enter. It seems, no condition in the lease is necessary. *Prince*, 687. See *Van Rensselaer v. Holbrook*, 1 La. Ann. 180. But this is contrary to the general rule. *Kenege v. Elliott*, 9 Watts, 258. So, in Vermont, ejectment lies for non-payment of rent, without demand or re-entry. But the suit may be stopped by a payment into court. *Verm. Rev. St.* 216. In Maine it is held, that in a suit by a lessee upon the covenants in the lease, the defendant cannot set up as a defence a process of forcible entry sued out by him, upon which no judgment has been rendered, to prove an entry for breach of condition. *Wheeler v. Hill*, 4 Shepl. 329. In New York, the landlord may re-enter after fifteen days' notice. *Sts.* 1846, 369. A suit lies without entry, *Lawrence v. Williams*, 1 Duer, 585.

In Massachusetts it is held that the court has authority, by the common law, to stay proceedings in a writ of entry brought to enforce a forfeiture, designed to secure the payment of rent, and incurred by accident or mistake, upon the tenant's bringing the amount of the rent, interest and costs into court, for the defendant. *Atkins v. Chilson*, 11 Met. 112.

A lessee incurred the forfeiture of his term by tendering a quarter's rent, through mistake, a day or two before it was due, and omitting to pay it on the quarter day. The lessor had refused to receive the rent for several previous quarters, and had an action pending against the lessee, to recover the demised premises, on the ground of another alleged cause of forfeiture. After failing in that action, the lessor brought a writ of entry against the lessee to recover the premises, on the ground of the forfeiture by non-payment of the aforesaid quarter's rent. Held, the proceedings in this last action should be stayed, on the lessee's paying to the lessor, or bringing into court for his acceptance, the full amount of the rent in arrear, with interest thereon and costs. *Ib.*

In the same State, it is now enacted, (*Sts.* 1847, 440,) that, after fourteen days' notice, the landlord may bring a summary process for possession. But payment, or tender, before judgment, prevents a forfeiture.

In Missouri, if, by the terms of a lease, rent is to be paid on a certain day, and, if not paid within ten days thereafter, the lease to be forfeited, a tender before the day the rent is due will not prevent a forfeiture. *Illingworth v. Miltenberger*, 11 Mis. 80.

(b) Where it is provided, first, that in case of the non-payment of rent, the lease shall cease and determine, and afterwards that the landlord may re-enter; an entry is necessary to restore his title. *Stuyvesant v. Davis*, 9 Paige, 427.

limitation to the lessor on failure of payment, and upon payment back again to the lessee.(1)

58. For the purpose of distress, no previous demand of the rent is necessary, or, if expressly required, it may be made after the day when the rent falls due.(a) But an entry for breach of condition, if made before such demand, is tortious. It is said, that the condition is in derogation of the grant, and that the tenant is to be presumed to be residing on the premises in order to pay the rent, for the preservation of the estate, unless the contrary appears, by the feoffor's being there to demand it and actually making a demand, and by the tenant's wilful default.(2)

59. But if the lease provides that the lessor may enter "without further notice or demand," when the rent is due, no demand is necessary.(3)(b)

59 a. Sometimes the clause of re-entry expressly provides that it shall be *peaceable*. Upon this point the following case has recently arisen in Massachusetts. By the Revised Statutes, (p. 184, sec. 1,) entry into lands and tenements must be made peaceably. A lease provided, that upon breach of any covenant the lessor might enter and expel the lessee by force, if necessary. Held, a legal provision, and that under it, the lessor could not use such force as would constitute a breach of the peace, but only what would sustain the plea of "*molliter manus*,"(4)

(1) Lit. 327; Co. Lit. 203 a; Ib. n. 2 & 3; *Jemmot v. Cooly*, 1 Lev. 170; T. Ray. 135, 158; *Wartenby v. Moran*, 3 Call, 424; *Farley v. Craig*, 6 Halst. 270-1. See *Western, &c. v. Kyle*, 6 Gill, 343.

(2) Co. Lit. 144 a; *M'Murphy v. Minot*, 4 N. H. 251; *Gillb* 173. See 4 Dane, 127.

(3) *Fifty, &c. v. Howland*, 5 Cush. 214.

(4) *Fifty, &c. v. Howland*, 5 Cush. 214.

(a) Taking a distress is a legal demand where the rent is reserved in money, and in many cases where it is payable in kind; but not in a case where tenants had contracted to pay rent in iron, and were to furnish iron drawn according to order, and could not know when, nor how much, nor what size of iron to tender. *Hesler v. Pott*, 3 Barr, 179.

If a lease, in addition to the *reddendum* and a covenant to pay rent, provide, that in case there is no sufficient distress, or any covenant is broken, the lessor may re-enter; he cannot thus re-enter, where there is a sufficient distress. *Van Rensselaer v. Jewett*, 5 Denio, 121. See 4 Dane, 127.

By a perpetual lease in fee, executed in 1794, reserving an annual rent, the lessee covenanted to pay the rent on the first day of January of every year, and it was provided, that if such rent remained unpaid for twenty-eight days, the lessor might prosecute to recover the same, or collect it by distress and sale; and, if no sufficient distress could be found, or if either of the covenants should not be performed, then it should be lawful for the lessor to re-enter. &c. Held, the lease did not make distress a condition precedent to re-entering, nor was there an implied or express agreement, that the lessor should not re-enter, if there was sufficient distress upon the premises. *Van Rensselaer v. Snyder*, 9 Bard. 302.

(b) A lease contained a covenant, in the usual form, by the lessee, to pay all rates or taxes, and a proviso for re-entry upon a breach. Held, non-payment in reasonable time of a poor rate, duly assessed, allowed and published, justified a re-entry, without showing previous demand or notice. Also, if the covenant was to pay on demand, a demand on the premises of the tenant's son was sufficient. *Davis v. Burnell*, 5 Eng. L. & Equ 417.

Where, in a lease in fee, there was a reservation of rent, among other things, of one day's service with carriage and horses, payable at a particular day in each year; held, no demand of performance was necessary, before bringing an action for a default. [*Whitlessey, J.*, dissenting.] *Van Rensselaer v. Gallup*, 5 Denio, 454.

Lease conditioned that if the rent shall be in arrear, or upon the lessee's failure to perform and observe any covenant in the lease, the lessor may at any time while the default continues re-enter and repossess the premises. The lease also contained a covenant, that the lessee should not occupy the buildings or suffer them to be occupied for dwellings or any unlawful purpose. Held, such covenant ran with the land, and bound the estate in the hands of sub-tenants, and an unlawful use by them worked a forfeiture. *Wheeler v. Earle*, Cush 31.

60. In the creation of rent-charges, it is usual to reserve a right of entry, *by way of use*, which, as incident to the rent, becomes executed by the statute of uses, as a legal estate. Thus, lands are conveyed to A, to the use, intent and purpose that B may receive out of them a certain annual sum or rent-charge; and to the further use, &c., that if the rent be in arrear for a certain time, B or his assigns may enter and receive the profits till satisfied. When the rent becomes in arrear, the use springs up from the seizin of A, and ceases with the payment. If the rent-charge is assigned, the right of entry passes along with it.(1)

61. The common law imposes very strict terms upon a lessor, in regard to the demanding of rent; requiring that it be done upon the land, at the most public and notorious place, such as the front door, or, if there is no house, at the gate of the land, and before sunset of the day when the rent falls due, that the money may be counted. In New York, it is said these rules are in force, unless dispensed with in certain cases by statute. So in Ohio. In New Hampshire, it has been questioned whether they are adopted in all their strictness; but late cases decide, that the demand must be at the day when the rent falls due, in the afternoon, a sufficient time before sunset to allow counting of the money, and upon the land. In New Jersey, they are held inapplicable, where the tenant denies his holding, or forbids and prepares to resist a distress; or where, by the condition of re-entry, the lessor is merely to hold, till paid from the profits. The condition will be saved, either by a tender upon the land, that is, a readiness to make a tender, or a personal offer to the lessor, off the land.(2)(a)

(1) Gilb. 37.

(2) *Jackson v. Kipp*, 3 Wend. 230; *Coon v. Brickett*, 2 N. H. 164; *Farley v. Craig*, 6 Halst. 262; 3 Kent, 374; 1 Saun. 287, n. 16; *Boyd v. Talbert*, 12 Ohio, 212; *Sperry v. Sperry*, 8 N. H. 477; *De Lancey v. Garnier*, 12 Barb. 120.

(a) It has been held in Vermont, that where a rent is merely nominal, as, for instance, an ear of corn annually, non-payment is no ground of forfeiture. *People, &c. v. Socy, &c.*, Paine, 652. So, also, that a tender may be made on the day on which the rent falls due, *at a late hour in the evening*. *Thomas v. Hayden*, (Windsor Co., July term, 1846, cited by KELLOGG, J.), 19 Verm. 587. The strict rule as to a demand of rent has been recognized by the Supreme Court of the United States. *Connor v. Bradley*, 1 How. 211. In Maine, a lease provided, that the lessor might enter and without process or notice expel the tenant, if he should fail to pay rent. The lessor gave notice to one claiming under the tenant, but not on the land, nor when any rent was due, that he should look to him for the rent. Held, not sufficient to terminate the lease. *Gage v. Smith*, 2 Shepl. 466. A lease provided, that if the rent should be unpaid for a year after it should become due, the lessor might re-enter, and all the right of the lessee should become extinguished. The rent was demanded on the day prefixed, but was not paid. In the course of the year the arrears of rent were tendered to the lessor. Held, the lease was not forfeited. *Jones v. Read*, 15 N. H. 68.

By a grant made in 1813, a yearly rent of wheat, hens, and one day's service, was reserved to the grantor, payable on the 1st day of February in each year; and the grantee covenanted to pay the same "at the times and in the manner aforesaid." There was also a proviso, that if the rent remained unpaid for twenty-eight days, the grantor might prosecute or distrain for such rent; and a further proviso, that if no sufficient distress could be found, or if either of the covenants should be broken, the grantor, his heirs, &c., might re-enter. Held, the grantor had a right to re-enter in two events: 1. If the rent remained unpaid for twenty-eight days, and no sufficient distress could be found; and, 2. In case the grantor demanded the rent on the very day it became due, at a convenient time before sunset, and at the particular place where it was made payable, or, if no place was specified in the lease, then at the most notorious place on the premises demised, and the grantor failed to pay the same. Held, also, that a demand made at the expiration of twenty-eight days from the day the rent became due was insufficient. *Van Rensselaer v. Jewett*, 2 Comst. 141.

62. An action of debt lies, upon a *lease for years*, for rent. And leases usually contain a covenant, upon which the action of *covenant* may be brought. At common law, *debt* does not lie for rent, upon a *lease for life*. Otherwise, by St. 8 Anne, c. 14. Similar acts have been passed in New York, Delaware, Virginia, Kentucky, Missouri and Illinois. In Illinois, in case of a lease for life, and an occupation without any special agreement for rent, the owner, his executors, &c., may recover the rent, or a fair satisfaction for use and occupation, in *debt* or *assumpsit*.(1)

63. In addition to the remedies above named, there is the action of *debt*(a) or *assumpsit* for *use and occupation*, where the letting is not by deed. This action is specially provided in New York, New Jersey, Delaware, Indiana, Arkansas and Missouri;(b) and any unsealed agreement for a certain rent may be used as evidence of the amount to be recovered. In Alabama, this action lies, by statute, even upon a lease by deed, if no certain rent is agreed upon. But in Massachusetts it is held, that *assumpsit* will not lie in case of a sealed lease, even upon an express parol promise to pay the rent; in Pennsylvania, that it will not lie against the assignee of a sealed lease; in Maine, upon any written lease.(b) Nor will it lie where the tenant entered as a trespasser. And though *assumpsit* lies for rent, yet, as it issues from the realty, a bond given for rent, reserved merely by parol, is no extinguishment of it.(2)(c)

- (1) Co. Lit. 47 a, n. 4; 1 N. Y. Rev. St. 747; 1 N. J. St. 186; 1 Vir. Rev. C. 155; 2 Ky. Rev. L. 1354; Illin. Rev. L. 675; Misso. St. 376; Dela. Rev. Sts. 421.
 (2) 1 N. Y. Rev. St. 748; 1 N. J. St. 187; Ind. Rev. L. 424; Ark. Rev. St. 520; Misso. St. 377; Dela. St. 1829, 365; Grant v. Gill, 2 Whart. 42; Gunn v. Scovill, 4 Day, 228; Aik. Dig. 357; Codman v. Jenkins, 14 Mass. 93; Stockett v. Watkins, 2 Gill & J. 326; Cornell v. Lamb, 20 John. 407; Lloyd v. Hough, 1 How. 153; Gage v. Smith, 2 Shepl. 466; Blume v. M'Clurker, 10 Watts, 380. See Marseilles v. Kerr, 6 Whart. 500; Scott v. Hawsman, 2 McL. 180; Bailey v. Campbell, 1 Scam. 112; Whitney v. Cochran, Ib. 210; Ballentine v. M'Dowell, 2, 28; Stephens v. Lynn, 8 Carr. & P. 389; Green v. London, &c. 9. 6; Drury, &c. v. Chapman, 1 Carr. & K. 14; Gibson v. Kirk, 1 Ad. & El. N. S. 850.

(a) Where it is provided, that the rent, if not paid at the appointed time, is to be recovered in an action of debt, no forfeiture can be claimed for non-payment. De Lancey v. Ga Nun, 12 Barb. 128.

(b) It is said to have been long in use in Virginia. Lloyd v. Hough, 1 How. 153. In Delaware, it lies against one who entered under a contract to purchase. Rev. Sts. ch. 120. In Maine, though the rent is reserved by deed. Sts. 1853, 35. See Pinderghast v. Young, 1 Post. (N. H.) 234.

(c) So, the right of *distress* is not extinguished, by taking a bond and warrant of attorney for the rent, at the time of giving the lease, as collateral security. It would be otherwise with a judgment upon the agreement to pay rent. But if A and B hire by parol from C, a bond from A alone for the whole rent discharges B. Howell v. Webb, 2 Pike, 360. An action for use and occupation may be maintained, though the tenant has quit the premises, if his contract still remains in force. Westlake v. De Grave, 25 Wend. 669. So, without actual occupancy Stier v. Surget, 10 S. & M. 154. See Gilholey v. Washington, 4 Const. 217. It does not lie without a contract, express or implied. De Young v. Buchanan, 10 Gill & J. 149. As where the tenant considered the property his own. Johnson v. Beauchamp, 9 Dana, 148. A demise must be shown, or evidence offered of a *tenancy*. Ward v. Bull, 1 Branch, 271. If, under color of a void sealed instrument, a party occupies with the assent of the owner, an action for use and occupation will lie; if without such assent, an action of trespass. Anderson v. Critcher, 11 Gill & J. 450. The action for use, &c., lies where one has occupied under a contract of sale, which has been rescinded. Howard v. Shaw, 8 Mees. & W. 118. Not where the possession is tortious. Lloyd v. Hough, 1 How. 153. Nor for the use of premises sold at execution or a trust sale, from

64. A, an executor, leases land of the deceased by parol, for one year. The will was afterwards set aside, and the plaintiff, an heir, having been appointed administrator, brings assumpsit against the lessee for rent. Held, the action would not lie; for if A was authorized by the will to lease, the contract was with him individually, and either he or his representative must enforce it; if not authorized, the lessee had made no contract with the plaintiff, but, as to him, was a trespasser.(1)

65. Although a lessor may at his election sue or distrain for rent, or enter for non-payment of it by virtue of the condition, yet he cannot do both, and the bringing of a suit or making a distress will be held a waiver of the condition, because it affirmeth the rent to have a continuance. But, it is said, he may receive the rent and acquit the same, and yet enter for condition broken. But if he accept a rent due at a day after, he shall not enter, (for the prior breach,) because the acquittance for this raises a presumption that all other instalments have been paid. Recovery upon a covenant for rent is no bar to a subsequent distress.(2)

(1) *Boyd v. Sloan*, 2 Bai. 311. See *Brown-Sheldon*, 5 Cow. 448; *Newman v. Rutter*, 8 *ing v. Haskell*, 22 Pick. 310; 1 How. 152; *Watts*, 51; *Prindle v. Anderson*, 19 Wend. 391.
Picket v. Breckenridge, Ib. 297.

(2) *Co. Lit.* 211 b, 373 a; *Jackson v.*

the time of the sale till the redemption of the estate; except on contract between the parties for rent. The only remedy is by ejectment, and an action for mesne profits. *O'Donnell v. McMurdie*, 6 Humph. 134. Proof of occupation by the defendant of the premises during the time declared for, his acknowledgment of the lease, and an offer by him, on a certain discount being made by the plaintiff, to have judgment entered for the balance, will support the action. *O'Connor v. Tynes*, 3 Rich. 276.

A leased premises to B for a year. Before the end of the year, A, with the consent of B, leased the same to C for the year following, and C rented a part of the same to B, who occupied a part of the year, and abandoned the premises. Held, B was liable to C for use and occupation of the portion rented by him, and, as he hired for no specific time, C might sue for such rent before the end of the year. *Cooke v. Norriss*, 7 Ired. 213. Whether the right to recover for use and occupation, given in New York by 1 Rev. Sts. 748, sec. 26, is not limited to the period of actual occupancy, *quære*. *Cleves v. Willoughby*, 7 Hill, 83.

Upon the ground that assumpsit for use and occupation will not lie, where the defendant has neither occupied nor held the premises during the time for which the recovery is sought; where the plaintiff demised to the defendant certain premises for a term, which the latter abandoned after occupying for a time, and the plaintiff gave the defendant notice that he should let them for the best terms he could, and hold him responsible for any deficiency, and then leased to another, who occupied for the remainder of the term, but became bankrupt and failed to pay; held, the action would not lie against the defendant, for the time during which such other person occupied. *Beach v. Gray*, 2 Denio, 84.

A lessor may maintain "debt for use and occupation" against the assignee of his lessee, under a demise by writing not under seal. *McKeon v. Whitney*, 3 Denio, 452; *Moffatt v. Smith*, 4 Comst. 126.

So, it seems, a landlord may recover upon an *insimul computassent*, though the evidence be of an accounting concerning rent secured by deed. *Cartledge v. West*, 2 Denio, 377.

But, where the tenant is assignee of the lessee, under an assignment for benefit of creditors, and the promise, upon the accounting, was to pay the rent when the defendant should receive funds from the assigned property; there must be proof that he has received such funds. *Ib.*

The common count in debt for use and occupation is good; and, in such count, it is not necessary to allege the character in which the plaintiff sues, whether as assignee of the reversion, or otherwise. *Armstrong v. Clark*, 17 Ohio, 495.

In an action of debt for use and occupation, a plea that the plaintiff is grantee of the reversion, and that before any part of the rent had accrued, the defendant, by deed, assigned the premises to A, and put him in possession, is bad on demurrer, as amounting to the general issue. *Ib.*

66. It is said that, though the lessor receive part of the rent, he may re-enter for the residue.(1)(a)

67. Statute 4 Geo. II. provided, that a lessee should have restoration of his land, on paying the rent, &c., in six months from judgment against him; or, if he paid before judgment, that the proceedings should be stayed.(2) (See p. 241, n. a.) It is said, in New Hampshire, though this statute is not expressly adopted, the principle of it is in force.(3)

68. In Illinois, Missouri, New York and New Jersey, where a half year's rent is due, and there is a right of re-entry, an ejectment may be brought without demand; and, if execution be levied before the arrears and costs are paid, the lease is avoided, unless the judgment be reversed for error, or the tenant, or, in New York, any party interested, obtain relief in Chancery, by a bill filed in six months from judgment. But he may stay the suit by a tender, before final judgment. In Missouri, New Jersey and New York, a mortgagee of the lease, not in possession, may avoid the judgment within six months, by paying the rent, costs and charges, and performing the agreements of the lessee. Substantially the same provisions are made in Arkansas. In New York, the landlord shall account, on settlement, for all that he has made from the land, or might have made but for his wilful default.(4) In Kentucky and Delaware,(5) the law so far favors the claim of rent, that a landlord, upon making oath that his tenant is likely to leave the county before rent day, may have a process of attachment before the rent is due.

69. In some cases, Chancery will lend its aid for the recovery of rent; but only where there is no effectual remedy at law.(b) Nor will it change the nature of the rent, so as to create a liability, unless there is fraud in preventing a distress.

(1) Ib. n. 1.

(2) See Pennant's case, 3 Rep. 64, 65; Noy, 7.

(3) Coon v. Brickett, 2 N. H. 163.

(4) 2 N. Y. Rev. St. 505-7; Illin. Rev. L.

676; Misso. St. 377; 1 N. J. R. C. 189-90; Ark. Rev. St. 520.

(5) 2 Ky. Rev. L. 1353; Del. St. 1829, 365-6.

(a) See *supra*. ch. 15, sec. 66. In New Hampshire, a condition of re-entry is waived, even after entry, by acceptance of the rent in arrear when the entry was made. Coon v. Brickett, 2 N. H. 163. Otherwise in New York, unless the rent not only was received, but accrued, after forfeiture. 3 Cow. 230. In this State, the distinction has been taken, that where the tenant does an act, or is chargeable with an omission, which authorizes the landlord to re-enter merely, any affirmation by the latter will revive the lease; but it is otherwise where the lease has become absolutely void. Smith v. Saratoga, &c., 3 Hill, 508. The receipt of rent accruing after forfeiture is a waiver. After a re-entry, an action lies for rent accruing before forfeiture. But for subsequent rent, an action for mesne profits is the remedy. Where a lease reserves the right of re-entry, the lessor to have the land "as if the indenture had never been made;" held, covenant would still lie for the rent accrued before entry. Hartshorne v. Watson, 4 Bing. N. 178. See Doe v. Rees, Ib. 384.

(b) Where trustees, by authority of an act of assembly, sold and conveyed land, reserving in the deed a ground-rent, to be paid to the proprietor of the land, when he should be ascertained, and the proprietor of the land afterwards filed a bill against the purchaser to recover the ground-rents; and the answer showed that they were unpaid; held, the statute of limitations was no bar. Mulliday v. Machir, 4 Gratt. 1.

A bill in equity to recover rent, brought by an assignee of a lessor against two separate grantees of different portions of the premises, conveyed to them by the lessor, to whom the rights of the lessee had been assigned; is multifarious. Childs v. Clark, 3 Barb. Ch. 62.

A lessee cannot maintain a bill, to compel his lessor and a claimant of the premises to litigate their rights to the rent, where the evidence tends strongly to show that the lessee obtained possession by collusion with the claimant, and for his benefit, in order to prejudice the lessor. Williams v. Halbert, 7 B. Mon. 184.

In such case, the claimant cannot maintain a cross bill, to try a purely legal right to the premises. Ib.

70. Lease in perpetuity, with a condition and covenant, that upon every sale the lessor's consent should be obtained, with the right of pre-emption to him; and, if afterwards sold to another, that one-tenth of the price should be paid to the lessor. A sale having taken place, and the purchaser having entered; held, the lessor had a claim *at law* for one-tenth of the price; and, as the transaction was a restraint and fine upon alienation, Chancery would not interfere for his relief.(1)

71. Pending a suit against the tenant to enforce forfeiture of the lease, the landlord cannot maintain a bill in equity, as upon a subsisting lease.(2)

72. With regard to the *estates* which may be had in a rent, they are, in general, the same with the estates in land already described. Thus, a man may be tenant in fee, in tail, for life or for years, of a rent-charge. A rent-service, being incident or annexed to the land itself or the reversion therein, is of course subject to the same limitations and dispositions as the reversion; and a rent-charge, though not thus incident, may be held in the same ways as the lands themselves.

73. In some cases, where a peculiar form of reservation has been adopted, the question has arisen, whether the rent should be a fee-simple or only a chattel interest. Thus, where rent was reserved to the lessor, *his heirs and assigns*; one sum for a certain number of years, then a larger sum for another term of years, and a new valuation to be afterwards made at the end of successive long terms, and the rent fixed accordingly, *to be paid forever*; held, this last clause imported that the rent first fixed should be perpetual, being subject to increase, but not to diminution; and that the rent was a fee-simple, not a *succession* of chattel interests, passing to executors.(3)

74. In case of an estate *pour autre vie* in a rent, there could be no general occupancy after the owner's death, living the *cestui que vie*; because, from the nature of things, no entry could be made upon it, and the terms of the grant made no provision for such occupancy. Hence, at the death of the tenant for life, the rent terminated. But if the rent is limited to one *and his heirs*, for his life and the lives of others, his heirs shall hold upon his death, as special occupants, by nomination and by descent. So, if the limitation is to executors, it seems to be now settled, although anciently doubted, that the executors may take as special occupants. And it is presumed that the same rules upon this subject apply to rents, which have already been stated in regard to lands themselves.(4) (See ch. 4.)

75. Rents are subject to *curtesy*. And *seizin in law* is sufficient to give curtesy in a rent-charge, being often the only possible *seizin*. And, it seems, there shall be curtesy, even though the rent were granted to the wife, the first payment to be made at a future time, which did not arrive before her death; because the grant was immediate, though the payment was future.(5.) If a woman makes a gift in tail, reserving rent to her and her heirs, marries and has issue, and the

(1) 3 Cruise, 199; *Livingston v. Stickles*, 8 Paige, 398. See *Prestons v. McCall*, 7 Gratt. 121.

(2) *Stuyvesant v. Davis*, 9 Paige, 427.

(3) *Farley v. Craig*, 6 Halst. 262.

(4) *Salter v. Boteler*, Vaugh. 199; *Smar-*

tle v. Penhallow, 1 Salk. 189; *Bowles v. Poore*, Cro. Jac. 282; *Low v. Burron*, 3 P Wms. 264, and *n.*; *Bulier v. Cheverton*, 2 Rolle Abr. 152. *Supra*, ch. 4.

(5) Co. Lit. 29 a.

donee dies without issue, and then the wife dies; the husband shall not have curtesy in the rent, because it has terminated by act of God, and no estate in it remains. But if a man be seized in fee of a rent, and make a gift in tail general to a woman, who marries and has issue, and the issue die, and the wife die without issue, the husband shall be tenant by the curtesy of the rent, because it remains.(1)(a)

76. Rents are subject to dower, as has been already stated, (ch. 8,) in reference to a rent-service. A rent-charge is also subject to dower. But a personal annuity is not. And if a widow sue the heir for her dower in a rent-charge, he cannot defend, upon the ground that he claims the provision to an annuity, since he can so elect only by bringing a *writ of annuity*.(2) In regard to dower, however, as well as curtesy, a distinction is made between a rent-charge *de novo*, and one already *in esse*, in which an estate of inheritance is created.(3)

77. Thus, where a rent *de novo* is granted to a man and the heirs of his body, and he dies without issue, his widow shall not be endowed—the rent being absolutely determined by his death. It is otherwise, where a remainder is limited upon the estate tail. In such case, for the purpose of dower, the rent shall continue against the remainder-man.

78. And if a rent already *in esse* be entailed, the widow shall be endowed, though the husband die without issue.

79. A remainder in a rent-charge may be limited upon a life-estate, or upon an estate tail, even though the rent be created "*de novo*;" and, therefore, without the remainder, there would be no reversion in the grantor.(4)

80. A rent *de novo* may be created *in futuro*: because such grant of a new right has not the effect of putting a precedent estate in abeyance, which, it has been seen, is against the policy of the law. But a rent *in esse* is subject to the same rule in this respect with the land itself, because there was a precedent estate in it; and such grant, dividing the title, produces an uncertainty as to the legal owner.(5)

81. A rent *de novo* may be limited to cease for a time, and then revive. Thus it may be limited to one and his heirs, and, if the grantee die leaving a minor heir, the rent to cease during his minority. In such case, if the widow sue the tenant for dower, she shall have execution when the heir comes of age.(6)

82. So a rent may cease for a time, for reasons independent of the original limitation, and afterwards revive, when those reasons cease to exist.

83. Lands, leased by trustees, were by an act of the legislature confirmed in fee to the tenants, they paying a certain rent to the trustees, and all taxes upon the value of the land over and above the rent. By a subsequent act, the lands were taxed like other lands, and the legislature assumed the payment of the rent to the trustees. Afterwards, the lands ceased to be taxed. Held, the rent, originally payable by

(1) Co. Lit. 30 a.

(2) Co. Lit. 32 a; Ib. 144 b.

(3) Chaplin v. Chaplin, 3 P. Wms. 229.

(4) 3 Cruise, 203.

(5) Gilb. 60.

(6) Fitz. Abr. *Dower*, 143; Jenk. Cent. 1, ca. 6.

(a) So if a rent *de novo* be granted in tail, and cease with failure of issue, it is still subject to curtesy. Co. Lit. 30 a, n. 2.

the tenants to the trustees, revived; that the true construction of the latter act was, that the rents should be paid from the taxes, only while such taxes were laid; that the rents could not be discharged without the assent of the trustees, and their acquiescence in receiving them from the government was only an adoption of that mode of payment, not a waiver of *any* payment.(1)

84. The statute of uses is applicable to rents. Thus, if a rent-charge be limited to A in trust for B, the statute executes the use in B. And if there be also a clause of distress, and a covenant to pay the rent to A to the use of B, the right of distress will vest in B, as incident to the rent; but the covenant will not, being merely collateral.(2)

85. But a use upon a use, in rents as well as lands, is not executed by the statute. Thus, where one conveyed lands, to the use and intent that certain trustees should have a rent-charge in fee, and then the rent to be to the use of A in tail-male, remainder over; held, the widow of the issue of A was not dowable, he having only a trust.(3)

86. Where a person is once seized of a rent, he cannot lose his right merely by *non-user* or failure to receive it, or even by an adverse claim and receipt of it by another man, and an attornment to him. Rent being a mere creature of the law and collateral to the land, the right always carries with it the possession. The maxim is "*nemo redditum alterius, invito domino, percipere aut possidere potest.*" The owner of a rent may, however, consider himself disseized, and bring an action accordingly, at his election, for the purpose of more speedy and effectual redress.(4)

87. A rent is not *forfeited* by an attempt to convey a greater interest in it than the owner possesses, because he can pass only his own title.(5)

CHAPTER XVII.

RENT—DISCHARGE AND APPORTIONMENT.

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| <p>1. General rule—no apportionment as to <i>time</i>.</p> <p>3. Eviction by landlord or third persons; from the whole or a part of the premises.</p> <p>6. What is an eviction.</p> <p>12. What is not an eviction.</p> <p>16. Loss by act of God, &c. — total or</p> | <p>partial; loss by fire; debt and covenant.</p> <p>26. Purchase of the land by landlord—effect upon a rent service.</p> <p>27. Apportionment by transfer of the land.</p> <p>29. Lease by tenant for life.</p> <p>33. Rent-charge—when extinguished and when not.</p> <p>37. When apportioned.</p> |
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1. RENT-SERVICE being a *retribution for the use of land*, the general principle is, that, if by any means the tenant is deprived of the land, as by quitting or assigning the premises, with the lessor's consent, or

(1) *Adams v. Bucklin*, 7 Pick. 121.

(2) *Cook v. Herle*, 2 Mod. 138.

(3) *Chaplin v. Chaplin*, 3 P. Wms. 229.

(4) *Edward Seymour's case*, 10 Rep. 97 a;

Co. Lit. 323 b; *Gilb. Ten.* 104; *Lit.* 588-9, 237, 240.

(5) *Co. Lit.* 251 b.

by *eviction* under a paramount title; his obligation to pay rent ceases.(a) Eviction will not discharge the liability for rent previously due, even though payable in advance, and though, before the quarter for which it was payable in advance expires, a mortgage on the estate is foreclosed, a sale made, and the tenant attorns to the purchaser. But it has been doubted, whether rent could be recovered in such case for a period subsequent to eviction. If eviction take place at any time before the appointed day of payment, there will be no apportionment, but the whole rent will be discharged.(1) It has been intimated that, if the lessee has derived a substantial benefit from the use of the estate for a part of the term, he may be liable on a *quantum meruit*. The case is compared to that of a *charter-party*, where the whole contract of affreightment is not fulfilled, but the goods have been carried to an intermediate port.(2)

2. Where a lessee covenants to pay rent in advance, it may be paid at any time during the day on which it is payable, and, if evicted by paramount title on that day, he is discharged.(3)

3. Eviction may be effected, either by the landlord himself without title, or by a third person under a paramount title. And, where it applies to *the whole land*, an eviction in either of these modes has the same effect of discharging the rent. But where the tenant is evicted from only a part of the land—if by a stranger, the rent shall be apportioned—if by the lessor himself, the whole will be discharged(4)(b)

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| <p>(1) Gilb. 145; Wood v. Partridge, 11 Mass. 493; M'Elderry v. Flannagan, 1 Har. & G. 308; Giles v. Comstock, 4 Comst. 270. See Bordman v. Osborn, 23 Pick. 295; also ante, ch. 15, sec. 72.</p> | <p>(2) Fitchburg, &c. v. Melven, 15 Mass. 270.
(3) Smith v. Shepard, 15 Pick. 147.
(4) 3 Kent, 376; Dyett v. Pendleton, 8 Cow. 727; Co. Lit 148 b; Lewis v. Payn, 4 Wend. 423; Zule v. Zule, 24 Wend. 76.</p> |
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(a) It has been held, that no action can be maintained upon the covenant to pay rent, unless the defendant was let into full possession of the premises. *Holgate v. Kay*, 1 Carr. & K. 341.

But, in covenant for rent against an assignee of the lessee, he cannot show, under a plea denying that the lease is the deed of the lessee, that the premises, at the date of the lease and assignment, were possessed adversely to the lessor; it being conceded that there was no title paramount to the plaintiff's. Nor can he offer such proof, under a plea that the lessee's title did not pass to him, as alleged. *University, &c. v. Joslyn*, 21 Verm. 52. If the defendant has been excluded by adverse possession, existing at the time of the demise, and continuing afterwards, he must plead it specially. *Ib.* A plea, alleging that, prior to the execution of the lease, certain persons entered and expelled the plaintiff, and continued their possession to the day of the demise, and then occupied adversely; but not alleging the eviction to be under a paramount title, or that the defendant, or any one under whom he claims, is connected with the adverse title; is bad. *Ib.*

In an action for use and occupation, eviction before the rent fell due is a good defence under the general issue. *Prentice v. Elliott*, 5 Mees. & W. 606.

In covenant for rent, the plea of eviction by title paramount must allege, that it was by title existing before the demise, and that there was an actual entry by the evictor. *Naglee v. Ingersoll*, 7 Barr, 185.

(b) So, where an absolute purchaser of land is evicted from only a part of it, this is no ground for rescinding the whole contract. *Simpson v. Hawkins*, 1 Dana, 305.

One who, by fraudulent representations, is induced to become a lessee of an entire lot, of which the lessor only owned a part, may, after the discovery of the fraud, enter into possession, and occupy during the term, and, in an action by the lessor for the rent, may recoup the damages he has sustained by means of the fraud. *Whitney v. Allaire*, 4 Denio, 554.

It has been held in England, that to an action against a lessee upon his covenants to repair, not to assign, or commit waste, it is not a good plea, that the lessor allowed a stranger to enter upon, and eject the tenant from, a part of the premises. *Newton v. Allin*, 1 Ad. & El. (N. S.) 518.

The landlord cannot distrain for rent, where the tenant is kept out of one room in the building leased by a prior lessee, although the tenant has occupied during the whole term. *French v. Lawrence*, 7 Hill, 519.

4. As to the question, what shall constitute a *part* of the premises, with reference to an eviction; if the lessee retains merely certain articles appurtenant to a building from which he is turned out, as, for instance, the tools and machinery in a mill; this is held to be an eviction from the whole; though, it seems, he would be liable upon a *quantum meruit* for the use of the articles.(1)

5. The establishment of a right of common in the lands will not operate, at law, as an eviction, to apportion the rent, not being a *title to the soil*. But, it seems, there will be an apportionment in equity, unless the land be still fairly worth the rent reserved.(2)

6. There are some cases where, although there is no actual eviction, yet the law will attach the same consequence to the acts done, viz., a discharge of the rent—the tenant having lost the use of the land.

7. A leased a house to B for one year. B indorsed to A the note of a third person, as security for the rent; occupied for two quarters, for which he paid, and part of a third; at the end of which time he removed, delivering up the key. A then let the house to C, and delivered her the key; and afterwards sued the note in his own name, and obtained full satisfaction of the judgment. B brings assumpsit against A, for money had and received. Held, he should recover the amount of the note and interest, deducting the balance due for a part of the third quarter's rent: that A might be considered as B's agent in procuring a new tenant, and thus responsible for the rent; or, if not, as having ousted B from the house, or consented to an assignment of the term to C, and accepted rent from her, which would discharge B.(3)

8. If the tenant is in law evicted, before the rent day arrives, by a mortgagee claiming under a mortgage prior to the lease, he is discharged from the whole rent, notwithstanding, it seems, he afterwards continues to occupy; because, after the entry of the mortgagee, the tenant was accountable to him.(4)(a)

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| (1) Fitchburg, &c. v. Melven, 15 Mass. 268. | See Hemphill v. Eckfeldt, 5 Whar. 274; Field v. Swan, 10 Met. 112; Giles v. Comstock, 4 Comst. 470. |
| (2) Jew v. Thirdwell, 1 Cha. Cas. 31. | |
| (3) Randall v. Rich, 11 Mass. 494. | |
| (4) Fitchburg, &c. v. Melven, 15 Mass. 268. | |

(a) If the mortgagee enters for a breach of condition, and threatens to expel the lessee unless he pay the rent to him, which the lessee agrees to do, and actually does; this is an eviction. So in case of a claim under any other paramount title, and an *attornment*. And if the mortgagee demands rent, and threatens to "put the law in force," the lessee has a good defence on the ground of *payment*, without pleading eviction, or *nihil habuit*, to an action for rent by the lessor. Smith v. Shepard, 15 Pick. 147; Johnston v. Jones, 9 Ad. & Ell. 809. See Salmon v. Mathews, 8 Mees. & W. 829; Morse v. Goddard, 13 Met. 177.

A, a mortgagee of leased lands, having a title paramount to that of B, the lessor, recovered a judgment for possession, and entered under an execution, but left the lessee in possession. Held, A might recover rent accruing subsequent to such entry, but not before. Mass. &c. v. Wilson, 10 Met. 126; see Newall v. Wright, 3 Mass. 153.

Where a judgment creditor levied his execution upon real estate, under lease and in the occupation of the lessee, and, before the rent became due, entered claiming title, and threatened the tenant to put him out unless he would yield possession and attorn; whereupon the tenant agreed, in writing, to hold under him; held, such entry and disturbance, although not an eviction in a technical sense, were equivalent to an ouster, and the tenant was not afterwards liable to the lessor for the rent, and might dispute his title in an action of assumpsit therefor. George v. Putney, 4 Cush. 351.

A, having taken a lease, procured B to become surety for the rent, and, to indemnify him, executed a mortgage on certain lands, by which he provided that, if he failed "to pay the whole or any part of the rent," B should have the power to sell the lands. A, alleging

9. A leases to B a portion of his land; afterwards conveys the whole land to C in fee, reserving rent; and then, for non-payment of rent by B, accruing after the deed to C, enters and distrains. This is an eviction of C, which suspends his whole rent.(1)

10. But where one having a paramount title made an entry upon the lessor, before he gave the lease, but he refused to deliver possession, and the former then brought a real action, and recovered judgment after the lease was made; held, such entry was no eviction, to bar a suit for the rent.(2)

11. A mere *breach of covenant* by the lessor does not excuse from the payment of rent, though the covenant is one, the performance of which would increase the value of the premises; as, for instance, a covenant to repair. So, where a lessor in fee covenanted that the lessee should have common of pasture and *estovers* from other lands of the lessor, and afterwards *approved* the lands, thereby destroying the common; held, this covenant could not be construed as a grant, and the breach was no defence to a suit for the rent.(3)(a)

12. A mere entry upon the land by the landlord is simply a trespass, and not an eviction which discharges the rent. So an action lies for the rent, though the landlord has offered to let and advertised the

(1) *Lewis v. Payn*, 4 Wend. 423.

(2) *Fletcher v. McFarlane*, 12 Mass. 43.

(3) *Watts v. Coffin*, 11 John. 495; *Ether-*

idge v. Osborn, 12 Wend. 529; *Bryan v. Fisher*, 3 Blackf. 320; *Hill v. Bishop*, 2 Ala. (N. S.) 320.

a failure on the part of the lessor to comply with the terms of the lease, refused to keep the premises the full term, and to pay the entire rent, and B became liable for the whole rent. A having abandoned the possession, B compromised with the lessor, and gave the lessor possession before the expiration of the lease. B then advertised to sell under his mortgage, and A brought a bill in equity to enjoin the sale. Held, that A was not released from the rent by the lessor's taking possession, and, the compromise being made by B in good faith, although not binding on A, and being manifestly to his advantage, that equity would not restrain B from enforcing his legal rights under the mortgage. *Destrehan v. Scudder*, 11 Mis. 484.

The entry of the landlord on premises left by the tenant during the term, putting another person in possession, and refusing to permit the assignee or agent of the tenant to occupy during the residue of the term, constitute an eviction, which suspends accruing rent, but not that which has fallen due before entry. *Briggs v. Thompson*, 9 Barr, 338.

(a) A sold land to B, with covenants against incumbrances, which were known to him, and also covenants for quiet enjoyment; for which B was to pay ground-rent; and A agreed to advance B money for building, for which the rent was to be increased. A granted the rent to C, and the grant was recorded; and, before the deed was delivered, B gave notice to C, that A had failed to advance the money. Held, in an action by C against B for the rent, as B had the above-mentioned covenants, he could not keep back the rent, which was in the nature of purchase-money, though the mortgages were not satisfied and the land was unproductive; that, as A had failed to advance, and C had notice, B could keep back the part of the rent which was the consideration for the advance; that, if C had paid the whole purchase-money for the grant of the rent before notice, she would be protected for the whole, or *pro tanto* where part had been paid. *Juvenal v. Jackson*, 2 Harris, 519.

Unnecessary and tortious delay and negligence of a landlord, in making repairs during the term, to the injury of the tenant, cannot be set up as an eviction, where the tenant continues in possession a year afterwards. *Cram v. Dresser*, 2 Sandf. 120.

In an action of covenant for rent, it appeared that, between the date of the covenant and the time when the tenancy was to have commenced, the house was rendered unfit for use by the wrongful act of the landlord, whereupon the tenant refused to take possession.—Held, the landlord, was not entitled to recover. *Cleves v. Willoughby*, 7 Hill, 83.

Lessees of land, on one side of a river, with the ferry privilege belonging to the same, acquired the land on the opposite side, and the right of ferry from that side, according to law, by giving bond to the commissioners. In covenant against them on the lease for rent, they pleaded that they had been evicted. Held, the facts did not sustain the plea. *Huff v. Walker*, 1 Smith, 134.

premises, and thereby prevented applications for under-letting; and though they have been unoccupied.(1)(a)

13. It is said, the erecting by the landlord of a *nuisance* upon adjoining land will not have the effect of eviction as to payment of rent.(2) But an intentional, annoying and injurious interference with, or disturbance of, the beneficial enjoyment of the premises, suspends the rent, without any physical expulsion. So, if committed by the family of the landlord. The fact that the premises leased are in an unhealthy condition, if the tenant has entered, is no defence against a claim for rent. If he take measures speedily to remove the cause of complaint, he may claim a deduction for the expense. Otherwise, where he entered knowing, or having opportunity to know, the facts.(3)

14. Where a very gross and excessive nuisance occurred upon the premises themselves, by the breaking asunder of a privy therein, and the tenant quit as soon as he could find other accommodations; held, he was not liable afterwards for use and occupation.(4)

15. The accidental spreading of a poisonous substance over a pasture leased, whereby cattle died, was held not to discharge the rent.(5)

15 a. A landlord may erect a building on a lot adjoining him, though it darkens the windows of the building on the lot demised. Such erection is not an eviction, if it is a ground of damages.(6)

15 b. A leased the lower part of a house to B, and afterwards the upper part to C. B used his part for purposes of prostitution, accompanied by drinking, noise and riot, of which C gave A notice. A denied all knowledge of such use. C having quit the premises leased to him; held, in an action for rent, the above facts were no defence; that it was no more the duty and right of the landlord than of any other person, to abate the nuisance of a bawdy-house.(7)

15 c. A landlord himself occupied the room over the premises leased, as a grocery store, the drippings from which rendered the leased property unfit for use; whereupon the tenant abandoned them to the lessor. Held, he was no longer liable to pay rent.(8)

16. In the cases above mentioned, the tenant is deprived of his land by the fault of the lessor; consisting either in a wrongful entry made by himself, a wrongful use of other land, or in conveying a defective title, which is afterwards defeated by third persons. But there are other cases of a different sort; where the tenant loses his land or buildings, wholly or in part, by inevitable accident or irresistible force. Upon this point, the following distinctions seem to be established, though not with the perfect clearness that might be desired.

17. Where the tenant is deprived of the use of the leased premises, he is discharged from any mere *legal liability* resulting from his lease

(1) *Wilson v. Smith*, 5 Yerg. 379; *Ogilvie v. Hull*, 5 Hill, 52.

(2) 3 Kent, 371.

(3) *Cohen v. Dupont*, 1 Sandf. 260; *Westlake v. De Grave*, 25 Wend. 669.

(4) *Cowie v. Goodwin*, 9 Carr & P. 378.

(5) *Sutton v. Temple*, 12 M. & W. 52.

(6) *Palmer v. Wetmore*, 2 Sandf. 316.

(7) *Gilhooly v. Washington*, 3 Sandf. 330.

(8) *Jackson v. Eddy*, 12 Miss. 209.

(a) As to the effect of an eviction, by the taking of the premises for public uses, see *ante*, ch 15, sec. 72 & n. Where a statute authorized the widening of a street, providing compensation to land-owners by application to a judicial tribunal; held, that a party who took a lease of land subsequently to the statute, being evicted, had no remedy upon the covenant for quiet enjoyment. *Frost v. Earnest*, 4 Whar. 86.

and occupancy, such as *waste*. But if he has expressly covenanted or agreed to pay rent, he still remains liable, as before, to an action of *covenant*, or an action of *debt*.(1)

18. Thus if an army enter and expel the tenant, he is still bound for the rent.(a) So, if a house is blown down, or accidentally burned,(b)

(1) *Padine v. Jane*, 1 Rolle's Abr. 946; *Alleyn*, 26; *Sty.* 47. See *Bigelow v. Collamore*, 5 Cush. 226.

(a) One of the earliest cases upon this subject arose from a tenant's being driven from his land, in the reign of Charles I., by Prince Rupert and his soldiers. And the action was not *covenant*, but *debt*. The *reservation* was held to make a *covenant in law*. *Paradine v. Jane*, *Alleyn*, 26.

In South Carolina, a loss by *the dangers of war* has been held a good defence. *Bayly v. Lawrence*, 1 Bay, 499. So, it has been held, that, under the plea of *no rent in arrear*, a lessee may prove that the house has been rendered almost untenable by a storm, and that the landlord had notice to repair. And, in such case, it seems the rent may be apportioned. *Ripley v. Wightman*, 4 McC. 447.

In a lease for years of a mill driven by water, it was stipulated, that if the premises, or any part thereof, should be destroyed or damaged, during the term, by fire or other unavoidable casualty, so as to be rendered unfit for use and habitation, the rent reserved, or a part thereof, according to the nature and extent of the injury, should be suspended or abated, until the premises should be put in a proper condition for use by the lessor. In an action for rent, the lessee offered to show that the water-wheel had been in use for several years previous to the lease, and had frequently been out of order and repaired; that, during the term, it broke down, when going at its ordinary rate of speed; and that upon examination it was found to be so rotten, old, out of repair, and worn out, as to be almost worthless, and not worth repairing; but no evidence was offered to show that the condition of the wheel was owing to any special cause, or sudden event, or any accident other than as above mentioned. Held, the facts stated would not entitle the lessee to a suspension or abatement of the rent. *Bigelow v. Collamore*, 5 Cush. 226.

In Pennsylvania, seizure and eviction by *public enemies* is no defence to an action for rent, though it discharges the obligation to *give up the premises in repair*. *Pollard v. Shaufler*, 1 Dall. 210.

Where a building is torn down by public authority, if the act is unauthorized, it is a trespass; if authorized, the authority was equally well known to both parties. In either case, only the balance of rent accruing subsequently can be deducted on this account, as for failure of consideration. *Noyes v. Anderson*, 1 Duer, 342.

(b) The destruction of leased premises *by fire*, as would naturally be expected, has given rise to more questions and distinctions than any other form of *accidental* or *providential* loss. The general rule is, undoubtedly, as stated in the text; but not adopted without doubt and discussion, and often qualified or modified by the circumstances of particular cases. The practical importance of the subject is much diminished, by the almost universal custom of expressly excepting loss by fire from the covenant in leases to pay rent.

It has been held that an agreement to give a lease, generally does not bind the party to give a lease, providing, that if the premises shall be burned or rendered untenable, the rent shall cease till they are rebuilt or repaired. *Eaton v. Whitaker*, 18 Conn. 222.

Where, after a destruction by fire, the lessor entered, took away certain articles, and made various uses of the property; held, the tenant was still bound for the rent. *Belfour v. Weston*, 1 T. R. 310.

An upper floor of a house was occupied, at a rent payable quarterly. Pending a quarter, the house was burnt, and rendered untenable. Held, the landlord might still recover, in an action for use and occupation, at least the amount of rent up to the time of the fire, from the preceding quarter day. *Parker v. Gibbins*, 1 Gale & Dav. 10.

So, it has been held, that a tenant from year to year is liable for use and occupation, though the premises be burned. *Izon v. Gorton*, 5 Bingh. N. 501; *Voluntine v. Godfrey*, 9 Verm. 186. It seems, if the house is rebuilt, the tenant might claim it. *Ib.* But where the third story of a house was leased for a term, the house burnt and rebuilt, and a tender made to the tenant of his part, who refused to take it; it was left to the jury to decide, in an action for rent, whether "the old law was too severe," and whether the facts showed an eviction. *Law Rep.*, Feb., 1841, p. 390.

And where, a long time after a loss by fire, the tenant brought ejectment against the landlord for the house, rebuilt where the former one stood; upon the ground of lapse of time, and that the landlord, though not bound to rebuild, and legally entitled to the rent, had not enforced his claim; it was left to the jury to consider, whether the plaintiff had not *waived*

although the lessee covenanted to keep the premises in repair, casualties by fire only excepted; his covenant to pay rent will bind him during the term.(1) (See ch. 15.)

19. The general rule above stated is founded upon the consideration that a lease for years is *a sale* for the term, and, unless there are express stipulations, the lessor does not insure against inevitable accidents, or any other deterioration; and that losses by fire generally arise from the carelessness of tenants, which it is the policy of the law to restrain.(2)

20. The rule above stated is the prevailing one *at law*. But in equity it has been held, that a loss by fire as effectually discharges the rent, as an eviction by title; and, although the landlord may maintain an action at law, that equity will restrain it by injunction, until the house is rebuilt; especially where he was *insured*. But neither landlord nor tenant is bound to rebuild, unless it is so expressly agreed.(3)

21. But it is further said, that there is no general rule in a court of equity to relieve in such a case. It will afford relief only under particular circumstances. In late English cases, Chancery has refused to interfere; and Chancellor Kent regards this as the settled doctrine.(4)(a)

22. Where a tenant is deprived, by act of God or inevitable accident, of *a part* only of the premises leased, it seems there will be no apportionment of the rent. The earliest case upon this point, was one in which a man hired land and a flock of sheep together. The whole flock having died, it was contended that the rent should be apportioned; but the question was not decided.(5) Where a mill was carried away by ice, it was held, that the tenant was still bound to pay rent, partly on the ground, that this was only a partial destruction of the property leased—a fishery and other valuable rights being still left.(6) If a part of the land is surrounded by water, or swept by wild-fire, there shall be no apportionment. But if a part of it be covered or surrounded by the sea, the rent shall be apportioned, because the tenant loses the use of the land, with very slight chance of regaining it.(7)

23. The complainant hired a store in Boston for three years, coven-

(1) *Monk v. Cooper*, 2 Ld. Ray. 1477; *Hallett v. Wylie*, 3 John. 44; *Lamott v. Sterett*, 1 Harr. & J. 42; *Taverner, Dyer*, 56 a; *Carter v. Cummins*, 1 Cha. Cas. 84; *White v. Molyneux*, 2 Kelly, 124.

(2) *Fowler v. Bott*, 6 Mass. 67; 3 Kent, 373-4; *Cline v. Black*, 4 McC. 431; (which case treats the English rule on the subject as doubtful. And see *Brown v. Quilter*, Amb. 621.)

(3) *Treat. of Equ. lib. 1, ch. 5, sec. 8;*

Brown v. Quilter, Amb. 619; *Steele v. Wright*, 1 T. R. 708; *Gates v. Green*, 4 Paige, 355.

(4) 1 T. R. 710; *Fowler v. Bott*, 6 Mass. 68; *Hare v. Groves*, 3 Anst. 687; *Holtzoffell v. Baker*, 18 Vez. 115; *White v. Molyneux*, 2 Kelly, 124.

(5) *Taverner's case*, *Dyer*, 55 b; *Hart v. Windsor*, 12 Mees. & W. 68.

(6) *Ross v. Overton*, 3 Call, 268.

(7) 1 Rolle's Abr. 236.

his right to the premises at the time of the fire; and they found for the defendant. *Doe v. Sandham*, 1 T. R. 710; *Baker v. Holtzoffell*, 4 Taun. 45.

In a suit for rent of premises destroyed by fire, evidence that the property was insured, and the landlord received the insurance money, or that he received money for loss of the property, out of a general relief fund, is not a defence. *Magaw v. Lambert*, 3 Barr, 444.

But if a landlord take possession of the ruins of his premises destroyed by fire, for the purpose of re-building, if without the consent of his tenant, it is an eviction; if with his assent, it is a rescission of the lease; and in either case the rent is suspended. *Ib.*

(a) So, where there is a covenant to pay rent and repair, with express exception of casualties by fire, the lessee is liable for rent, though the premises be burned and not rebuilt after notice; nor will equity restrain a suit therefor. *Ward v. Bull*, 1 Branch, 271.

anting to pay the rent and leave the premises in good repair at the end of the term, and the lessor reserving a right to enter and make improvements. The front part of the land was taken and the front wall of the building cut off by the city, in order to widen the street. Held, the term was not thereby ended, nor the tenant discharged from his covenants to pay rent.(1)(a)

24. Lease of three rooms and a landing upon a canal, with a front of 200 feet, and a covenant to pay rent while permitted to occupy. The rooms being burned, held, there was no discharge, but only a proportional abatement of the rent, unless the rest of the property was surrendered.(2)

24. *a.* A leased store was burned, the whole rent having been paid in advance, and the lessor rebuilt and leased to others. Held, the lessee might recover so much of the rent as applied to the period since the new lease.(3)

25. Where a lessor, in a lease of several buildings, covenanted to repair in case of damage by fire, and the lease provided, that in case of such damage, the rent for the buildings thereby rendered untenable should cease while they remained untenable; held, the covenants were independent, and the neglect of the lessor to rebuild did not excuse the non-payment of rent for the buildings which were uninjured.(4)

26. A purchase, by the landlord from the tenant, of his whole interest, will discharge or extinguish the rent. But a purchase on condition, or of a part only of the tenant's interest, will not extinguish, but merely suspend, the rent; which, upon the termination of the particular estate purchased, or performance of the condition, and the restoration of the land to the tenant, will revive. So, if the landlord purchase only a part of the lands, the rent will be extinguished proportionably for these only, but still continue for such part of the lands as are retained by the tenant. So a landlord may release a part of the rent, and the rest will remain.(5) But if the rent be payable in some indivisible thing, as a horse or a hawk, a purchase by the landlord of part of the land extinguishes the whole rent. On the other hand, if the return to be made is some act for the public benefit—as to repair a road, or keep a beacon—such a purchase will not extinguish the rent, even in part. A descent of part of the tenancy to the owner of the rent will not extinguish it, though indivisible.(6)

27. Although formerly doubted, it is now settled, that a rent-service, being incident to the reversion, may be apportioned by transferring a part of the latter, with which the rent will pass, without any express mention of it. So the rent itself may be apportioned by devise.(7) Thus, one having a rent of £10 may devise £6, part thereof, to A, B and C

(1) *Patterson v. Boston*, 20 Pick. 159.

(2) *Willard v. Tulman*, 19 Wend. 358.

(3) *Ward v. Bull*, 1 Branch, 271.

(4) *Allen v. Culver*, 3 Denio, 284.

(5) 3 Cruise, 206-7; *Gourdine v. Davis*, 1 Bal. 469; Lit. 222; 18 Vin. Abr. 504.

(6) Gilb. 165; 1 Inst. 149 a; Gilb. 166.

(7) 3 Cruise, 211.

(a) Where a statute authorized the widening of a street, providing compensation to land-owners by application to a judicial tribunal; held, that a party who took a lease of land subsequently to the statute, being evicted, had no remedy upon the covenant for quiet enjoyment. *Frost v. Earnest*, 4 Whar. 86.

severally, to each a third. In such case each devisee (and, it seems, the heir at law also) may have a separate remedy for his rent.(1)

28. A rent-service may also be apportioned, by an assignment by act of law; as where a legal process is levied upon a part of the reversion, or where the widow of the landlord recovers one-third of the reversion for her dower. So in case of the death of a landlord, each of several heirs may sue separately for his portion of the rent.(2)

29. At common law, if a tenant for life, having underlet the land, died before the rent fell due, neither his executor, nor the reversioner, nor remainder-man, could recover a proportional part of it. The former could not, because his only claim would be for use and occupation, which would not lie upon a sealed lease; nor the latter, because the rent did not accrue in his time.. St. 11 Geo. II. ch. 19, s. 15, provides, that in such case the executors, &c., may recover rent for the time that the tenant occupied, *pro rata*; and, if he died upon the rent-day, the whole amount. But this act applies only where the lease ends with the death of tenant for life. If it does not thus terminate, the rent goes to the person in reversion or remainder.(3)(a)

30. In equity, this statute has been held to extend to a tenant in tail dying without issue.

31. Thus, where such tenant, having leased for years, died without issue a short time before rent-day, and the whole rent was paid to the remainder-man: held, the executor of tenant in tail might maintain a bill against the remainder-man, for such part of the rent as accrued before the tenant's death; upon the grounds, that the case was within the equity, though not the words, of the act; and, where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases; and also (and chiefly) that, the tenant not having been legally bound to pay the rent to any one, the payment should be applied to the benefit of those equitably entitled to the respective proportions.(4)

32. It has been said of the foregoing case, that it seems rather to be a decision what the statute ought to have done, than what it has done. But it was at the same time held, that, where one occupied *from year to year*, under the guardian of an infant tenant in tail, inasmuch as the lessee was in under no lease or covenant, but merely an implied contract, he could not raise an implication that he was to occupy rent free,

(1) *Collins v. Harding*, 13 Rep. 57; *Gilb. 173*; *Ards v. Watkins*, Cro. Eliz. 637, 651; *Daniels v. Richardson*, 22 Pick. 565. See *Salmon v. Mathews*, 8 Mees. & W. 827; *Crosby v. Loop*, 13 Illin. 625.

(2) *Campbell's case*, 1 Rolle's Abr. 237;

Montague v. Gay, 17 Mass. 439; *Cole v. Paterson*, 25 Wend. 456.

(3) *Jenner v. Morgan*, 1 P. Wms. 392; 3 Cruise, 213; *Perry v. Aldrich*, 13 N. H. 343.

(4) *Paget v. Gee*, Ambler, 198.

(a) The statute of apportionment, (4 Wm. IV, c. 22,) does not apply as between the executor and heir of a tenant in fee. *Beer v. Beer*, 9 Eng. L. & Equ. 468.

In Delaware, rent may be apportioned between tenant for life and remainder-man. Rev. Sts. ch. 120. So in Iowa. Code, 1851, ch. 82.

The plaintiff, a tenant *pour autre vie*, leased the land during the life of the *cestui*, at an annual rent, payable on the 1st of April in each year. The *cestui* died October 15th. Held, the lessee was not liable for rent to the plaintiff from April to October; the statute of Geo. II. not authorizing an action by the plaintiff. *Perry v. Aldrich*, 13 N. H. 343.

and, the whole amount having been paid to the receiver, the portion accruing before the infant's death was awarded to his executors.(1)(a)

33. In case of a *rent-charge*, if the owner of the rent purchase any part of the land from which it issues, the whole rent is extinguished. The reason of this distinction between a *rent-service* and a *rent-charge* is, that, while the former, consisting originally in feudal services, was favored by the law, and not allowed to be detached from any lands held by tenants; the latter is against common right, of no public benefit, and issuing out of every part of the land, so that the law will enforce it only according to the original contract.(2)

34. But if the grantor of the rent, after such purchase, make a deed to the grantee, reciting the purchase, and authorizing the grantee to distrain for the rent upon the remaining land; this amounts to a new grant.(3) And, if a part of the land come by *descent* to the owner of the rent, the latter shall be apportioned according to the value of the remaining land.(4) If the owner of a *rent-charge*, issuing out of three acres of land, release one of them from it, the whole is discharged. But if, being entitled to a certain sum, he release a part of that sum, the balance remains. It is said, that in the latter case he deals with the rent, which is his own; and in the former with the land, which is another's.(5)

35. In Pennsylvania, as has been stated, (ch. 16,) a *ground-rent*, reserved upon a conveyance in fee, is a *rent-service*. Hence, if the owner release a part of the land from it, the remaining land shall be still

(1) *Vernon v. Vernon*, 2 Bro. R. 659; *Hawkins v. Kelly*, 8 Ves. 308.

(2) Co. Lit. 147 b; Gilb. 152.

(3) Co. Lit. 147 b.

(4) Lit. 224; Gilb. 156.

(5) 18 Vin. Abr. 504; Gilb. 163; Co. Lit. 148 a; 3 Vin. Abr. 10, 11; *Farley v. Craig*, 6 Halst. 262.

(a) Held, in a late case, that the act providing for an apportionment of rent does not apply to unwritten leases from year to year. *Markley*, 4 My. & C. 484.

The principle of apportionment may be applied to the tenant, as well as the landlord. Where a lessee assigns part of his interest, the rent may be apportioned, and the lessor may sue the assignee in covenant for his proportion. *Van Rensselaer v. Bradley*, 3 Denio, 135.

In an action against the assignee of a part of the demised premises for rent, the plaintiff may declare against him as assignee of a specified part, in which case his recovery will be limited to that part; or he may declare for the whole, and leave the defendant to take issue on the assignment by plea or evidence. *Van Rensselaer v. Jones*, 2 Barb. 643.

The rent must be apportioned according to the value of the part held by him compared with the whole. And, if there is no proof of the relative value, the premises will be presumed to be of equal value, and the rent should be apportioned according to quantity. *Id.*

But, generally, the apportionment of rent among several assignees must be according to value, and not quantity, or number of acres. (*Whittlesey, J., dissenting.*) *Van Rensselaer v. Gallup*, 5 Denio, 454.

A severance of the occupation of demised premises, the rent being paid to the lessor by the respective tenants, is not a severance of the conditions of the lease, and a breach by one works a forfeiture of the whole lease. *Clarke v. Cummings*, 5 Barb. 339.

In *Michigan*, (Rev. Sts. 265.) one in possession of land, from which a rent is due, is liable for a proportional part, though he has only a portion of the land charged.

With regard to the principle on which rent is to be apportioned as to *time*, the following case occurred in Pennsylvania:

The Bedford Springs were leased for a term, commencing April 1, at an annual rent, payable September 1, which was the conclusion of the watering season. In applying the proceeds of the tenant's goods, sold on execution, to the lien of the landlord; held, the rent should be apportioned according to the interval between the commencement of the current year and the day of payment, not on the basis of the whole year. *Anderson, &c.*, 3 Barr, 218.

proportionably chargeable; more especially if the release has an express saving of such liability.(1)

36. It is said to be a common practice in England, for the owner of a rent-charge to join in conveying that part of the land, which it is agreed to discharge from the rent, with a proviso in the deed, that the rest of the land shall still remain liable. But since this operates as a new grant, the rent will be postponed to any prior incumbrance on the land. Sometimes, where the owner of the lands conveys a part of them, the grantee of the rent-charge covenants not to distrain or enter upon the part conveyed. But, it seems, this might discharge the whole rent.(2)

37. A rent-charge may be *apportioned* either by act of parties or act of law. Thus, if the owner assign a portion of it to another, each shall hold his respective share, and be entitled to his remedy. The reason of the rule is, that the whole land remains liable as before, and that the policy of the law, having allowed this kind of rent, will not prevent a distribution of it among children. Anciently, to effect such apportionment, the tenant was obliged to attorn to the assignee; after which, he could not complain of being subjected to two suits instead of one. And, although the practice of attornment is now for the most part done away, yet, as the tenant may avoid any suit by punctual payment, the rule still prevails. So, a part of a rent-charge may be taken by legal process, which will effect an apportionment.(3)

38. If a part of the lands, from which the rent issues, descend to the owner of the rent, the latter shall be apportioned, inasmuch as the party acquires the land by act of law, and not by his own act.(4)

39. The feoffee of a husband grants a rent-charge to the wife. The husband dies, and one-third of the land charged is assigned for dower. The rent shall be apportioned, and not issue wholly from the residue.(5)

(1) *Supra*, ch. 16; *Ingersoll v. Sergeant*, 1 Whart. 337. *v. Craig*, 6 Halst. 262-273; *Rivis v. Watson*, 5 Mees. & W. 255.

(2) 3 Cruise, 209; *Butler v. Monnings*, (4) Lit. 224; Gilb. 156.

Noy, 5. (5) Co. Lit. 32 b, n. 3.

(3) Gilb. 163; 18 Vin. Abr. 504; *Farley*

CHAPTER XVIII.

WASTE.

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| <ol style="list-style-type: none"> 1. Importance of the subject. 2. American doctrine. 3. Definition. 4. Voluntary or permissive. 6. Felling timber. 10. American law. 12. Waste of buildings. 19. Loss by fire. 20. Disturbance of the soil—mines, &c. 23. Conversion of the land. 25. Heir-looms—destruction of. 26–59. Permissive waste—repairs. 30. Act of God. 32. Amount of waste. 34. Who punishable for—tenant for life, | <ol style="list-style-type: none"> &c.—Statutes of Marlbridge, &c. 36. Ecclesiastical persons. 39. American doctrine. 47. Who may sue and be sued for. 56. Waste by third persons. 58. Action on the case for. 60. Injunction and other equity proceedings. 68. Property in timber cut, &c.—who has; contingent remainders, &c. 76. Cutting of timber by order of Court. 80. Lease <i>without impeachment of waste</i>, &c. 92. Special provisions as to waste in the United States. |
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1. IN treating of estates for life and for years, many incidents or qualities have been noticed which are common to both estates. It remains to consider another subject, of much importance, the principles of law pertaining to which are for the most part alike applicable to tenant for life and tenant for years. This is the subject of *waste*. Lord Coke says, "it is most necessary to be known of all men."(1)

2. Chancellor Kent remarks,(2) that the American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country. So it is said, in this country, no act of a tenant amounts to waste, unless it is or may be prejudicial to the inheritance, or to those who are entitled to the reversion or remainder.(3) But, inasmuch as the English doctrine remains wholly applicable in some of the States, and in the rest has undergone very partial change, this doctrine will be first stated, and then qualified by an account of such alterations as the statutes or judicial decisions of the respective States have introduced.

3. Waste is the destruction of such things on the land, by a tenant for life or for years,(a) as are not included in its *temporary profits*.

(1) Co. Lit. 54 b.

(2) 4 Kent, 76; Kidd v. Dennison, 6 Barb. 9.

(3) Pynchon v. Stearns, 11 Met. 304.

(a) In some cases the term is applied to other tenants than for life or years; as, for instance, to an adverse claimant in possession. Thus it is held, that where a defendant in an ejectment suit has been in possession for many years, claiming in fee, in his own right, and in hostility to the plaintiff, he should, until legally evicted, be permitted to remain in the full enjoyment thereof, to the extent that he would be were no adverse claim set up; subject to the restriction, that he shall not commit a permanent and lasting injury to the inheritance; and the cutting down of such trees as it is necessary to cut down for the regular clearing up and improvement of the lot, so as to put it in proper farming condition, according to the rules of good husbandry, is not waste; but, should the defendant continue to cut down timber or other wood, so as to encroach upon what should be left and preserved, as necessary for repairs of fences and other erections, and for firewood, it seems he would be guilty of waste, and, upon application, would be restrained and punished. The People v. Davison, 4 Barb. 109.

So, under a *contract of sale*, giving time for payment of the purchase-money, the purchaser

In other words, it consists in such acts as tend to the permanent loss of the owner in fee, or to destroy or lessen the value of the inheritance.(1)(a)

4. Waste is either *voluntary* or *permissive*; the former consisting in some positive act, the latter in mere neglect or omission.(b)

5. Of voluntary waste, there are various kinds.

6. The first and perhaps principal kind, is *the felling of timber trees*; which, although the tenant has a qualified property in them for shade and shelter, and for the masts and fruit—he has no right to cut down, more especially if it is bad husbandry to do so, and no pretence of its being done for *estovers*. But he may cut coppices and underwoods, according to custom, and at seasonable times. So the *thinings* of fir trees less than 20 years old belong to the tenant for life. He has, however, no property in the underwood, before it is cut; and therefore cannot have an account of what was wrongfully cut by a preceding tenant.(2)

7. Where the timber is included in a lease, the lessee may have trespass against the lessor for felling the trees, and the lessor *waste* against the lessee. And, if a stranger fell them, each may have his own appropriate action. The landlord cannot have *trespass*. When the trees are expressly excepted, the lessor has an implied power of going on the land to fell them, and may sue the lessee for any injury done to them. So he may maintain trespass against a stranger. Where the timber is neither expressly included nor excluded, it would seem that the tenant has the right to have it continued, but no right to cut it down, unless waste is expressly authorized.(3)(c)

(1) 1 Swift, 517–8.

(2) Co. Lit. 53 a; Rich. Liford's case, 11 Rep. 48 b; Pigot v. Bullock, 1 Ves. jun. 479; 7 N. H. 171; Ridgeley v. Rawling, 2 Coll. 275; Edge v. Pemberton, 12 Mees. & W. 187. See 5 Mees. & W. 11.

(3) 11 Rep. 48 a; Pomfret v. Ricroft, 1 Saun. 322, n. 5; Foster v. Spooner, Cro. Eliz. 18; Heydon v. Smith, Godb. 173; Jackson v. Carter, 5 Ves. 688.

to have possession in the mean time, and the privilege of converting the timber into lumber for the purpose of payment; the court will not grant an injunction to prevent him from cutting timber, there being no allegation nor proof that the land would not be an adequate security for the money, without the timber. Van Wyck v. Alliger, 6 Barb. 507. But where A and B entered into a contract for an exchange of lands, and subsequently passed the deeds of conveyance and delivered possession, before which time, and after the contract of sale, A committed waste on the land sold by him; held, B might maintain an action on the case against him. Marsh v. Current, 6 B. Mon. 493.

(a) According to this definition, the term *waste* does not *per se* import anything wrong or unlawful; because it may, under certain circumstances, be lawfully committed. Thus, as will be seen, a particular tenant may hold the land “without impeachment of waste;” that is, with the privilege of committing waste. The word, however, is more generally used in the different sense of an *unauthorized* or *illegal* destruction of timber, &c. According to the latter meaning, we should say, “for a tenant to cut timber, &c., is waste;” according to the former, “a tenant cannot lawfully commit waste *by cutting timber*, &c. (See ch. 1, sec. 74, n.)

(b) As to the distinction between them, see Martin v. Gilham, 7 Ad. & Ell. 540.

(c) A lessor covenanted, that the lessee should have as much firewood as she should desire from a certain tract of land; and then cut most of the wood thereon, and converted it to his own use. Held, a breach of the covenant. Lovering v. Lovering, 13 N. H. 513.

A lease contained the following clause: “All the timber in the south-east corner, of about five acres, suitable and proper for fuel, to be left, and not cleared.” Held, the corner land specified was not excepted from the lease, but the clause amounted to an agreement not to cut the timber thereon; and, therefore, although the lessor could not maintain trespass for injury to the real estate in cutting the timber, he could maintain trespass *de bonis*

8. Timber trees are those *used for building*, and the question is one of *local usage*.(a) Thus, where *birch* trees were used in a certain county for buildings of a mean kind, it was held waste to fell them. So horse-chesnuts and pines. But it is also waste, to cut those standing in defence of a house, though not timber, as, for instance, willows, beech, maple, &c., or to cut trees for fuel, where there is sufficient dead wood; or to stub up a quickset thorn fence. So it is waste, to lop timber trees, and thereby cause them to decay; or to destroy or stub up the young germins or shoots; or to cut down fruit trees growing in the garden or orchard; but not those growing elsewhere.(1)

9. It is said, in places where timber is *scant*, it may be waste to cut such trees, as are not commonly reckoned to be timber. On the other hand, upon a similar principle, it has been held not to be waste, in Massachusetts, to cut oaks for firewood, these trees being very abundant, and commonly used for this purpose. But it is waste, to cut timber-trees and exchange them for firewood, especially if the latter might be otherwise obtained.(2) So, in a bill against a tenant, for waste of timber, it is no justification, that firewood and timber were furnished by him for the farm, from other premises; but, in account decreed against him for such waste, he may be allowed in mitigation for what he so furnished. So, where a condition in a lease is, that the tenant shall not cut off wood and timber, except for firewood and fencing, and he cuts off timber for other purposes, he cannot escape forfeiture, by showing that he has not cut off more than would have sufficed for his firewood and fencing timber, and that he obtained the latter from other land;(3) nor can he set up as a defence, that he has farmed the land more beneficially than the lease required.(4) And, where trees are cut for no purpose connected with the immediate improvement of the land, and sold off the land, without intending to apply the proceeds to such improvement, waste is always committed, and the defendant has no right to *recoupe* for improvements which he might have made at some other time.(5) So, in North Carolina, though a tenant for life of land entirely wild may clear as much of it for cultivation as a prudent owner of the fee would, and sell the timber that grew on that part of

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| <p>(1) Dyer, 65 a; Co. Lit. 53 a; Cumberland's case, Moore, 812; Jackson v. Brownson, 7 John. 234; Chandos v. Talbot, 2 P. Wms. 606; Rex v. Minchin, 3 Burr. 1308.</p> <p>(2) Padelford v. Padelford, 7 Pick. 152; Richardson v. York, 2 Shepl. 216; Sarles v.</p> | <p>Sarles, 3 Sandf. Ch. 601; Simpson v. Bowden, 33 Maine, 549; Greber v. Kleckner, 2 Barr, 209.</p> <p>(3) Clark v. Cummings, 5 Barb. 339.</p> <p>(4) Ballitt v. Musgrave, 3 Gill, 31.</p> <p>(5) Ibid.</p> |
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asportatis for carrying away the wood, after it had been severed. Schermerhorn v. Buell, 4 Denio, 422.

While the general rules relating to waste are controlled by previous formal agreements of the parties, the reversioner cannot claim a forfeiture, if he has assented to the act either before or after it was committed. Clemence v. Steere, 1 R. I. 272.

So, the receipt of rent, after the tenant has incurred a forfeiture by cutting timber, is a waiver of the forfeiture. Camp v. Pulver, 5 Barb. 91.

(a) So, where it is the custom of husbandry in the vicinity to sell off hay from farms, it is not waste to do so. But the removal of bog-grass from a farm, where it has usually been foddered on the farm, is waste. Sarles v. Sarles, 3 Sandf. Ch. 601.

The question of waste is said to depend on the custom of farmers, the condition of the land, the demands of good husbandry, the situation of the country, and the value of the timber. McCullough v. Irvine, 1 Harr. 438; Morehouse v. Cotheal, 2 N. J. 521.

Cutting hoop-poles is waste, unless this is the ordinary mode of managing the farm. Clemence v. Steere, 1 R. I. 272.

the land, yet it is waste to cut down valuable trees, not for the purpose of improving the land, but for the purpose of sale.(1)

10. With regard to the cutting down of timber, in several of the States, (*supra*, s. 2,) the strict rules of the English law are not adopted. Thus, in Massachusetts, (Statutes of 1854, 72, 73,) where a widow, there being no issue, elects to take half the real estate, consisting of wild or woodland, she may clear and improve it. In Vermont,(a) New York, and Ohio, if the land is wholly wild and uncultivated, the tenant may clear a part of it for cultivation, leaving, however, enough for the permanent use of the farm, which is a point of fact for the jury; and consistently with good husbandry. So, in North Carolina, the tenant may clear sufficient land to furnish support for his family; and a dowress may cut timber to make into staves and shingles, if this is the common and only beneficial use of the land. So, in New Hampshire, the consumption of necessary fuel at the residence of the widow, cut from the dower-land, she not residing thereon, is not waste. So, in Maine, it is not waste to cut wood for necessary fuel and repairs. So, in Pennsylvania,(b) Virginia and Tennessee, tenants in dower have been allowed to clear wild lands, not exceeding (in the former State) a just proportion of the whole tract. It has already been stated, that in several of the States a widow is not dowable of wild lands, for the reason that they would be of no benefit to her, as the clearing of them would be waste.(2) (Sec ch. 9, s. 12.)

11. In Tennessee, the lessee of a mine, with liberty to smelt ore, may cut timber sufficient for this purpose. And a widow may cut timber on one part of the land to fence another, though the reversions of the respective parcels belong to different heirs. Her rights are not to be affected by any arrangement among third persons, to which she is not a party. This last point has also been decided in Massachusetts.(3)

12. In relation to *buildings*, waste may be committed, either by pulling them down, or suffering them to remain uncovered, whereby the timbers rot. But, unless they do rot, these acts do not constitute waste. If uncovered before he came in, the tenant does not commit waste by suffering them to fall; but he has no right to pull them down. If he have done or suffered waste, but repaired before action brought, this is a good defence, but must be pleaded specially, not proved under the plea "*quod non fecit vastum*."(4)

(1) Davis v. Gilliam, 5 Ired. Eq. 308.

(2) Walk. Intro. 278; Jackson v. Brownson, 7 John. 227; Parkins v. Cox, 2 Hayw. 339; Ballentine v. Poyner, 2 Hayw. 110; Hastings v. Crunckleton, 3 Yeates. 261; N. H. Rev. St. 329; Pur. Dig. 221; Findlay v. Smith, 6 Munf. 134; Crouch v. Puryear, 1 Rand. 258; Owen v. Hyde, 6 Yerg. 334;

Hickman v. Irvine, 3 Dana, 123; 26 Wend. 115; Me. Rev. St. 393; Allen v. McCoy, 8 Ohio, 418; Childs v. Smith, 1 Md. Ch. 483.

(3) Wilson v. Smith, 5 Yerg. 379; Owen v. Hyde, 6, 334; Padelford v. Padelford, 7 Pick 152. See *infra*, sec. 20.

(4) Co. Lit. 53 a, and n. 3.

(a) In this State, it is laid down generally, that cutting wood to fit the land for cultivation is not waste, if good husbandry require it, and the inheritance be not injured; even though the timber be sold and consumed elsewhere. Hough v. Birge, 11 Verm. 190.

(b) In this State, the court remark upon the distinction between the condition of things in England, where "every part of every tree will bring cash," and in the United States, where lands are in great measure valueless, till cleared; and they come to the conclusion, that, if a prudent owner would clear off the timber, and if such clearing raises the value of the land, it is no waste. Givens v. McCalmont, 4 Watts, 463; Owen v. Hyde, 6 Yerg. 334.

13. The right to cut timber for repairs does not depend upon the obligation to repair. Thus, if a house be ruinous when leased, the tenant may, though he is not bound to, cut timber for repairs. So, even where the lessor has covenanted to repair, or where the lease is without impeachment of waste, for the house only.(1)

14. Lord Coke says, it is waste to build a new house, (meaning, probably, *with timber cut upon the land*;) and to suffer it to be wasted is a new waste. And, if the tenant suffer the house to be wasted, and then fell timber to repair it, this is *double waste*.(2) (See sec. 7.)

15. It is waste to convert a dwelling-house into a store or warehouse, because the safety and permanency of the building are thereby endangered. So, to convert two chambers into one, or the converse; or a hand-mill into a horse-mill.(3)

16. It is waste to pull down a house, though a new one be built, if the latter is smaller than the former. Otherwise, if the former house fall down, and a smaller one is built. To build a larger one, in this case, with timber from the land, is waste. But not to abate a new house, which has never been covered.(4) The removal of a building erected by the tenant, and not affixed to the freehold, is not waste, nor tearing down a barn so dilapidated that there is danger of its falling upon the cattle.(5) Nor the erection of a new outhouse, with timber from the farm, in place of one which had become ruinous.(6)

17. It is waste to remove anything attached to the premises, either by the lessor or the lessee, unless removable upon the principles of the law of fixtures, which have been already explained.(7) (*Supra*, ch. 1.)

18. It is said, with particular reference to the alteration of buildings, that the strictness of the law in relation to waste has been carried to an unwarrantable extent; and that the cases are very discordant. In a modern case in England, the opening of a new door in a building was held to be no waste, unless it impaired the evidence of title. In a recent case in this country, where the lessee of "a store and cellar" raised the store from one to two feet, and finished off a victualing cellar, for which purpose the cellar had never before been used; held, this, of itself, would be waste, but, as the lessor had covenanted that the lessee might "repair, alter, and improve," this was a permission to make the alterations.(8)

19. At common law, a tenant for life was not liable for loss by fire, whether accidental or negligent. But such loss was held to be waste, under the Statute of Gloucester. A later statute, however, 6 Anne, c. 31, ss. 6, 7, exempts all tenants from liability for accidental fire, unless it arises from some contract with the landlord.(a) A general covenant to

(1) Co. Lit. 54 b.

(2) Co. Lit. 53 a, b.

(3) *Douglass v. Wiggins*, 1 John. Ch. 435;
Co. Lit. 53 a, n. 3.

(4) Bro. Abr. *Waste*, 93; Co. Lit. 53 a,
and n. 4.

(5) *Clemence v. Steere*, 1 R. I. 272.

(6) *Sarles v. Sarles*, 3 Sandf. Ch. 601.

(7) Co. Lit. 53 a.

(8) *Young v. Spencer*, 10 Barn. & Cr. 145;
Hasty v. Wheeler, 3 Fairf. 436-7; *Doe v.*
Jones, 4 Barn. & Ad. 126.

(a) A testator devised to A, for life, a house and other real estate, "he committing no manner of waste, and keeping the premises in good and tenantable repair." In July, 1837, A entered into possession, and in November, 1844, the house was totally destroyed by an accidental fire. In 1845, A was found lunatic by inquisition, and the lunacy was dated from the 1st of October, 1843. Upon petition in lunacy of the remainder-men, who were

repair binds the tenant to rebuild in case of fire. Hence, it has become usual specially to except such loss.(1) (See *supra* ch. 17.)

20. It is waste to dig for clay, gravel, lime, stone, &c., except for repairs or manurance. So also to open a new mine (unless in case of a lease of all mines in the land) or clay-pit; but not to work one already opened, or to open new pits or shafts for working the old veins; because they could not otherwise be wrought.(a) If mines are expressly included in the lease, and there are open ones, these only are embraced. But if there are no open ones those unopened will pass.(2)(b)

22. Where certain salt-works were devised for life, subject to the payment of large legacies: held, the devisees might, to any extent, use the salt, and the woodland used by the testator for fuel, in carrying on the works.(3)

22. But, it is said, the tenant cannot take timber, to use even in mines that are open.(4)

23. Anciently, *the conversion of one kind of land into another*,(c) as, for instance, of pasture into arable, was waste, because it not only changed the course of husbandry, but tended to obscure the title. But, it has been said, that the pasture must have been such immemorially, and not merely *long before*; and, in the improved state of agriculture in modern times, the old rule may be considered as greatly relaxed, if not wholly obsolete. Thus, converting meadows into pasture is not waste, unless detrimental to the inheritance, or contrary to the ordinary course of good husbandry. So, a tenant does not commit waste, by opening a way over meadow-land, for his convenience, digging drains by the side thereof, and carrying on earth for the purpose of making the way passable; or by erecting houses on such land, where there were none before, and digging cellars for them, and raising the ground about them; or by carrying quantities of earth upon the low and wet parts of such land; if the occasional breaking up of land is a judicious and suitable mode of cultivating it, the cost of levelling small, and if, after deducting such cost, the land over

(1) 1 Cruise, 137; *Chesterfield v. Bolton*, 2 Com. R. 626; *Pasteur v. Jones*, Cam. & Nor. 194; *Bullock v. Dommitt*, 6 T. R. 651; 1 Bibb, 536. See *Cornish v. Strutton*, 8 B. Mon. 586.

(2) Co. Lit. 53 b, 54 b; *Saunders' case*, 5 Rep. 12. See *Whitfield v. Bewit*, 2 P. Wms. 240;

Raine v. Alderson, 4 Bing. N. R. 702; *U. S. v. Gear*, 3 How. 120; *Ferrand v. Wilson*, 4 Hare, 388; *Owings v. Emery*, 6 Gill, 260.

(3) *Findlay v. Smith*, 6 Munf. 134. (See *supra*, sec. 11.)

(4) Co. Lit. 53 b, n. 1.

also committees of the person and estate; held, the lunatic's estate was liable, under the terms of the condition, to reinstate the house; and a reference was directed, as to what amount ought to be expended in rebuilding, and out of what fund the expense should be paid, with liberty to the next of kin to take a case to law, upon the construction of the condition. *Skingley*, 3 Eng. Law and Eq. 91.

(a) Whether this can be done after they have been abandoned, *qu.* See *Viner v. Vaughan*, 2 Beav. 466.

(b) Where certain land was held by *copyhold* tenure, and, from time to time before the tenant came in possession, there being no proof at what periods, large masses of stone fell from cliffs above, and had become partially imbedded; held, they belonged to the lord, with the soil, and the copyholder had no right to remove them. *Dearden v. Evans*, 5 Mees. & W. 11.

(c) The impoverishment of fields, by constant tillage from year to year, is waste. *Sarles v. Sarles*, 3 Sandf. Ch. 601.

So, suffering pastures to be overgrown with brush, where it would not be suffered by a man of ordinary prudence. *Clemence v. Steere*, 1 R. I. 272.

which the way was made, and on which the houses were built, would, in case of their removal, be equally (or more) valuable for agricultural purposes, including ploughing and laying it down to grass, as if it had not thus been changed and built upon. But where, in the creation of the estate, there was an express prohibition against ploughing land unfit to be ploughed, Chancery will interpose by injunction to prevent it.(1)

24. If a tenant, by an act of good husbandry, produces consequences of injury which could not reasonably be foreseen, he shall not be held guilty of waste. Thus, where a tenant diverted a creek into a swamp, whereby the trees were killed, and the lessor lay by twenty years, during which a new and better growth sprung up; held, no forfeiture of the lease for waste.(2)

25. It is waste, in England, to destroy *heir-looms*; as, for instance, to destroy so many deer, fish, &c., as not to leave enough for the stores.(3)

26. *Permissive* waste consists chiefly in suffering buildings to decay. But, if they were ruinous when leased, the tenant is not bound to repair, though justified in cutting timber for that purpose, because the law favors the maintenance of houses.(a) And, in Massachusetts, he may cut timber trees, and sell them to procure boards for repairs, if this course be economical and beneficial to the estate.(4)

27. Chancery will not decree that a tenant for life repair, nor appoint a receiver for that purpose; for this would be productive of harassing suits and expensive depositions.(5)

28. If a tenant covenants to repair, and does not, waste will not lie.(6)

29. It has been held in South Carolina, that a tenant for life is liable for one-fourth the expense of repairs, to be estimated by commissioners.(7)

30. For waste caused by act of God, or enemies, the tenant is not in general responsible, as where a house falls by a tempest. But, if merely unroofed, he is bound to re-cover it before the timbers rot. So, it is not waste to remove timber thrown down upon pasture land by a tempest, especially where it is valueless. And, where the timber is of value, if its prostration upon pasture land prevents the full enjoyment of the life estate, the tenant should be permitted to remove it upon such terms as may be deemed by the court equitable.(8)

31. Where the bank of a river, or a wall of the sea, is destroyed by a sudden flood, the tenant is not liable. Otherwise, where the current is so moderate that he might by due diligence preserve the bank, or where the injury happens by the ordinary flowing and reflowing of the tide.(9)

(1) Co. Lit. 53 b; Dyer, 37 a; Gunning v. Gunning, 2 Show. 8; 1 Swift, 517-8; Keepers, &c. v. Alderton, 2 Bos. & P. 86; Worsley v. Stewart, 4 Bro. Parl. Ca. 377; Clemence v. Steere, 1 R. I. 272; Pyncheon v. Stearns. 11 Met. 304.

(2) Jackson v. Andrew, 18 John. 431.

(3) Co. Lit. 53 a.

(4) Co. Lit. 53 a, 54 b; Loomis v. Wilbur, 5 Mas. 13.

(5) Wood v. Gaynon, Amb. 395.

(6) Co. Lit. 54 b, n. 1.

(7) Smith v. Poyas, 2 Des. 65.

(8) 2 Rolle's Abr. 820; Co. Lit. 53 a; Houghton v. Cooper, 6 B. Mon. 281.

(9) Co. Lit. 53 b; Dyer, 33 a; Griffith's case, Moo. 69.

(a) But it is waste to tear them down, and he is liable even if torn down after he leaves them and without his consent. Clemence v. Steere, 1 R. I. 272.

32. It seems, waste may be of so small value, as not to be a proper subject of legal inquisition. But Lord Coke says, trees to the value of three shillings and four pence hath been adjudged waste, and many things together may make waste to a value. It is said, it ought to be to the value of 40*d.* at least.(1)

33. Where the lessee of a meadow, containing three lots, ploughed it into a garden, and built upon it, and a verdict was rendered against him for three farthings damage, one farthing for each lot; judgment was given for the defendant.(2)(a)

34. With respect to the persons who are liable for the commission of waste, there seems to be no little confusion in the books. Lord Coke says, that at common law a tenant for life was not *prohibited* from waste, unless expressly restrained from committing it. Mr. Cruise limits this remark to the case where lands were *granted* to a person for life, and assigns as the reason, that the grantor had power to impose such terms as he thought proper. Chancellor Kent says, that, at common law, a *prohibition* against waste would lie only against a tenant holding *by act of law*. It is said, the *Register* contains five several writs of waste; two at the common law, for waste done by a dowress or a guardian; and three by statute, for waste done by tenant for life, for years, and by the curtesy. But it is added, *some have thought* that, at common law, waste did not lie against tenant by the curtesy. In Connecticut, it is held that, at common law, waste would lie only against a dowress, guardian, or tenant by the curtesy. In Delaware, tenant by the curtesy, or in dower, is expressly made liable for waste. But Lord Coke says, waste does not lie against a *guardian* in socage.(3)(b)

35. Two early English statutes made provision for the punishment of waste committed by *any tenants* for life or for years. Statute of Marlbridge, 52 Hen. III., c. 24, authorized the action of waste, and gave full damages; and the Statute of Gloucester, 6 Edw. I., c. 5, extended the penalty to a forfeiture of the place wasted, and treble damages(4)

36. Ecclesiastical persons, bishops, parsons, &c., seized of lands *jure ecclesie*, although having a fee-simple qualified, are placed, in respect to waste, under the restrictions of tenants for life. They may cut timber or dig stone for repairs of the church or parsonage, or sell them to raise money for this purpose; but, for anything beyond this, they are liable, in England, to a writ of prohibition, or ecclesiastical censure, or injunction in Chancery, and to the last named process in the United States,(5)

(1) Co. Lit. 53 a; Ib. n. 10.

(2) 2 Bos. & P. 86.

(3) 1 Cruise, 123; 4 Kent, 77, 79, 81; Co. Lit. 54 a, and n. 11; 1 Swift, 519; Jefferson v. Durlam, 1 Bos. & P. 120-1; Scott v. Lenox, 2 Brock. 57; Dela. Rev. Sts. 293.

(4) 3 Bl. Comm. 14. By St. 3 & 4 Wm. 4, ch. 27, the writ of waste is abolished.

(5) Rich. Litord's case, 11 Rep. 49 a; Stockman v. Whither, Rolle's R. 86; Ackland v. Atwell, 2 Rolle's Abr. 813; Strachy v. Francis, 2 Atk. 217. But see Jefferson v. Durlam, 1 B. & P. 105.

(a) Where a man is found guilty of waste as to part of the premises on which he is charged, it amounts to a verdict of acquittal as to the residue. Morehouse v. Cotheal, 2 N. J. 521.

The verdict in an action of waste is good, if it do not specify the exact extent of the premises wasted. A mere designation of each place wasted, where there are several, will not be sufficient. Ib.

(b) At common law, a guardian, by committing waste, forfeited his trust; a widow had a keeper set over her. 2 Inst. 300.

37. So, also, an injunction lies against the widow of a deceased rector, and an action on the case against one who has resigned, or the representatives of one deceased, by the successor, for dilapidations, or even a neglect to repair.(1)(a)

38. In Maryland, if the rector commit waste, he forfeits treble damages to the vestry.(2)

39. Chancellor Kent observes, that the provisions of the Statute of Gloucester may be considered as imported by our ancestors, with the whole body of the common and statute law then existing, and applicable to our local circumstances. It has been expressly re-enacted in New Jersey, New York(b) and Virginia, and adopted in North Carolina, Pennsylvania, Maryland, Massachusetts and probably other States. In Pennsylvania, a recent statute provides, that the tenant, in case of permissive waste, shall, before decree of forfeiture, be directed to repair; in default of which he forfeits the place, with treble damages.(3)

40. In Ohio, a tenant in dower, for voluntary or permissive waste, forfeits the place wasted, but the statute does not give treble damages. Tenant by the curtesy does not forfeit. In Delaware, the action of waste is limited to three years. It lies for waste committed without written license.(4)

41. In Massachusetts,(c) Maine and Michigan, the penalty is, in general, forfeiture, with damages.(5) But in Massachusetts, a tenant, against whom an action is pending for recovery of land, and who commits waste thereon, is liable to treble damages.(d) In Maine, the Statute of Gloucester has been held not to be in force, nor does the action of waste lie against a dowress. Perhaps, for actual waste, an action on the case would lie. Tenant by the curtesy is liable for waste.(6)

(1) *Hoskins v. Featherstone*, 2 Bro. 552; *Jones v. Hill*, Carth. 224; *Jones v. Hill*, 3 Lev. 268; *Radcliffe v. D'Oyly*, 2 T. R. 630.

(2) 2 Md. L. 426.

(3) 4 Kent, 80-1; 1 N. J. L. 209; 1 Virg. 227; 1 N. C. Rev. St. 609; *Bright v. Wilson*, Cam. & N. 26; *Carver v. Miller*, 4 Mass. 563; *White v. Wagner*, 4 Harr. & J. 391; *Padelford v. Padelford*, 7 Pick. 152; *Sackett v. Sackett*, 8, 309; Penn. St. 1840, 217.

(4) 2 Chase, 1316; Walk Intro. 326, 329; Dela. Rev. Sts. 441, 293. See 3 Harring. 9.

(5) Mass. Rev. St. 630. See St. 1841, 187; Mich. Rev. St. 265; Me. 1b. 393.

(6) *Smith v. Follansbee*, 13 Maine, 273; Me. Rev. St. 567.

(a) Where a rector was cutting down timber on the glebe lands, and had sold some, and applied the money for necessary repairs of the rectory and other houses on the lands, he was restrained, at the suit of the patron of the rectory, from cutting any timber, except to be used for the purpose of repairs, and from selling or disposing of any timber then or hereafter to be cut. *The Duke of Marlborough v. St. John*, 10 Eng. Law & Eq. 146.

It seems, it is only by way of indulgence, under special circumstances, as, for instance, where there is timber on an outlying part of the glebe, so far distant as to make it not worth while to bring the timber to the place where repairs are to be done, that a rector would be allowed to sell timber, even for the purpose of defraying the expense of necessary repairs with the proceeds. *Ib.*

(b) Chancellor Kent says, (4 Comm. 81, n. a.) the *writ of waste*, as a real action, is there essentially abolished; but an *action of waste* substituted, with the same penalty.

(c) Whether, in Massachusetts, the English law of forfeiture, with treble damages, was ever in force, see 3 Dane, ch. 78, art. 11, sec. 2; art. 13, secs. 3, 4, 5; art. 14; *Jackson*, 340; *Padelford v. Padelford*, 7 Pick. 152; *Sackett v. Sackett*, 8, 309.

(d) But such damages can be recovered only in the manner provided by the statute. They cannot be made an item of charge by a mortgagor against a mortgagee, in an account stated between them by a master, upon a bill to redeem. *Boston, &c. v. King*, 2 Cush. 400.

The provision of the Revised Statutes, giving damages for waste, to be recovered in a real action for the land itself, supersedes the common law remedy; and the claim need not be specifically set forth. *Raymond v. Andrews*, 6 Cush. 265.

42. In Rhode Island, the action of waste is still in use for recovery of the freehold estate wasted.(1)

43. In Indiana,(2) a widow forfeits the place wasted to the immediate reversioner or remainder-man. But, for *negligent* waste, she is merely liable in damages. A statute requires her to keep the estate in repair. In New Hampshire and Vermont, a widow is made liable to an action, for strip or waste done or suffered. In Maryland, at the suit of a devisee or his guardian. In Wisconsin, a widow is required not to do or suffer waste, and to keep the premises in repair, and is liable to damages to the next owner of the inheritance, for breach of this requirement. So, in general, a remainder-man may sue for waste by a particular tenant.(3)

44. In Illinois,(3) a widow forfeits to the immediate reversioner, having a freehold or inheritance, where she wantonly or designedly commits or suffers waste. But, for negligent or inadvertent waste, the claim is for damages only. In both cases, the remedy is an action of waste. If she marry again, the husband is liable with her for waste done by her before, or by him after marriage.

45. In Connecticut, until a recent period, there was no statute against waste by a tenant for years, and, it is said, few actions of waste are brought. A tenant for life, holding *by act of party*, might commit waste or authorize another to do it, without incurring any liability. But, by a late act, all particular tenants for life or for years, though holding by act of party, are forbidden to commit waste, with a saving of vested rights. The Statutes of Marlbridge, and of Gloucester, are not in force; but the provisions of the former are adopted as to tenants in dower and by the curtesy, upon the ground of general reasonableness.(5)(a)

46. In Kentucky,(6) the Statute of Marlbridge is re-enacted—"farmers shall not make waste, nor sale, nor exile of house, woods and men," &c., without license. For such waste, they shall yield *full damages*, and be punished by *amercement grievously*. But a subsequent chapter of the Revised Laws provides an action of waste, giving forfeiture and treble damages, according to the Statute of Gloucester. It has been held, that a reversioner cannot recover the land from a tenant in dower, for waste, by ejectment.

47. Only the immediate reversioner in fee, of an estate for life, can maintain an action of waste. Hence, during the continuance of an intermediate life-estate between such reversioner and the party who commits waste, the latter is not liable, and, if he die before the intermediate tenant, the action is forever gone. In New York, this rule has been changed by statute; but the reversioner recovers, without prejudice to the intervening estate. In North Carolina, an action lies at the instance

(1) Loomis v. Wilbur, 5 Mas. 13.

(2) Ind. Rev. L. 210-11.

(3) 1 Verm. L. 159; N. H. L. 189; Verm. Rev. St. 291; Md. L. 407; Wisc. Rev. St. 335; ch. 62, sec. 37.

(4) Illin. Rev. L. 237, 625.

(5) 1 Swift. 89. 519; Moore v. Ellsworth, 3 Conn. 487; Crocker v. Fox, 1 Root, 323; Rose v. Hayes, Ib. 244; Conn. St. June 6, 1840, p. 28.

(6) 2 Ky. Rev. L. 1530; Robinson v. Miller, 2 B. Monr. 287.

(a) Where a widow suffers the estate assigned for her dower to need repairs, the court will order it into possession of the next owner, for a sufficient time to make the repairs, unless she gives security. Conn. Sts. 189.

of him *in whom the right is*, against all tenants committing the waste. In Pennsylvania, a trustee in fee of the legal estate may maintain an action of waste against an equitable tenant for life.(1)

48. Tenant for life is liable to an action, for waste committed by him, though he have since assigned his estate.(2)

49. Lord Coke says, that an heir cannot have an action of waste for waste done in the life of his ancestor, nor a parson, &c., in the time of the predecessor. So if tenant for years, having committed waste, die, an action of waste does not lie against the executor, &c. But in Virginia, Kentucky, North Carolina, Delaware, Wisconsin, New Jersey, New York, Michigan, Maine and Massachusetts, statutes provide, that the heir may sue for waste done in the time of his ancestor.(a) And in Massachusetts, Maine and Michigan, an action for waste survives against executors, &c.(3)

50. In order to sustain the action of waste, the reversion must continue in the same state as when the waste was done; for, if the reversioner grant it away, or lease it for years, unless it be "*in futuro*," the waste is punishable, even though he take the whole estate back again. The same effect is produced, though he grant the reversion to the use of himself and his wife and of his heirs. The action of waste consists in *privity*.(4)

51. If tenant by the curtesy or tenant in dower assign his or her estate, and waste be done by the assignee, the heir may have an action of waste against either of such tenants, and recover the land from the assignee. In New York, it is provided, that the action may be brought against the assignee. In Delaware, the assignee of a tenant is liable. And, if the heir have also assigned, the action lies in favor of his assignee, against the assignee of the tenant, because the privity is destroyed. In other cases, the action shall be brought against him who did the waste, for it is in nature of a trespass.(5)

52. If a tenant, after assignment, continue to take the profits, he is liable for waste.(6)(b)

53. Lord Coke says, a wife, holding an estate by survivorship, shall be punished for waste done by the husband in his life, if she agree to the estate, though there hath been variety of opinions in our books.

(1) Co. Lit. 53 b, 218 b, n. 2; Paget's case, 5 Rep. 76 b; Bray v. Tracy, Cro. Jac. 688; 1 N. Y. Rev. St. 750; 1 N. C. do. 609; Woodman v. Good, 6 M. & S. 169.

(2) 1 Cruise, 90.

(3) Mass. Rev. St. 630; 1 Virg. Rev. C. 277; 2 Ky. Rev. L. 1530-1; 1 N. C. Rev. St. 610; 1 N. J. R. C. 209; 2 N. Y. R. S. 334; Mich. Rev. St. 496-7; Me. Ib. 568; Dela. Ib. 293.

(4) Co. Lit. 53 b, 54 a.

(5) Co. Lit. 54 a; Bates v. Shraeder, 13 Jolin. 260; 2 N. Y. R. St. 334; Dela. Rev. St. 293.

(6) Co. Lit. 54 a; 1 Vir. R. C. 277; 1 N. J. do. 209-10; 2 Ky. R. L. 1530-1; 1 N. C. Rev. St. 609.

(a) A *feme sole* claimed certain land by virtue of a location thereof, made to her by the proprietors; and, after her intermarriage with A, he entered upon the land, under the location, and continued in possession thereof, after her decease, as tenant by the curtesy. Her heirs conveyed their reversionary interest to B, who sued A in an action of waste. Held, A could not defeat the action, by showing that the location of the land was so defective, that it would not bar the proprietors, nor persons claiming under them; but that he was estopped to deny the title under which he entered. Morgan v. Larned, 10 Met. 50.

(b) In Massachusetts, it is held; that neither an action of waste, nor an action on the case in the nature of waste, lies in favor of an assignee of the reversion against a tenant in dower, for waste done by her assignee. Foot v. Dickinson, 2 Met. 611.

54. But an action of waste does not lie against the husband of a woman, tenant for life, after her death—the former having committed waste during her life; for he was seized only in her right, and she was tenant of the freehold. Otherwise, if she was tenant for years, because the term vested in him. So, the assignee of the estate of the husband is liable for waste, because his seizin and possession are several, and he is strictly a tenant for the life of the husband.(1)(a)

55. If tenant for life assign on condition, and the grantee do waste, and the former re-enter for condition broken; the action of waste lies against the grantee, and the place shall be recovered.(2)

56. Although the statute of Marlbridge prohibits only *farmers* from committing waste, yet a tenant is responsible for the waste, by whomsoever done, the law regarding him as having power to prevent it, while the landlord has no such power, not being on the land. The reversioner looks to the tenant, and he has a claim over, in trespass, against the wrong doer himself. Only the act of God, of the public enemy, or of the lessor himself, will excuse the lessee. He is like a common carrier.(3)

57. Lord Coke says, even an infant, and *baron* and *feme*, shall be punished for waste done by a stranger. But, although the reversioner *may* hold the tenant liable for waste done by a stranger, he may also, at his election, bring an action on the case against such stranger, for any injury in its nature permanent—as, for instance, digging up the soil. The action of waste lies against a lessee only.(4)

58. The action of *estrepement* or waste is said to be in great degree superseded by *an action on the case in nature of waste*, which has the advantage of being maintainable by any other reversioner, as well as the owner in fee. The measure of damages is the injury to the inheritance. The Revised Statutes of Massachusetts, Maine and Michigan, provide this remedy, at the election of the party injured. In Maine, the demandant in a writ of entry may recover for waste in such action.(5)

59. It is said that, except under special circumstances, there is no remedy for *permissive* waste, after the tenant's death, either in law or equity. It has also been held, that the action on the case would not lie for permissive waste. But this decision has been doubted.(6)

60. Chancery will interpose, *by injunction*,(b) to prevent waste or re-

(1) Co. Lit. 54 a; Davis v. Gilliam, 5 Ired. Equ. 308. Randall v. Cleaveland, 6 Conn. 328. (See Wilford v. Rose, 2 Root, 20.)

(2) Ib. (5) 1 Cruise, 124; 4 Kent, 81. (See 6 Conn. 328;) Mass. Rev. St. 630; Mich. Rev. St. 496; Me. Ib. 610–11, 568.

(3) Co. Lit. 54 a; Ross v. Gill, 4 Call, 252; (6) Turner v. Buck, 22 Vin. 523; 4 Kent, 78.

(a) A, and B his wife, being seized for their joint lives and that of the survivor, C took A's estate, and, living A, permitted waste. A having died, held, B could not have an action on the case against C. Bacon v. Smith, 1 Ad. & Ell. (N. S.) 345. Actions for waste may be brought by, as well as against, husband and wife. In an action of waste by a husband and wife, against the alienee of the husband's interest in his wife's land, the declaration alleged, that the reversion in fee was in the wife. Held, if this declaration was defective, in not alleging that the reversion was in the husband and wife, the defect was cured, after verdict, by the statute of jeofails. Dejaratte v. Allen, 5 Gratt. 499.

(b) In a bill for waste, a single clear instance of waste, committed intentionally, is sufficient to entitle the complainant to a continuance of the injunction, and to a decree for an account. Sarles v. Sarles, 3 Sandf. Ch. 601.

quire security against it, upon application of the owner in fee, notwithstanding there is an intermediate reversion. So, also, upon application of a remainder-man for life, though there are intermediate limitations in tail, and to trustees to preserve contingent remainders; because, although the plaintiff, even when his estate vested, would have no interest in the timber, yet he would have the benefit of the mast and shade.

61. So an injunction lies by the landlord against a sub-tenant, or in favor of an unborn child. In a suit against a tenant for life and her under-tenant, where a decree is made for an account against both; the master may, if the tenant for life request it, ascertain what amount shall be made up to her by the under-tenant.(1)

62. Chancery will interpose to prevent waste, "*pendente lite*," before any act committed, if a party manifests his intention, and asserts a right,

(1) 1 Rolle Abr. 377, pl. 13; Moor, 554; Hill, 157; Langworthy v. Chadwick, 13 Conn. 110v. on Frauds, 226, ch. 7; Perrot v. Perrot, 3 Atk. 94; Worsley v. Stewart, 4 Bro. 42. See Hilton v. Granville, 1 Cr. & Ph. 283; Sarles v. Sarles, 3 Sandf. Ch. 607; Briggs v. Parl. Ca. 377; Livingston v. Reynolds, 2 Earl, &c., 8 Eng. L. & Equ. 194.

Where there is a privity of title as between tenants for life, or years, and the reversioner it is not necessary to show irreparable injury or destruction to the estate. *George's, &c. v. Detmold*, 1 Maryland Ch. Decis. 371.

But, as between strangers or parties claiming adversely, both in trespass and waste, the injury must be shown to be irreparable. *Ib.*

The mere allegation, that the defendant is selling timber of the complainant, without further averment as to some peculiar value of the timber for some particular purpose, has been held not sufficient to warrant an injunction. *Hatcher v. Hampton*, 7 Geo. 49.

It is not necessary for a landlord to prove his title to the premises, to sustain an injunction against his tenant, for cutting and carrying away timber. *Parker v. Raymond*, 14 Mis. 535.

Where the chief object is an injunction against future waste, it is of purely equitable cognizance, and the court, to prevent multiplicity of suits, when waste has been committed, will direct an account and satisfaction for past injuries. *Ib.* *Rodgers v. Rodgers*, 11 Barb. 595.

A bill in equity was filed by tenants in fee, alleging that the defendants, confederating together, entered upon their land, cut down large quantities of wood, quarried large quantities of limestone, are continuing to cut down wood and quarry stone, and design to remove the same; and that they have instituted actions of trespass *quare clausum fregit* for the said acts, which are now depending; but not that the trespass was to the destruction of the inheritance, or the mischief irreparable, nor stating such facts, as would show that the apprehension of further acts of trespass was well founded; nor charging insolvency in the defendants. Held, an injunction would not be granted upon such a bill, to restrain further acts of trespass or waste. *Hamilton v. Ely*, 4 Gill, 34.

A bill charged with particularity that A, who was insolvent, claimed certain lands, as the purchaser, at an irregular sale of a tax collector, whose deed he had; that A was threatening to commit trespasses and waste; that he and others, acting avowedly under his authority, were making preparations with a view to their commission; that the complainants had been disturbed in the enjoyment of their property, and were likely to be more seriously interrupted; and that they were thus prevented from making the profit from their estate which otherwise they would. Held, Chancery might grant an injunction to stay trespass and waste, and might remove the cloud from the complainant's title, and direct the cancellation of the deed, especially as the deed in form was *prima facie* valid. *Lyon v. Hunt*, 11 Ala. 295.

Instances of the interference of Chancery for the purpose of enjoining waste, are as follows. Where a mere trespasser digs into and works a mine. So where a trespasser, in collusion with the tenant, attempts to cut timber. So where there is a dispute concerning boundaries, and one party is about to cut ornamental or timber trees. So where one in possession under articles is proceeding to cut timber. So where lessees are taking from a manor, bordering on the sea, stones of peculiar value. In short, in all cases of timber, coals, ores and quarries, where the party is a mere trespasser, or exceeds his limited rights; upon the ground, that the acts are or may be an irreparable damage. 2 Story, (Equ.) 244-5, sec. 929.

to commit waste.(a) So, after a decree for the sale of mortgaged property.

63. The Chancery remedy is limited to cases, in which the title is clear and undisputed.(1)

64. In Rhode Island, a writ of *estrepement*, being in the nature of an injunction, it seems, may be issued by the court or a judge, after notice to the adverse party, and the giving of a bond by the applicant. In Delaware, one having a lien upon land may have an injunction or writ of *estrepement*. So this writ lies, pending an ejectment. In Pennsylvania, a writ lies to restrain waste by tenant for life.(2)

65. In Maryland,(b) provision is made by statute for the interference of Chancery in case of waste. In Virginia, this is the only remedy. The action of waste is never brought.(3)

66. In New Jersey,(4) a statute provides for a writ of waste out of Chancery, against a tenant for life or other term. The judgment is for forfeiture, and treble damages.

67. In Massachusetts, equity jurisdiction of waste is given to the Supreme Court; and they may stay waste by an injunction.(c) The same process is provided against an owner of land who commits, or threatens or prepares to commit, waste, after the land has been attached. A similar provision in Maine. In New York, the Supreme Court has Chancery jurisdiction to enjoin against waste, where it is actually commenced or threatened. The injunction may be granted against one who colludes with the tenant to commit waste.(5)

68. Although an owner in fee cannot sue for waste, if there is an intermediate estate, yet, where timber is cut down by the tenant, the pro-

(1) *Gibson v. Smith*, 2 Atk. 182; *Kane v. Vanderburgh*, 1 John. Cha. 11; *Smith v. Poyas*, 2 Dess. 66; *Storm v. Mann*, 4 John. Cha. 21; *Tessier v. Wise*, 3 Bland, 60; *Williams*, Ib. 215. See *Stewart v. Chew*, Ib. 441; *Murdock*, 2, 461; *Hough v. Martin*, 2 Dev. & B. 379.

(2) R. I. St. 1836, 910; Dela. St. 1843,

547-8; Dela. Rev. Sts. 293; Penn. Sts. 1849, 472.

(3) 1 Md. L. 599; Rob. Prac. 560.

(4) 1 N. J. L. 209.

(5) Mass. Rev. St. 631-2; Me. Rev. St. 569; *Wilbur v. Wilbur*, 7 Met. 249; *Rodgers v. Rodgers*, 11 Barb. 595

(a) In Virginia and Kentucky, if a tenant commit waste after a suit brought against him, the sheriff shall keep the land. In Maine and Massachusetts, such tenant forfeits treble damages. In New Jersey, the court will not grant rules to stay waste, in trespass *qu. claus.* 1 Vir. Rev. C. 277; 1 Smith, 138; *Leeds v. Doughty*, 6 Halst. 198; Mass. Rev. St. 630; 2 Ky. Rev. L. 1531. Similar provisions in New York to those in Virginia, &c.; 2 Rev. St. 336. In Wisconsin, waste may be stayed pending a suit. Rev. St. 581.

Where land is sold on execution, the purchaser takes possession, and such land is redeemed; the owner is not entitled to rent or damages for waste before the redemption, but is entitled to rent for the time he was wrongfully kept out of possession after redemption. *Kannou v. Pillow*, 7 Humph. 281.

Where a party claims a right to land, by virtue of his adverse possession, without deed or an execution, he may maintain an action of waste, or trover, or an action on the case in the nature of waste, against the execution defendant, for cutting timber during the fifteen months subsequent to the sale, while he remains in possession; but not trespass, or replevin in the *cepit*. *Rich v. Baker*, 3 Denio, 79.

(b) It is no objection to the jurisdiction of the Court of Chancery of Maryland, to stay waste by a dowress, that the remedy should be sought on the equity side of the county court. *Childs v. Smith*, 1 Maryland Ch. Decis. 483.

(c) This jurisdiction applies only to cases of technical waste; not to trespasses which a court with full Chancery powers might enjoin. *Attaquin v. Fish*, 5 Met. 140. So in Maine. The jurisdiction there attaches, only where there is privity of estate. *Leighton v. Leighton*, 32 Maine, 399.

perty in it vests immediately in the owner of the inheritance at that time, and he may seize or maintain trover or replevin for it, or compel an account of its proceeds, if sold. The tenant has an interest in the timber while it remains standing—it is a part of the inheritance; but this interest is immediately forfeited by the wrongful act of severing it.(1)

69. Land was conveyed to the use of A, for life, remainder to the use of his first and other sons in tail; remainder to B for life, with like remainder to his sons. B has a son, living A, who had none, and A severs timber from the land. Held, the son of B should have *trover* for the timber, although he could not have waste, on account of the intermediate estates; and the chance of A's having a son, who would take the inheritance before the son of B, was a mere possibility, liable to be defeated by a feoffment of A, and which did not interfere with this action.(2)

70. Where there are intermediate limitations of the kind above-mentioned, and the immediate owner of the fee brings a bill in Chancery, for an account of timber cut down and sold; the court will not turn the plaintiff round to an action at law, the case being one which peculiarly calls for a discovery; nor will it order the money, paid into court, to be put out for the benefit of unborn heirs, who may afterwards have a title paramount to that of the plaintiff.(3)

71. The same rule applies, (*ante*, sec. 68,) where the timber is severed by accident; as, for instance, by a storm.(4)

72. But, where there are trustees to preserve contingent remainders, Chancery will not allow a severance of the timber, by collusion between the tenant and the immediate owner in fee, to the injury of unborn heirs.(5)

73. Nor will it allow a tenant for life, who also has the first vested estate of inheritance, to take advantage of his own wrong in committing waste, to the prejudice of intermediate contingent remainders, although at law he would undoubtedly have power to do it.

74. A was tenant for life, remainder to his first and other sons in tail, remainder to B for life, with like remainder to her sons, estates to trustees to preserve, &c., remainder to A in fee. A had no son; B had one, who died very young. A commits waste, after which, B has another son. Held, A could not have the timber cut down; nor the administrator of B's son, deceased, because he was dead at the time the waste was done; nor the other son of B, because his estate was liable to be defeated by A's having a son;(a) and therefore, that the money received for the timber should be paid into court.(6)

75. This having been done, upon the subsequent death of A, and a hearing of the respective parties who claimed the money, viz., the administrator of B's son, B's second son, and the executor of A; held,

(1) *Mores v. Wait*, 3 Wend. 104; *Bulkley v. Dolbeare*, 7 Conn. 232; *Bewick v. Whitfield*, 3 P. Wms. 267; *Richardson v. York*, 2 Shepl. 216; *Railroad v. Kidd*, 7 Dana, 250.

(2) *Uvedale v. Uvedale*, 2 Rolle Abr. 119.

(3) *Whitfield v. Bewitt*, 2 P. Wms. 240; *Lee v. Alston*, 1 Bro. Rep. 194; *Ib.* 3, 37.

(4) *Newcastle v. Vane*, 2 P. Wms. 241.

(5) 1 Cruise, 128.

(6) *Williams v. Duke of Bolton*, 3 P. Wms. 268.

(a) A better reason seems to have been, that he was born after the waste was committed.

that, inasmuch as the settlement had been wrongfully disturbed by A, the money should be restored to the same course which it would have followed had no such act been done; that B should have an interest for life, remainders in tail, and a reversion in A, according to the settlement.(1)

76. A Court of Chancery sometimes orders the cutting down of timber, upon land held by a tenant for life, for the purpose of paying debts and legacies charged upon the inheritance.

77. Devise to the testator's wife for life, remainder to A in fee, on condition of his paying legacies at certain appointed times; in default of which payment, remainder over. A filed a bill in equity, averring his desire to cut timber for payment of the legacies, and that the widow and the subsequent remainder-man connived to prevent him, in order that his estate might be forfeited by breach of condition, although he offered indemnity for any damage. The court allowed the prayer, upon his making satisfaction for breaking the ground, &c., and referred it to the Master to determine how much was needed for the object, and which part of the timber could best be spared.(2)

78. So also, where timber is decaying, a court of chancery will order it to be cut, for the benefit of a remainder-man in tail, or a remainder-man for life, without impeachment of waste—especially if such remainder-man represents himself as in necessitous circumstances. And the proceeds shall be paid over to him, and no part of them to the tenant. But enough timber must be left for repairs and *botes*, all damages compensated, and the act done under direction of the Master. And the right shall not extend to trees standing for defence and shelter of the house, or for ornament.(3)

79. In Maine and Massachusetts, any person, seized of a freehold, or of a reversion in fee or in tail, in wood-land, may petition the court to have the wood cut and sold, and the proceeds invested for the benefit of parties interested. If the property is likely to deteriorate, the court shall grant such petition, and appoint trustees for the management of the business.(4)

80. Leases for life, from very ancient times, have usually contained the clause, "*absque impetitione vasti*"—without impeachment of waste. And it seems to be now settled, that such clause not only authorizes the tenant to cut timber without incurring the statutory penalty, but vests the property of it in him, when cut or blown down. So, also, it entitles him to the materials of a *building* blown down. In other words, it gives him, in this respect, the rights of an owner in fee. But if the timber is cut by a stranger, it belongs to the reversioner.(a)

81. The words "without impeachment of any action of waste" would merely exempt the tenant from *liability to suit*. The phrase "with full

(1) Powlett v. Duchess of Bolton, 3 Ves. jun. 374; Williams v. Duke, &c., 1 Cox, 72; (Dare v. Hopkins, 2 Cox, 110.)

(2) Claxton v. Claxton, 2 Vern. 152.

(3) Aspinwall v. Leigh, 2 Vern. 218; Bewick v. Whitfield, 3 P. Wms. 267.

(4) 1 Smith's St. 134; Mass. Rev. St. 806-7.

(a) Where one had a power to lease without impeachment of waste, and a proviso was inserted in a lease made by him, that the lessee should pay so much an acre for ploughing pasture or using the land contrary to the covenants; to an action for the penalty, held, it was no defence, that the clause in the lease amounted to a license to commit waste. Bringloe v. Goodson, 8 Scott, 71.

liberty to commit waste" is sometimes used. And *voluntary waste* is often expressly excepted; in which case it has been held, that wilful waste is not excused. It has been suggested of late, that the exception applies only to houses, and not to timber; but a late case has decided, that where decaying timber is cut down by order of court, this clause entitles the tenant only to the interest of the purchase-money. So, where there is a remainder-man for life without impeachment of waste, timber cut during a prior estate vests, not in him, but in the owner of the fee.(1)

82. A lessee for years, holding under tenant for life without impeachment of waste, may lawfully commit waste. But the tenant for life cannot transfer his power, so that it may be exercised after his own death; nor, where his estate is in remainder, subject to a prior life estate, without the power, will any agreement between the two tenants for life be sustained, for committing waste before the former estate terminates.(2)

83. A tenant for life, without impeachment of waste, is not permitted to commit malicious waste, to the destruction of the estate. This is sometimes called *equitable waste*; and a court of chancery will not only prevent it by injunction, but compel restitution after it is committed.(a)

(1) 4 Kent, 77; Co. Lit. 220 a; Lewis v. Tollemache, 1 Hare, 456; Briggs v. Earl, Bowles' case, 1 Rep. 82 b; Bulkley v. Dolbeare, 7 Conn. 232; Pyne v. Dor, 1 T. R. 55; Aston v. Aston, 1 Ves. 265; 1 Cruise, 131; Wickham v. Wickham, 19 Ves. 419; Pigot v. Bullock, 1 Ves. jun. 479. See Tollemache v. Tollemache, 1 Hare, 456; Briggs v. Earl, &c., 8 Eng. L. & Equ. 194.

(2) Bray v. Tracy, W. Jones, 51; 1 Cruise, 133; Robinson v. Litton, 3 Atk. 210; Garth v. Cotton, 756.

(a) The power is considered inequitable, and therefore Chancery controls it; but still with reference to the presumed intent of the party creating it. Marker v. Marker, 4 Eng. L. & Equ. 95.

Relief is granted, where a tenant cuts down timber, for the sake of the profit to be derived from a sale, upon the same principles on which an injunction is granted to stay what is called *equitable waste*. Kidd v. Dennison, 6 Barb. 9.

Where the whole of a farm when leased for a rent, is in a wild and unsettled state, with the exception of a few acres, the parties will be held to have intended that the lessee should be at liberty to fell part of the timber, in order to fit the land for cultivation; but this right will not authorize the lessee to destroy all the timber, and thereby irreparably injure the premises, or permanently diminish their value; nor to cut trees for the profit to be derived from a sale; nor, just before the expiration of his lease, to cut down timber, upon the pretext of gradually clearing up the land and preparing it for cultivation. Ib.

So, where a widow has dower assigned to her in land, the reversion of which is divided among several, she has in general, a discretionary right to get wood for repairs, firewood, &c., from what part of the land she pleases; but, it seems, that, in an extreme case, when she acts out of mere caprice and partiality, with a view to favor one at the expense of the other, equity might interfere. Dalton v. Dalton, 7 Ired. Eq. 197.

Tenant for life, dispossessable for waste, had power to lease for 21 years, certain ancient pasture lands, which she afterwards, before any lease, had converted into garden allotments in a manner amounting to waste. The leasing power provided against "any fine, premium, or foregift being taken for the making thereof," and that "none of the lessees should be, by any clause, or words therein contained, authorized to commit waste, or exempted from punishment for waste." In a lease reciting this power, the tenant for life demised, December 13th, 1845, for 21 years from the 1st of July last, reserving a rent payable half-yearly, January 1st, and July 1st, 1846. The lessee covenanted not to break up any of the pasture land demised, "except for the purpose of carrying out the allotment system" introduced by the tenant for life. Held, such reservation of rent did not amount to a fine, premium, or foregift. Hopkinson v. Ferraud, 6 Eng. L. & Eq. 404; also, that the exception in the covenant did not amount to a license or authority to the lessee, to commit waste by carrying out the allotment system; and, if any implication could be made so as to construe that exception, as implying a permission by the lessee to do anything, it could not be inferred that it permitted him to do more than to carry out the allotment system during the life of the tenant for life, so far as she had power to permit it, and not otherwise. Ib.

84. A, upon the marriage of his son, settled an estate upon himself for life, without impeachment of waste, remainder to the son for life, &c. Afterwards, having taken a dislike to his son, A caused the house to be injured, by tearing off fixtures of various kinds, to the value of £3,000. The court ordered an injunction, and also that the damage be repaired.(1)

85. Chancery will also restrain such tenant from cutting down timber, serving for shelter or ornament to a mansion-house, or not fit to be felled—such as young saplings, or trees standing in lines, avenues, or ridings in the park, whether planted or natural.(a)

86. But, if such waste has been actually committed, Chancery will not decree satisfaction for it to the remainder-man.(2)

87. The clause “without impeachment of waste” does not justify what the law terms *double waste*.(b) Therefore, where an estate for life, with this right, is devised to be sold, the proceeds to be invested in other land, to be settled in the same way; the tenant cannot commit waste on the former, because he may do it upon the latter, and this would be double waste.(3)

88. Where a limited power to commit waste is annexed to an estate for life, the tenant will be restrained from exceeding such power; but it will be liberally construed.

89. Devise to one for life, with power to cut down such trees as four persons named should allow. These persons having died; held, the power remained, and the Court of Chancery would regulate its exercise, and refer to the Master the question what trees could properly be cut.(4)

90. A, having by will devised land to his wife for life, made this codicil—“whereas by my will my wife cannot cut any timber—now, during widowhood she may cut timber for her own use and benefit at seasonable times,” &c. Held, the wife was not restricted to the cutting of timber for her own use or for *estovers*, but might cut any kind of timber, though not saplings or sticks fit only for paling.(5)

91. While a lease may contain clauses authorizing the commission of waste; it may on the other hand contain covenants on the part of the lessee against it. Thus, if a lessee covenants not to cut, destroy, or take off more wood, &c., than is actually used on the farm, and to make

(1) *Vane v. Ld. Barnard*, 2 Vern. 738. See *Kidd v. Dennison*, 6 Barb. 9.

(2) *Downshire v. Sandys*, 6 Ves. 108; *Packington v. Packington*, 3 Atk. 215; *Ashton v. Aston*, 1 Ves. 264; *O'Brien v. O'Brien*, Amb. 107; *Tamworth v. Ferrers*, 6 Ves. 419; *Day v. Merry*, 16 Ves. 375; *Rolt v. Somerville*, 2 Abr. Eq. 759; *Cousett v. Bell*, 1 Y. & Coll. Cha. 569.

(3) *Plymouth v. Archer*, 1 Bro. R. 159; *Burges v. Lamb*, 16 Ves. 174.

(4) *Hewitt v. Hewitt*, Amb. 508; *Hewett v. Hewett*, 2 Eden, 332.

(5) *Chamberlyne v. Dummer*, 1 Bro. R. 166; *Chamberlyne v. Dummer*, 3, 549.

(a) Several persons, entitled successively to life estates limited in strict settlement, became bankrupt, and their assignees cut down timber left for ornament and shelter. Upon a bill filed on behalf of A, the then first tenant in tail in existence, who was an infant, the assignees were ordered to bring the money into court, which, with the accumulations, amounted to £26,133 2s. 10d. Two of the tenants for life died without issue; A attained twenty-one, and, being still the first tenant in tail, and entitled to the first estate of inheritance, presented a petition for payment to him of the fund and the accumulations, which were ordered to be transferred to him. *Lushington v. Boldero*, 8 Eng. Law and Eq. 265.

(b) This phrase is sometimes used in a different sense. Sec. 14.

no waste, sale or destruction; it will be waste for him to cut wood to be used in burning bricks for sale.(1)

92. In most of the States, special provision is made by statute against wanton injuries to land, buildings, trees, &c., by persons without title; and, more particularly in the Western States, against the act of firing woods and prairies, belonging either to the party himself, or to another.

CHAPTER XIX.

ESTATE AT WILL AND AT SUFFERANCE.

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|---|---|
| 1. Estate at will—definition. | 6. How terminated. |
| 2. Incidents. | 18. Notice to quit, and summary process to eject. |
| 3. Estate from year to year—notice to quit. | 22. Estate at will—how affected by the statute of frauds. |
| 5. Estate at will—whether assignable, &c. | 27. Tenant at <i>sufferance</i> . |

1. AN *estate at will*, is where one man lets land to another, to hold at the will of the lessor.(2)(a)

(1) *Livingston v. Reynolds*, 26 Wend. 115. |

(2) Lit. s. 68; 4 Kent, 109.

(a) In Iowa, (Code, 1851, ch. 78, sec. 1208,) possession of a tenant is *presumed* to be at will.

An estate at the will of the lessee is at the will of the lessor also; and *vice versa*. *Cheever v. Pearson*, 16 Pick. 271; 1 Cruise, 190. See 1 Gill & J. 360. The right to enter upon, use and possess the land of one, at the pleasure of another, is a lease at will, even though no rent is reserved, if the case shows some other adequate consideration. *Cheever v. Pearson*, 16 Pick. 271. So it is said, one placed on the land without any terms prescribed or rent reserved, and as a mere occupier, is strictly a tenant at will. 4 Kent, 112. A occupied land of B, under an agreement to pay rent; but neither the amount of it, nor the time of occupation, was agreed upon. B having notified A to quit immediately, which he did; held, an action for use and occupation would lie, without demand. *Spaulding v. M'Osker*, 7 Met. 8.

A lease made by an agent in his own name being void, a tenant entering under such a lease is a tenant at will, and as such is entitled to notice to quit before ejectment will lie against him. *Murray v. Armstrong*, 11 Mis. 209.

A parol agreement that one party should enter on the land of the other, dig ore, erect buildings, &c., and pay fifty cents a ton for all ore removed, amounts to a lease; but its duration is to be determined by the jury, who are to say whether, upon all the evidence, it was at will, or from year to year, under the instructions of the court as to what constituted a lease for a year, and what a tenancy at will. *Mooney v. Miller*, 8 Barr, 272.

A joined his fence to B's in several places, part of B's fence being on A's land, and the fence so joined was permitted to stand for seven years; then B, without notice to A, threw down the fence. Held, in an action of trespass, that A was to be considered as tenant, and entitled to notice after so long an acquiescence, and that B had no right to enter upon A's land, or from his own land to throw down A's fence. *Shean v. Withers*, 12 B. Mon. 441.

A person entering and holding land under an agreement to buy it, is at least a tenant at will. *Jones v. Jones*, 2 Rich. 542.

So, in case of occupancy under an agreement for a future sale or lease, the occupant is tenant at will; his right is defeated by demand of possession, and his estate ceases, in North Carolina, after three weeks' notice. If he disclaims the owner's title, this is a forfeiture, and no notice is necessary. *Love v. Edmondson*, 1 Ired. 152.

A parish voted that A, B and others, have liberty to erect a seminary-house on the par-

2. At common law, such estate was at the will of both parties, but neither could determine it wantonly and to the injury of the other. Thus, the lessee was entitled to *emblements*, notwithstanding a determination by the lessor, though not after a determination by himself; and the lessor to reut, though the lessee quit before rent-day. A tenant at will is also entitled to *estovers*. So, it has been held that the *manure* made upon the land belongs to him, and may be taken by his creditors.^{(1)(a)}

3. Estates at will, in the strict sense, have become almost extinguished under the operation of express statutes and judicial decisions. At first, a lease for no certain time, reserving an annual rent, was construed as for *one year*. By the modern English doctrine, the old estates at will are treated as tenancies *from year to year*,^(b) unless there is an ex-

(1) *Chandler v. Thurston*, 10 Pick. 209-10; 4 Kent, 109-10; *Staples v. Emery*, 7 Greenl. 201.

sonage land, &c., with liberty to remove it at pleasure, and that they have the land from the road, &c., for a seminary-yard. Held, the vote gave an estate at will. *Cheever v. Pearson*, 16 Pick. 266.

After a verbal agreement by A. to purchase the house of B, payment of the price and possession taken, but before a deed was given; the house was burned. A thereupon quit the land, refused a deed tendered by B immediately after the fire, and brought a suit to recover back the price, in which he prevailed. Held, A, while occupying the house, was a tenant at will, and liable for use and occupation, but not after refusing the deed. *Gould v. Thompson*, 4 Met. 224. Ejectment may be brought against a grantee, as landlord, where the grantor has remained in possession since the deed was made. *Hodges v. Gates*, 9 Verm. 178.

But it has been held, that a deed of land in fee, with a clause that the grantor should retain possession until a certain time, does not constitute the relation of landlord and tenant, so as to give jurisdiction by summary process for recovering possession, after the time has elapsed. *Sims v. Humphrey*, 4 Denio. 185.

In Vermont, where one enters upon land under an agreement to buy it, which fails without his fault, no action lies for use and occupation. *Hough v. Birge*, 11 Verm. 190. Nor is he entitled to notice to quit. *Wright v. Moore*, 21 Wend. 230.

Where one whose land has been sold on execution remains in possession an uncertain time, by consent of the purchaser, he is tenant at will. *Nichols v. Williams*, 8 Cow. 13. See 1 Swift, 91; *Watkins v. Holman*, 16 Pet. 25; *Stansbury v. Taggart*, 3 McL. 457.

Where one took possession of land under an agreement to purchase, and thus became a tenant at will, and upon his death his widow and devisee entered; held, she did not become a tenant at will, but her possession was adverse, and, being continued twenty years, gave a legal title. *Doe v. Rock*, 1 C. & Mar. 549.

(a) In England, it seems, an outgoing tenant may sell or remove the manure. *Roberts v. Barker*, 1 Cr. & Mees. 809. So in North Carolina, at any time before he quits. *Smithwick v. Ellison*, 2 Ired. 326. See *Goodrich v. Jones*, 2 Hill, 142; *Rinehart v. Olwine*, 5 W. & S. 157; *Law Rep.* (Jan. 1854,) 481. But it is held in Massachusetts, that an outgoing tenant at will of a farm has no right to remove the manure made thereon in the ordinary course of husbandry, and consisting of the collections from the stable and barn-yard, or of composts caused by the admixture of these with other substances taken from the farm; and, if he sell such manure, to be removed, to one having notice of the landlord's title, the purchaser gains no property, but is liable in trespass to the landlord for removing the manure. Otherwise, with manure made in a livery stable, or in any manner not connected with agriculture, or in a course of husbandry. *Daniels v. Pond*, 21 Pick. 367. The tenant has a qualified possession of the manure, for the purpose of using it on the farm; but a sale by him vests the right of possession in the landlord. *Ib.*; acc. *Lassell v. Reed*, 5 Greenl. 222; *Middlebrook v. Corwin*, 15 Wend. 169.

(b) It was formerly held, that a lease "from year to year, so long as both parties please," created a tenancy for at least two years. But it has been recently decided, that a tenancy from year to year lasts only so long as both parties please, and is determinable by either at the end of any year by notice. *Ring v. Argand*, Cro. Eliz. 775; *Doe v. Smarridge*, 9 Jur. 781. See *Doe v. Green*, 9 Ad. & Ell. 658.

In South Carolina, the court of magistrates and freeholders have exclusive and final jurisdiction of all cases of the holding over of tenants, and their judgment is final upon the

press grant or agreement to the contrary. With the same qualifications, a tenant from year to year has been held entitled to six months'

tenancy, the identity of the premises, and the expiration of the term and holding over of the tenant. The failure of the tenant to make a valid defence, such as tenancy in common, gives the tenant no ground for an injunction to restrain the execution of a judgment of that court. *Leonard v. McCool*, 3 Strobb. Eq. 44.

In Vermont, a tenancy by a parol lease for a term of years, which, under the Rev. Sts., (ch. 60, sec. 21,) is at first an estate at will only, by the continuance of possession and payment of rent by the lessee for several years, (in this case three years,) becomes a tenancy from year to year. *Barlow v. Wainwright*, 22 Vt. 88.

In such case, the tenant cannot, at any time during the year, surrender the premises against the will of the landlord, and thus excuse himself from the payment of rent. *Ib.*

Nor is it any defence in assumpsit for use and occupation, that he abandoned the possession. *Ib.*

Nor that the tenant, after having been in possession a few months, associated with him a partner in the business carried on by him on the premises, no new agreement being made with the landlord. *Ib.*

The parol agreement will still determine the amount of rent and the time of payment. *Ib.*

The reservation of an annual rent is said to be the leading circumstance that turns leases for uncertain terms, into leases from year to year. 4 Kent, 112; *Pope v. Garland*, 4 You. & Coll. 394.

The English rule of a tenancy from year to year is said to be, or to have been, in force in New York, but not in other States. 4 Kent, 111. Thus, where one occupied 18 years, and made improvements, but paid no rent, he was tenant from year to year. *Jackson v. Bryan*, 1 John. 322.

In Indiana it has been held, that a tenant from year to year shall have six months' notice. But the Revised Laws provide, that there shall be only three months' notice, immediately preceding the end of the year. *Jackson v. Hughes*, 1 Blackf. 427; Ind. Rev. L. 518.

In Massachusetts it was at first held, that a tenant at will was not entitled to six months' notice, but only to reasonable notice. The point was afterwards left doubtful, whether he could claim any notice; but reasonable notice was finally held necessary. In one case, it was held, that, though the tenancy was determined by the will of the lessor without notice, yet the lessee still should have a reasonable time to remove his family and effects. 4 Kent, 211; *Rising v. Stannard*, 17 Mass. 287; *Coffin v. Lunt*, 2 Pick. 70; *Ib.* 71 n.; *Ellis v. Paige*, 1 Pick. 49; acc. *Folsom v. Moore*, 1 Appl. 252.

In Maine, the statute of frauds is construed to make a parol lease strictly a tenancy at will. *Little v. Palister*, 3 Greenl. 15.

In Pennsylvania, it seems, if a tenant at will occupy more than a year, he becomes a tenant from year to year, and is entitled to three months' notice. *McDowell v. Simpson*, 3 Watts, 129. See *Cook v. Neilson*, 10 Barr, 41.

A landlord may treat a tenant holding over, after a term, as tenant from year to year, or as a trespasser, at his election. *Hemphill v. Flynn*, 2 Barr, 144.

An estate created without writing, in New Hampshire, is only at will. *Whitney v. Lovett*, 2 Fost. 10. So, though receipts for rent indicate a tenancy from year to year, or month to month. *Ib.*

In South Carolina, a tenant from year to year, holding over after the expiration of his lease at an annual rent, is entitled to three months' notice to quit, ending at the expiration of the year. *Godard v. Railroad Co.*, 2 Rich. 346.

The acts of 1808 and 1817 have not altered the common law in relation to tenancies from year to year, in respect to notices to quit. *Ib.*

Lease to A and B, partners, for one year. During the year, B left the firm, and C came in. The firm paid the rent reserved, and occupied for two years and three months after the lease expired. Held, they became tenants from year to year, and were liable for the rent of the whole year on which they had entered. *Hart v. Finney*, 1 Strobb. 250.

Lease for one year, the tenant giving his note for the rent. He occupied about two years, when the landlord demanded his note for the year's rent. The tenant refused to give it, or pay the rent. Held, a tenancy from year to year, determinable by notice to quit, but that the tenant had denied the tenancy by his refusal, and was liable to an ejectment without notice. *The State v. Stewart*, 5 Strobb. 29.

In North Carolina it is held, that, where one takes possession of land by license of the owner, for an indeterminate period, without reservation of rent, he is not a tenant from year to year, but strictly a tenant at will, and not entitled to notice to quit. *Doe v. Barker*, 4 Dev. 220. See *Brown v. King*, 5 Met. 173; *supra*, ch. 2.

In Tennessee it has been held, that a parol lease for six years could not be construed into a tenancy from year to year. *Porter v. Gordon*, 5 Yerg. 100.

notice to quit, and the landlord to the same. The notice must end at the end of the year; and it has been held that, even though the premises be burned during the year, the rent does not cease without legal notice (1)

4. But the rule of a half year's notice is not an inflexible one. Justice and good sense require that the time of notice should vary with the nature of the contract and the character of the estate. Hence, where lodgings(a) are hired, for instance, by the month, the time of notice is proportionably reduced. And, where a lessor had previously brought a suit for rent against the tenant, charging him by the month, and prevailed; this was held to be evidence of an understanding that he held by the month, and to regulate the time of notice.(2)

5. Tenant at will cannot *assign*, though he may take a *release*; but a tenant from year to year, it is said, may assign. So a sale *on execution* of the title of a debtor, who has only an estate at will, will pass no title to the purchaser upon which he can maintain ejectment. In New York and Missouri, estates at will and at sufferance are declared to be *chattel interests*, but not liable to be taken in execution.(3)

6. An estate at will may be *terminated*,(b) either by the lessor or the lessee. The former may determine the tenancy: 1. By an express declaration to that effect, either made on the land, or of which the lessee has notice.(c) So by a demand of possession. 2. By any act of ownership inconsistent with the tenancy, such as entering(d) and cutting wood, carrying away stone, or making another immediate conveyance. In the case last named, the lessee is said to become a tenant

(1) *Ellis v. Paige*, 1 Pick. 46; *Izon v. Gorton*, 5 Bing. N. 501; 4 Kent, 110-11; *Webber v. Shearman*, 3 Hill, 547; *Kingsbury v. Collins*, 4 Bingham 202. See *Alford v. Vickery*, 1 C. & Mar. 280; *Doe v. Mizem*, 2 Carr. & K. 56; *Doe v. Goldwin*, 2 Ad. & El. N. S. 143; *Doe v. Green*, 9 Ad. & Ell. 658; *Atherstone v. Bostock*, 2 Scott, N. 637.

(2) 4 Kent, 111-12; *Coffin v. Lunt*, 2 Pick. 70; *Prindle v. Anderson*, 19 Wend. 391.

(3) *Colvin v. Baker*, 2 Barb. 206; 4 Kent, 112; N. Y. Rev. Sts. 722; *Wisc. Rev. Sts.* 314; *Braythwaite v. Hitchcock*, 10 Mees. & W. 494; *Bigelow v. Finch*, 11 Barb. 498.

(a) Lodgings are defined, in reference to letting and hiring, as *part of a tenement*. They are held to require a written contract, as in any other case of agreement relating to *lands*. *Edge v. Stafford*, 1 Cr. & J. 391. So, where one took a house, partly furnished, at a certain rent, and the owner agreed to send in all other necessary furniture; held, this agreement related to an *interest in land*, and must be in writing. *Meehelen v. Wallace*, 7 Ad. & Ell. 49. But a contract with the keeper of a hotel or boarding-house, for board and lodging, paying separate prices for each, creates no *tenancy*, and gives the lodger no interest in real estate. *Wilson v. Martin*, 1 Denio, 602. But lodgers have the rights of tenants, such as the use of the door-bell, knocker, skylight of the staircase, and water-closet. *Underwood v. Burrows*, 7 Carr. & P. 26. So, it has been held, they cannot quit without notice. *Rickett v. Tullick*, 6 Carr. & P. 66.

(b) A tenant at will has an estate, which must be terminated, before he will cease to have a right of possession, begin to hold unlawfully, or be liable under the statute. *Wheeler v. Wood*, 25 Maine, 287.

Trespass to try titles will not lie against a tenant at will, as a wrong-doer, till his tenancy is determined. *Jones v. Jones*, 2 Rich. 542.

(c) The tenancy terminates *instantly*. But perhaps the tenant may enter to remove his goods, without being a trespasser. *Doe v. McKay*, 10 B. & C. 721.

(d) When a landlord, having a right of entry upon a house which his tenant has just left, finds the doors open and the house vacant, he may lawfully enter and keep possession, remove the furniture carefully, and store it safely at hand for his use. *Rollins v. Mooers*, 25 Maine, 192.

- at will or at sufferance to the landlord's grantee, who cannot treat him as a trespasser before entry or notice to quit.(1)(a)

7. The old doctrine, as to terminating the estate by the *acts* of the lessor, is still held to be in force, and not superseded by the statutory provisions in relation to *notice*.(b) Thus, a sale and conveyance by the lessor terminates the estate at will, and makes it a tenancy at sufferance, not subject to the statutory provision as to notice to quit.(2)

8. A, having leased to B at will, and the rent, payable quarterly, being in arrear, gave written notice to quit, and leased to C for years, not notifying B of such lease. Held, C might immediately bring the landlord and tenant process against B.(3)(c)

9. If a mortgagee enter, and notify the tenant of the mortgagor to pay rent to him or quit, the tenancy is terminated.(4)

10. If a lessor at will becomes insolvent, the vesting order, and notice thereof to the tenant, terminate the estate.(5)

11. On the other hand, the *lessee* may determine an estate at will, by any act of desertion, or any act inconsistent with the tenancy; as by attempting to convey in fee, assigning, or committing waste. If he assign, or make a lease, this amounts to a disseizin of the lessor, at his election; but it is held that the assignor, and not the assignee, is the disseizor, though the landlord may sue the assignee in trespass. And, by committing waste, the lessee becomes a trespasser—it being a determination of his estate. The action of *waste* does not lie against him, nor is he liable in any form for mere *permissive* waste.(6)(d)

12. A tenant at will mortgages in fee, and the mortgagee enters under a judgment upon the mortgage. The lessor may have trespass against the mortgagee.(7)

13. A conveys land to B, but continues to occupy as his tenant at will. C, a creditor of A, levies an execution upon the land himself, enters, and A points out what part of the land he wishes to have levied on, assists the surveyor, and gives no notice of B's title. Held, these

(1) 1 Cruise, 190-1; Keary v. Goodwin, 16 Mass. 1; Rising v. Stannard, 17, 288; Howell v. Howell, 7 Ired. 496; Turner v. Doe, 9 Mees. & W. 643. See Dorrell v. Johnson, 17 Pick. 263; Davis v. Thomas, 5 Eng. L. & Equ. 487.

(2) Benedict v. Morse, 10 Met. 223.

(3) Hildreth v. Conant, 10 Met. 298; Kelly v. Waite, 12, 300.

(4) Hill v. Jordan, 30 Maine, 367.

(5) Davies v. Thomas, 6 Eng. L. & Equ. 487.

(6) Warner v. Page, 4 Verm. 291; 1 Cruise, 191; Howell v. Howell, 7 Ired. 496; Chandler v. Thurston, 10 Pick. 209; Co. Lit. 57 a; Blunden v. Baugh, Cro. Car. 302; Lit. 71; Shrewsbury's case, 5 Rep. 13 b; Treat v. Peck, 5 Conn. 280; Daniels v. Pond, 21 Pick. 367; Cooper v. Adams, 6 Cush. 87.

(7) Little v. Palister, 4 Greenl. 209.

(a) But, where A conveys to B, and B to C, and A remains in possession, C may have ejectment against him without notice, though B has received rent since the conveyance to C. Jackson v. Aldrich, 13 John. 106. But a grantor, remaining in possession, is, like other tenants at will, entitled to the *crops*. Sherburne v. Jones, 2 Appl. 70. In case of a lease strictly at will, an entry by the landlord, and notice to quit given to the tenant, will terminate the lease and revest possession in the landlord, though the tenant be not actually turned out. Curl v. Lowell, 19 Pick. 25.

(b) It is said, tenancy at will seems still to retain its original character, except for the purpose of *notice*; and, with regard to this, it will be seen, that, in most of the United States, specific statutory provisions have established a definite rule, which leaves no room for construction or uncertainty.

(c) And if the tenant at will, having notice of such lease, enter and remove the crops, he is liable in trespass to a purchaser from the lessee. Ib.

(d) Nor a tenant from year to year. Torriano v. Young, 6 Carr. & P. 8; Gibson v. Wells, 1 N. R. 290. In Indiana, in case of waste, no notice to quit is necessary. Ind. Rev. L. 520.

facts constituted a determination of A's tenancy, so that B might maintain trespass against C.(1)

14. The *death* of either landlord or tenant terminates an estate at will.(2)

15. A distinction is made between a termination of the estate by *notice*, and a termination in other modes, without notice. In the former case, the tenant, it seems, becomes a trespasser by holding over, but not in the latter; as, for instance, by the *death* of the landlord, of which the tenant is not notified.(3)

16. Where a parol letting is made for a particular object, the lessee's estate will not extend beyond the time necessary for this purpose. Hence, if the tenant is put upon the land *to raise a crop*, and absconds before the crop is completed; this determines his estate.(4)

17. Although a tenancy at will may be terminated by the landlord, as above stated; yet, as to third persons, while the tenant occupies, the title is regarded as being in him. Hence, for any injury to the land, which affects merely the interest of the tenant, as by treading down the grass and breaking down a fence built by the tenant, the landlord cannot maintain an action.(5)

18. In England, by a recent statute, and in New York,(a) Pennsylvania, New Jersey, Maryland, Indiana,(b) Connecticut, (applicable to both written and parol leases,) New Hampshire, Vermont,(c) Maine and Massachusetts, and probably other States, a summary process is provided, by which a landlord may regain possession of land held by a tenant at will, after notice to quit. In Indiana, the right to *emblements* is saved. In most of these States, an accompanying provision is made with regard to the time of notice requisite before commencing the process referred to.(d) In New York and Maryland, one month's notice is required; in Pennsylvania, Delaware, Massachusetts, Indiana,(e) Michigan, Iowa, New Jersey, New Hampshire, three months'

(1) Campbell v. Procter, 6 Greenl. 12.

(2) 17 Mass. 284.

(3) Ib. 287.

(4) Chandler v. Thurston, 10 Pick. 209.

(5) Little v. Palister, 3 Greenl. 6.

(a) In this State, an exception from the process referred to, is where a term has still five years to run. St. 1840, 119.

(b) In this State, if the tenancy is from year to year, there must be three months' notice before the end of the current year, ending on the day when possession began. Rev. St. 584. To maintain the process, the plaintiff must prove that he is the landlord of the defendant, or claims under such landlord. Avery v. Smith, 8 Blackf. 222.

(c) Summary process applies in Vermont to parol leases. St. 1842. Middlebury, &c. v. Lawson, 23 Verm. 688. The lessee and the parties in possession, sub-tenants, adverse claimants, &c., may be joined in suit. Ib. The plaintiff recovers all rent due at the time of judgment. Ib. See Sts. 1850, 11; Hadley v. Havens, 24 Verm. 520.

(d) The statute (summary, &c.) does not apply, where the tenancy ends by consent, as at common law. Cooper v. Adams, 6 Cush. 87.

(e) A notice to quit must be *absolute*. A notice demanding possession, and declaring that, if possession is not given by a certain day, rent at a given rate will be claimed, is not sufficient. Ayres v. Draper, 11 Mis. 548.

An unauthorized notice to quit has been held insufficient, though afterwards ratified by the landlord. Doe v. Goldwin, 2 Ad. and Ell. (N. S.) 143.

Where a person is in possession in pursuance of an agreement for a purchase, and fails to comply with his part of the agreement, ejectment will lie against him at the suit of the vendor, without notice to quit. Baker v. Gittings, 16 Ohio, 485; Brumfield v. Brown, 7 Blackf. 142; Powers v. Ingraham, 3 Barb. 576. But see Bedford v. Thomas, 6 B. Mon. 332.

Where the defendant in ejectment was in possession under a contract for title with a third person, who was not shown to have any connection with the lessor or the plaintiff; held, notice to quit was not necessary. Petty v. Doe, 13 Ala. 568.

notice; in Connecticut and Maine, thirty days.' In general, if the rent is made payable at shorter intervals than the periods above named, the

If one who has entered as tenant, or *quasi* tenant, attempt to set up title under another, he is not entitled to notice to quit. *Meraman v. Caldwell*, 8 B. Mon. 32. *Bedford v. Thomas*, 6 B. Mon. 332.

On a sale of land on execution, the purchaser is entitled to immediate possession, and the defendant in execution, being in possession, is not entitled to notice to quit. *Snowden v. McKinney*, 7 B. Mon. 258.

The service of a notice to quit is not in law an admission of a subsisting tenancy; especially where such notice is served at the same time with a declaration and notice in ejectment. *Ib.* *Powers v. Ingraham*, 3 Barb. 576.

Lease for five years, provided that either party may terminate it, if dissatisfied, by giving the other six months' notice, and fulfilling all the other requirements of the lease till the end of the six months; with an agreement in the lease, to pay the rent by boarding the lessor and his family twenty-seven weeks each year between October and May. Held, the notice must expire at the end of a year of the term. *Baker v. Adams*, 5 Cush. 99.

If a tenant at will, whose rent is payable quarterly, quit the premises on a quarter day, without three months' notice, he will be liable *prima facie* for another quarter's rent; and, in an action therefor, the burden of proof will be on him, to show that the landlord had waived the notice, which would be a bar to the action, or that he had resumed possession under an agreement which discharged the tenant from further liability for rent. *Whitney v. Gordon*, 1 Cush. 266.

The lessor of a store gave the tenant three months' notice to quit, and, at the end of that time, upon the tenant's saying that it would be a great accommodation to him to remain longer, in order to sell off his goods, the landlord consented to his remaining. Having staid sixteen days, the landlord commenced the statutory process to eject him. Held, the notice had not been waived, and the action was maintainable. *Babcock v. Albee*, 13 Met. 273.

A landlord, to whom rent was payable monthly, gave notice to the tenant to quit "for the non-payment of rent." The same day, the tenant tendered him several months' rent; but it did not appear whether the tender was before or after service of the notice. The landlord said, he did not wish to take the money, as the tenant had made repairs, and he did not know the amount due; that the tenant need not quit, and, when he should come again, he would ascertain the balance and settle. Six or seven weeks afterwards, the landlord brings a process of ejectment. Held, under the notice, the plaintiff could recover only on the ground of non-payment of rent; that, if the tender was prior to the notice, the rent was not in arrear; if subsequent to the notice, there was a waiver of the notice, and a renewal of the tenancy. *Tuttle v. Beau*, 13 Met. 275.

If, after a notice to quit, the landlord receives rent for a period subsequent to its expiration, the notice is waived. *Collins v. Canty*, 6 Cush. 15. See *Whitney v. Swett*, 2 Post. (N. H.) 10.

In Indiana and Kentucky (and this is undoubtedly the general rule) the relation of landlord and tenant must exist, to entitle a party to notice. *Ind. Rev. Sts.* 585-6; *Shackelford v. Smith*, 5 Dana, 237.

The rule, that six months' notice to quit must expire at the end of the year, does not apply as between vendor and vendee by executory contract. *Lauders v. Beauchamp*, 8 B. Mon. 493.

Where one enters under an agreement for a lease, which he refuses to accept, he may be immediately ejected. But, if the landlord has received the rent monthly, according to the original agreement, a month's notice is requisite. *Anderson v. Prindle*, 23 Wend. 616.

The act, as to summary process, does not apply, where the landlord acquired his title under the levy of an execution, and the occupant holds under an adverse title. *Morrison v. Tenney*, 15 N. H. 126; *Hovey v. Blanchard*, 13, 145.

Where a tenant abandons the premises during an action of forcible detainer, and another party intrudes, claiming for himself, the original tenant is not liable for rent accruing after his abandonment. *Newman v. Mackin*, 13 S. & M. 383.

In all cases, where the landlord wishes to avail himself of the provisions of the Rev. Sts. of North Carolina, (c. 31, sec. 51,) requiring bonds from tenants refusing to surrender possession, &c., he must not only state the lease, and that the term has expired, but must also set forth in his affidavit, explicitly or in such a manner that the court may necessarily and fairly draw the inference, that the tenant, after the term expired, had refused to surrender the possession. *Phelps v. Long*, 9 Ired. 226.

Where the landlord obtains possession by summary proceedings, which are reversed on *certiorari*, the tenant is not entitled to restitution, if his term has expired. *Chretien v. Doney*, 1 Comst. 419.

A court of equity has not jurisdiction to stay summary proceedings, under the statute of New York, (2 Rev. Sts. 511,) by a landlord to eject a tenant holding over after the ter-

time of notice is reduced accordingly. Where the rent is unpaid, only seven days' notice is required in New Hampshire, if the rent is payable at shorter intervals than three months; fourteen in Massachusetts; thirty in Maine.(1)

19. In Ohio, it is said, nothing is settled on the subject of notice. In ejectment against a tenant, there must be ten days' notice before commencement of the term at which the appearance is to be made; and, in the process of forcible detainer, ten days' notice before suit brought. It is intimated, that this is the only required notice to quit. But the notice must expire before or at the time when the period designated ends. If the tenant enter upon a new one, he shall hold till the end of it. The pay day or rent determines the length of the period.(2)

20. In South Carolina, where there is a lease or demise in writing, for one or more years, or at will, after a determination of the estate and a written demand, the lessor, after ten days, may have a summary process to obtain possession, against either the lessee, or his sub-tenant.(3)

21. It is said that in New York, the statute, providing summary process against tenants, does not provide for any notice to a tenant *from year to year*. Hence he may be turned out without notice. The act does not apply to a tenancy created *by operation of law*.(4)

22. The resolutions of the courts, turning estates at will into tenancies from year to year, though founded in equity and sound policy, are said to be a species of *judicial legislation*; and would seem to be opposed by the English statute of frauds, which was long subsequent to the introduction of this tenancy, and which declares "all leases, estates, or uncertain interests in land, made by parol, to have the force and effect of estates at will only, and not in law or equity to be deemed or taken to have any other or greater force or effect, excepting, however, leases for not more than three years, on which a rent is reserved, amounting to two-thirds of the full improved value." "The English decisions,"

(1) 4 Kent, 113; 1 Steph. 474-5; Iowa v. Tarbox, 20 Conn. 510; Smith v. Rome, 31 Code, ch. 78, s. 1209; Ind. Rev. Sts. 584; Maine, 212; Preble v. Hay, 32. 456; Falkner v. Beers, 2 Dong. 117; Chamberlin v. Brown, 285; 1 Swift, 91; N. H. L. 1831, 22-4; Ib. 120, n.; Buck v. Binninger, 3 Barb. 391; Prindle v. Anderson, 19 Wend. 391; Conn. Sts. 1838, 399; Davis v. Thompson, 13 Maine, 209; White v. Bailey, 14 Conn. 271; Anderson v. Critcher, 11 G. & J. 450; Mich. Rev. Sts. 14; N. H. Rev. Sts. 424; Me. Rev. Sts. 393; N. Y. Sts. 1842, 293; 1849, 291; N. J. Sts. 1839, 104; Me. Sts. 1853, 35; Woodman v. Ranger, 30 Maine, 180; Quinebaug, &c.

(2) 1 Md. L. 126; Walk. Intro. 280.

(3) Brev. Dig. 16.

(4) Nichols v. Williams, 8 Cow. 13; Evertson v. Sutton, 5 Wend. 281.

mination of his term. If the tenant has sustained injury by the proceedings, he has an adequate remedy at law, either by writ of restitution from the Supreme Court, or by action on the covenants of his lease. Smith v. Moffat, 1 Barb. 65.

Under the Missouri act concerning landlords and tenants, the landlord is entitled to his action for possession against the tenant, or other person in possession, and cannot be deprived of his remedy by a transfer of possession, or by an abandonment by his tenant and the intrusion of a stranger. Will v. Peters, 11 Mis. 395.

Chancellor Kent remarks,(a) "have never alluded to this exception, but have moved on broader ground and on general principles, so as to render the exception practically useless."(1) The exception is dropped in the statute of frauds of Massachusetts, New York, Maine, New Hampshire and Vermont, but retained in Missouri, Indiana, Georgia, South Carolina, New Jersey, Michigan, and in North Carolina(b) and Pennsylvania, (without reference to the amount of rent reserved.)(2)

23. In Illinois, New York,(c) Alabama, Rhode Island, Tennessee, Virginia,(3) and in South Carolina and Missouri,(4) as the general rule, parol leases for more than one year are void for any longer term. Similar provision is made in Kentucky. But it is there held, and such undoubtedly is the settled general rule, that the statute does not render the lessee a trespasser. The rent reserved may be the measure of compensation for use and occupation, for which an action or a distress will lie. And, it is said, one entering under a parol lease for five years, may retain possession against any process known to the law.(5)(d)

24. In Connecticut,(6) the only statutory provisions are, that no action shall be brought upon a parol contract for the sale of lands, &c.; and that no lease shall be valid for more than one year, against any but the lessor and his heirs, unless *written*, &c., and recorded.

25. In Massachusetts, the court, in one case, founded their strict construction of the statute of frauds—differing from that given to the English statute—upon the consideration that the excepting clause contained in the latter is wanting in the former.(7) But in another, Judge Putnam strongly contends that this is an unauthorized construction. According to him, the statute of frauds does not pretend to describe the incidents of an estate at will; but only provides that parol leases shall have the effect of leases at will,—meaning the effect of such leases, as construed by judicial decisions. And he urges the adoption of the rule established in these decisions, by weighty considerations of public policy as to agricultural tenants.(8)

26. In Virginia, leases of lands or lots, containing no stipulation to the contrary, if made from year to year, terminate with the current year. In a city, borough or incorporated town, three months' in the country six months' notice is required before the end of the year.

(1) 1 Pick. 46; 4 Kent, 113-14.

(2) Purd. Dig. 681; 1 Smith's St. 288-9; 1 Vt. L. 188; N. H. L. 1829, 505; Mass. Rev. St. 408; 1 N. J. Rev. C. 151; Misso. St. 284; Mich. L. 116-17; Ind. Rev. L. 269; Prince, 914; 1 N. C. Rev. St. 290; Briles v. Pace, 13 N. C. 279.

(3) 1 Brev. Dig. 372; Illin. Rev. L. 313; S. C., St. Mar. 1817, p. 35; Aik. Dig. 207; R. I. L. 366; 1 Vir. Rev. C. 15; Tenn. St.

1801, ch. 25; Porter v. Gordon, 5 Yerg. 102; 2 N. Y. Rev. St. 134.

(4) Misso. St. 117; Purd. Dig. 681.

(5) 1 Ky. Rev. L. 734; Roberts v. Tammel, 3 Mon. 251; Calvert v. Simpson, 1 J. J. Mar. 548; 1 Swift, 260; Gudgeon v. Duval, 4 J. J. Mar. 230.

(6) Conn. St. 262, 350.

(7) 1 Pick. 46.

(8) 2 Pick. 72-5-8, n.

(a) The court in Massachusetts, as will be presently seen, (*infra*, sec. 25,) take a different view.

(b) All parol leases for mining purposes are void. Briles v. Pace, 13 N. C. 279.

(c) Whether a parol lease for a year, to commence *in futuro*, is valid, see Creswell v. Crane, 7 Barb. 191; Young v. Duke, 1 Seld. 463.

(d) In New York, a parol lease for more than a year is void. But, if the rent is to be paid monthly, and the tenant enters, the contract is in this respect a binding one. Prindle v. Anderson, 19 Wend. 391. So, a parol lease for four years has been held so far valid, as to support a distress for rent. Edwards v. Clemons, 24 Wend. 480.

Where a time certain is fixed, no notice is necessary. In Maryland, it is provided, that no conveyance of an estate *for more than seven years* shall be valid, unless made in writing, sealed, &c. This seems to be the only statute which bears upon the subject of estates at will.⁽¹⁾ In Delaware,⁽²⁾ every lease, which specifies no certain term, is for a year, or from year to year, unless the property has been usually let for a less term. A tenancy will not be construed as *purely at will*, "where it can inure or be construed as being from year to year;" but the former requires three months' notice to quit. A lease can be good only for a year, unless made by deed. In case of a demise for one or more years, unless the landlord or tenant give notice to determine three months before the end of the term, it shall be renewed for one year.

27. Tenant *at sufferance* is one that comes into the possession of land by lawful title, but holdeth over by wrong after the determination of his interest.^(a) He has only a naked possession, and no estate which he can transfer or transmit, or which is capable of enlargement by release; for he stands in no privity to his landlord, nor is he entitled to notice to quit; and, independent of statute, he is not liable to pay any rent. He is a *wrong-doer*, and holds by the *laches* of the landlord, who may enter, using no more force than is necessary, (it seems,) and put an end to the tenancy when he pleases, or bring ejectment; but, before entry, cannot maintain trespass. In Ohio, it is said, though such occupant is not liable to rent, *as such*, he might be liable in an action for use and occupation.⁽³⁾

(1) 1 Maryl. L. 126; Va. St. 1840-1, 76-7. 2 S. & R. 480; *Overdeer v. Lewis*, 1 Watts & S. 90; *Clapp v. Paine*, 18 Maine, 264; (2) Del. St. 1829, 286, 368. Rev. St. 366. *Jones v. Muldrow*, 1 Rice, 64. See *Pender-Mass.* 1, 17, 282; *Walk.* 280-1; *Mayo v. Fletcher*, 14 Pick. 525; *Duncan v. Blachford*, 1 Wood, 25 Maine, 287.*

* Upon the point, whether the landlord is justified in using force to regain possession, there seems to be some doubt. He undoubtedly thereby subjects himself to indictment for breach of the peace, and the only question is, whether the facts would furnish a justification for an action of trespass against him. See 4 Kent, 118, n. & auths. *Beecher v. Parmelee*, 9 Verm. 352.

In a late English case, it is held, that the landlord cannot regain possession by force. *Newton v. Harland*, 1 Man. & G. 644; 1 Scott, N. 474. And, it seems, such re-entry does not terminate the estate. *Ib.* In case of a lease for a year, soon after the end of the year, the landlord removed the tenant's goods without notice. Held, he was not liable in trespass, unless he used more force than was necessary, or committed wanton injury. *Overdeer v. Lewis*, 1 W. & S. 90.

In Maine, after the expiration of a written lease, no notice to the tenant is necessary for the purpose of terminating the tenancy. *Preble v. Hay*, 32 Maine, 456. Under the statutes of Maine, a tenant holding over by consent, after the expiration of the term, is a tenant at will; and is liable for rent only so long as he occupies. *Kendall v. Moore*, 30 Maine, 327. In Maine, where the occupant of land has holden, under a written lease, for one year, and holden over for nearly two years, and neglected to pay any rent; his right of possession will terminate in thirty days after written notice to quit, and he will be liable to the process of forcible entry and detainer, under Rev. Sts. c. 28, sec. 5. *Wheeler v. Cowan*, 25 Maine, 283.

In Delaware, a tenant under a written lease, holding over, continues, without notice to quit, to hold under its terms. *Jackson v. Patterson*, 4 Harring. 534. A tenant for years, who remains in possession after the expiration of his lease, is liable for the same rate of rent as that reserved under his lease. *Baker v. Root*, 4 McLean, 572. Whether a tenant at sufferance in Massachusetts is liable to pay rent, *quære*. *Delano v. Montague*, 4 Cush. 42. At the expiration of a lease for a definite period, the lessor may bring ejectment, though he has given notice to quit in three months. *Evans v. Hastings*, 9 Barr, 273.

(a) He is sometimes called tenant at will. 4 Kent, 114 n.

28. In New Jersey, it is held,(1) that, if a tenant for a fixed term hold over with the lessor's consent, he becomes a tenant from year to year. This consent may be express or implied; but it can be inferred only from acts; not from mere silence and inaction. Thus, where the lease was for a year, and the tenant held over for two years, held, ejectment would lie against him without notice.

29. So in New York,(a) a tenant for a year, who holds over without permission of the landlord, is liable to the summary process for obtaining possession, without having received a *month's* notice to quit. He is not a tenant *at sufferance* within the statute. Although the landlord's assent to his holding over may, it seems, be presumed from mere lapse of time, yet it was held that three months and twelve days was not a sufficient period for this purpose, more especially as the landlord had endeavored to regain possession without suit.(2)

30. In case of a verbal lease for a certain term, the tenant agreeing to quit at any time within such term, if the premises shall be sold; he becomes a tenant at sufferance by remaining in possession after a sale, and is liable to the *landlord and tenant process* without notice to quit.(3)

31. So the sale of land, mortgaged with power to sell, divests the mortgagor of all right and interest, and if he afterwards continue in possession, he is a tenant at sufferance.(4.)

32. It has been held, in Massachusetts, that under sec. 26, c. 60, of the Revised Statutes, a tenant at sufferance is not entitled to notice to quit, but, if he hold possession unlawfully, by force, is immediately liable to the process of forcible entry.(5)

33. After the expiration of a lease for years, the agent of the lessor went upon the land, and cut trees by his order and for his use, but the lessee continued to occupy, cut wood, and ploughed the land. The tenant was notified to quit at the end of the term. In an action of trespass against him for an injury to the soil; held, the above notice, though not requisite to determine the lease, showed the lessor's intent in entering by his agent, and that such entry was sufficient to sustain the action.(6)

34. Tenant at sufferance must be one who came to his estate by *act of party*. If one coming to an estate by *act of law* hold over, he is an *intruder*, *abator*, or *trespasser*. So, where one occupies land together with the owner, he cannot be a tenant at sufferance; for if there be no agreement between them, the legal possession is in him who has the right; and if there is an agreement, this negatives a *sufferance*.(7)

35. By St. 4, Geo. II., c. 28, and 11 Geo. II., c. 19, if a tenant hold over after demand and notice in writing to quit, or after he has himself

(1) *Den v. Adams*, 7 Halst. 99.

(2) *Rowan v. Lytle*, 11 Wend. 616.

(3) *Hollis v. Pool*, 3 Met. 350.

(4) *Kinsley v. Ames*, 2 Met. 29.

(5) *Ib.*

(6) *Dorrel v. Johnson*, 17 Pick. 263.

(7) 4 Kept. 115; *Johnson v. Carter*, 16 Mass. 446. In North Carolina, any particular tenant, holding over, comes under the law pertaining to landlords. *Montgomery v. Wymms*, 4 Dev. & B. 531.

(a) In this State, the summary process is applied to tenancies at will and sufferance, to cases of default in payment of rent, of discharge under the insolvent laws, and sale of the tenant's estate on execution. Sts. 1849, 291.

signified his intention to quit; he is liable for double rent. These statutes are substantially re-enacted in New York, Delaware, South Carolina, and Arkansas, (where 30 days are allowed,) but not generally adopted in the United States.(1) In Illinois and Missouri, if tenant for life or for years hold over after notice from the landlord, he is liable for double the *yearly value*; if after notice by himself of an intention to quit, double the rent reserved. And, in Missouri, there shall be no relief in equity.(2)

36. In New York, if guardians and trustees to infants, or husbands seized "*jure uxoris*," or others having estates determinable upon lives, hold over, they are trespassers, and liable for the full profits. There is a similar provision in England, by St. 6 Anne, c. 18.(3)

37. The same process, in general, lies against tenants at sufferance as against tenants at will.(a) Or the landlord may re-enter, without force.(4)

38. In South Carolina a statute provides, that all written leases and agreements shall terminate at the end of the time specified therein.(5)(b)

(1) 4 Kent, 115; Ark. Rev. St. 520; Dela. St. 1829, 368; S. C. St. 1808; *Reeves v. M'Kenzie*, 1 Bai. 497. See *Robinson v. Leeroyd*, 7 Mees. & W. 48.

(2) Illin. Rev. L. 675; Misso. St. 376-7.

(3) 4 Kent, 115, 6.

(4) 4 Kent, 116.

(5) S. C., Mar., 1817, p. 35.

(a) In England, a similar process is provided by a late act, 1 & 2 Vict. 74. In Indiana, the process does not apply to tenants at sufferance.

(b) In the same State, it is said, a tenant holding over after his lease expires, is liable for double rent. 4 Kent, 117, n. In Indiana, the summary process provided against tenants at will lies against a tenant for a term certain, without notice. Rev. St. 585-6.

CHAPTER XX.

USES AND TRUSTS. USES PRIOR TO THE STATUTE OF USES.

- | | |
|---|---|
| 1. Origin.
3. Nature and definition of.
7. The three incidents of.
11. Who might be seized to. | 12. How distinguished from legal estates.
23. Evils and mischiefs of, and statutes to prevent. |
|---|---|

1. HAVING treated of *legal* estates, we come now to consider *equitable* estates, or *uses* and *trusts*.^(a) At an early period a practice arose, in England, of one person's conveying lands to another, with a private agreement that the latter should hold the lands for the benefit and profit, of the feoffor; or of a third person. The practice did not become general till the time of Edward III., when it was resorted to by the churchmen to evade the statutes of mortmain, and enable them to receive the rents and profits of lands, which those statutes prohibited them from receiving and holding in their own names. Such a conveyance, made nominally to one person, but for the benefit of another, vested the legal estate in the former, and in the latter what the law termed a *use*.

2. A use corresponds to the *fidei-commissum* of the civil law. Under that system, there were many persons whom the law did not allow to be heirs or legatees. It became customary, therefore, for a testator, who desired to make provision for such persons, to constitute by will some *capable* person as his heir, adding a request that he would convey the estate to the intended object of his bounty. The latter, however, had only a *jus precarium*, or a right depending on courtesy and entreaty, and not a strictly legal claim. But, after the law had continued in this state for several centuries, the Emperor Augustus first, and afterwards Justinian, introduced regulations which placed the *fidei-commissum* upon a legal foundation; the former, by giving jurisdiction of it to the consuls and the prætor, (who was thence called *fidei-commissarius*), and the latter, by requiring an heir, supposed to be chargeable with such trust, to take an oath that he was not, or else to execute it.

3. In the early age of uses, the party beneficially interested, called *cestui que use*, like the Roman *hæres fiduciarius*, had no legal, but only a *precarious* right. But at length, to protect the rights of the clergy, who were chiefly interested in trust property, the clerical chancellors assumed jurisdiction of the subject; and, in the reign of Richard II., John Waltham, Bishop of Salisbury and Chancellor, for the first time issued a writ of *subpœna* returnable in Chancery, whereby the party charged with a trust was compelled to appear, and answer upon his oath the allegations made against him. This form of proceeding, being contrary to the spirit of the common law, became very obnoxious; and, in successive reigns, petitions against it were presented to Parliament, but without success; till, in the reign of Henry VI., it was provided, that no *subpœna* should issue, until the party applying for it had given se-

(a) Legal estates may be described, as those which are fully recognised, protected and enforced in courts of law; while equitable estates, for the most part, require an appeal to courts of equity, or those having equitable jurisdiction.

curity to pay, if he should fail in the suit, all damages and expenses incurred by the defendant.

4. Lord Bacon, in defining a use, says, "it is no right, title or interest in law,"—neither *jus in re* nor *ad rem*, neither an estate nor a demand; but something unknown to the common law, and for which therefore it furnished no remedy.(1)

5. He proceeds to say, that a use is "*dominium fiduciarium*," an ownership in trust; and therefore a use, and an estate or possession, differ rather in reference to the forum which takes cognizance of them, than the nature of the thing,—one being in court of law, the other in court of conscience.

6. A use was no property at law, because it arose from a mere declaration, and not from livery of seizin, which was absolutely necessary to create a freehold estate. Thus, it was very early held, that if A enfeoffed B to the use of himself, A, the feoffor, should have nothing, at law, against his own feoffment. So if the *cestui que use* entered upon the land, the feoffee to use might have an action of trespass against him; while, if the latter entered and ousted the former, he had no remedy at law, but his only redress was in Chancery. The *cestui*, although usually in possession, was a mere tenant at sufferance, and, if he made a lease, the lessee might plead that he had no estate in the land.(2)

7. Chancery at first interfered in favor of a *cestui que use*, only by compelling the feoffee to pay over the profits to him. But afterwards it proceeded to require, that the feoffee should convey the land to the *cestui*, or such person as he should select; and also defend the title against any adverse claimant. Hence it was said, that the three incidents of a use were *pernancy of the profits, execution of estates, and defence of the land*.

8. It was still held, however, that the land was subject to all liabilities and incumbrances in the hands of the feoffee, as if he were the only party interested; as, for instance, to dower and forfeiture. And the *cestui's* right in equity was held to be not *issuing out of the land*, like a rent or right of common, but *collateral to it*; and therefore not chargeable upon the land, into whose hands soever it might pass, but only by reason, and during the continuance, of *confidence in the person and privity of estate*.(3)

9. *Confidence in the person* at first extended only to the original feoffee; and it was held, that even his heir, after his death, was not liable to the use in Chancery, but could only be charged by a bill in Parliament. But, as early as the reign of Henry VI., it was settled that the liability extended not only to the original feoffee, but to all who came to the estate in the *per*, either *without consideration*, or *having notice* of the use. Thus, an heir of the feoffee was charged with the use. So a purchaser from the feoffee, if he either paid no consideration and had no notice, or if he paid a consideration and had notice.(4)

10. The requisition of *privity of estate* demanded, in order to a continuance of the use, that there should be not merely possession of the same land, but a continuance of the same estate in that land, which was

(1) Chudleigh's case, 1 Rep. 140 a.

(2) 4 Edw. IV., 3; 1 Rep. 140 a.

(3) 1 Rep. 122 a; Dalamere v. Barnard, Plow. 352; Dillon v. Fraime, Poph. 71.

(4) Keilw. 42; Bro. Abr. Feoffment at Use, pl. 10; Chudleigh's, 1 Rep. 122 b; Gilb. 178—9; 4 Pick. 71.

held by the original feoffee. Hence, a person holding the land, but not claiming in the *per*, even though he took with notice, was not chargeable; as, for instance, a disseizor, the lord holding by escheat, a tenant by the curtesy, or tenant in dower; all of whom claimed by a title paramount, and not the same estate with the feoffee.(1)

11. Any person, who was capable of taking lands by feoffment, might also be a feoffee to uses. And even those who were legally disabled to bind themselves, as infants and married women, if enfeoffed to uses, would be compelled in Chancery to execute them; because such persons might inherit from a feoffee, and would then clearly be chargeable; and the execution of the use was deemed to be made *by the feoffor*, through his agent the feoffee. But a corporation could not be seized to uses; not being subject to any compulsory Chancery process, and being supposed, as a matter of course, to hold to its own use.(2)

12. It was remarked by Lord Bacon, "uses stand upon their own reasons, utterly differing from cases of possession;" and the remark is illustrated by the following rules and principles.(3)

13. A use being recognized only in Chancery, which was governed to a great degree by the rules of the civil law, it was held, conformably to one of those rules, "*ex nudo pacto non oritur actio*,"—that no use could be created without a good or valuable consideration; for otherwise it was *donum gratuitum*. But this principle seems to have been applicable only to such conveyances as did not carry with them a change of possession, such as a covenant to stand seized, or bargain and sale, which were mere *contracts*.(4)

14. In other particulars, also, a use was not subject to the rules of the common law. Not being an *estate*, it was exempt from the burdens and incidents of feudal tenure. Thus, it was not forfeitable for crimes. For the same reason, it was not *extendible* by process of law; and, being neither a chattel nor hereditament, was not assets to the executor or the heir. So there was neither curtesy nor dower in a use, because the *cestui* had no legal seizin.(5)

15. A use, though held to be a mere right, was still, unlike other *choses in action*, subject to alienation; because, as no action at law lay to enforce it, the mischiefs of *maintenance* could not arise from such transfer.(6)

16. A use might be transferred by any deed or writing, and without livery of seizin, of which, from its very nature, it was of course not susceptible.

17. Contrary to the rule of the common law, a use might be declared to a person who was no party to the deed which created it.(7)

18. St. 1 Rich. III. ch. 1 empowered a *cestui* to alienate the legal estate without consent of the feoffee. This act was passed to prevent feoffees from entering upon the land, after a transfer by the *cestuis*, which had often previously been done.(8)

19. A use might be limited without those technical words of limitation which are necessary in a common law conveyance. Thus, a fee-

(1) 1 Rep. 139 b, 122 a.

(2) Bac. Read. 58; 4 Kent, 286; Plow. 102.

(3) Bac. Law Tracts, 310.

(4) Bac. Read. 13; 4 Kent, 286.

(5) Co. Lit. 272 a; 1 Rep. 121 b; Co. Lit. 374 b.

(6) Bac. Read. 16.

(7) Read. 14.

(8) 1 Cruise, 270.

simple would pass without the word *heirs*. So, a freehold might be limited to commence *in futuro*; or a contingent freehold remainder, upon a precedent estate less than freehold, because the freehold estate of the feoffee was sufficient to support such remainder.(1)

20. A use might be so limited as to be *revocable* by the will of the grantor, and give place to such new uses as he should appoint; or it might be so limited as to change from the original *cestui que use* to another person, upon the happening of some future event; even though the first limitation were in fee, and, therefore, in case of a legal estate, would preclude any further disposition. Thus, the limitation might be to A and his heirs till B should pay him such a sum, then to B and his heirs. The reason of this distinction was, that a legal estate, being created by livery, could be defeated only by the corresponding act of entry; and a charge required a corresponding discharge; while a use, arising from a mere declaration, was subject to be changed in the same way.(2)

21. A use was devisable, though lands at that time were not; and this was one reason for the large number of limitations to uses. But the devise of a use by a married woman was, in a very early case, held void even in Chancery.(3)

22. Uses, though differing in most points from legal estates, were subject to the same rules of descent.(4)

23. The doctrine of uses, as above described, although productive of some convenience, in enabling persons to convey their lands with less restraint and technicality than they could otherwise do, was found to open a door for very great and serious mischiefs. Creditors were defrauded by secret conveyances; husbands were deprived of curtesy, and wives of dower; and titles became so private, variable and confused, that it was difficult for a legal claimant of land to determine against whom he should maintain his action. To remedy these and the like evils, several successive statutes were passed, from the reign of Edw. III. to that of Henry VII., subjecting uses to legal process for the debts of the *cestui*, and to the feudal incidents and exactions of wardship and relief, where the *cestui* died without making a will.(5) These statutes, however, proved ineffectual to remedy the evils complained of. To avoid the feudal burdens consequent upon descent, devises became mischievously frequent. At length, after an unsuccessful attempt four years previously by the king, to procure the passage of such a law, the statute of uses,—27 Henry VIII. c. 10,—was enacted, with the title of “an act concerning uses and wills.” This act will be considered in the next chapter.

(1) Shelley's case, 1 Rep. 101 a, 135 a.

(2) 1 Cruise, 368; Bro. Abr. *Feoffment* at 18 Edw. IV.

Use, 30; Bac. Read. 18.

(3) Bac. Read. 20; 1 Rep. 123 b; Mich

18 Edw. IV.

(4) Co. Lit. 14 b; Gilb. 17.

(5) 1 Cruise, 369.

CHAPTER XXI.

USES AND TRUSTS. STATUTE OF USES, CONSTRUCTION AND EFFECT THEREOF.

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| <ol style="list-style-type: none"> 1. Terms of the statute. 2. Adopted in the United States. 3. Instantaneous seizin of trustee. 4. Who may be seized to uses. 7. What estate may be held to uses. 9. There must be a <i>cestui</i> "in esse." 10. What estate a <i>cestui</i> may take. 12. Feoffee and <i>cestui</i> must be different | <p>persons; construction, where they are the same.</p> <ol style="list-style-type: none"> 14. Exceptions to the rule. 15. There must be a use <i>in esse</i>. 16. <i>Actual seizin</i> vests in <i>cestui</i>. 17. Estate of feoffee will not merge. 20. Limitations to uses, how far subject to common law rules. 22. Implied and resulting uses. |
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1. STATUTE 27 Henry VIII., c. 10, called *the Statute of Uses*, and referred to at the end of the last chapter, recites, that by the common law, lands could not be passed by will, but only by livery of seizin; but that divers subtle practices had been introduced, in the form of fraudulent conveyances and assurances, and of last wills, whereby heirs were disinherited, lords deprived of their dues, husbands and wives of curtesy and dower, and perjuries committed. The statute then proceeds to enact, that where any person was or should be seized of any honors, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any person or body politic; the latter should have the legal seizin and possession, nominally given to the former, and corresponding to the use, trust and confidence held previously to the statute in lands so limited; and, where lands were limited to several persons to the use of a part of them, the latter alone should have the seizin and possession.

2. The English statute of uses is almost universally adopted in this country. It is substantially re-enacted in Illinois, Missouri and South Carolina. But in Ohio, it is said not to be in force.(1)(a)

3. Since this statute, and conformably to its intent, one person, taking lands to the use of another, gains only an instantaneous seizin, which subjects them to no incumbrances in his hands; but the legal estate vests immediately in the *cestui*.(2)

4. The same persons may be seized to uses now, that could have been so seized before the statute.

5. In England, the king or queen cannot be seized to uses. Thus, where a man received a fine of lands to the use of the conusor, after the former had committed treason; the *cestui* then conveyed to a third person, and the conusee was afterwards attainted; it was held, by very distinguished lawyers, that the queen (Elizabeth) would hold the lands

(1) Illin. Rev. L. 130; Misso. St. 119; 2 Brev. Dig. 313; French v. French, 3 N. H. 256; Walk. Intro. 310; Thompson v. Gibson, 2 Ohio, 339; Hefelstine v. Garrard, 7, 270. (2) 1 Cruise, 375; Brent's case, 2 Leon. 18.

(a) In Virginia, it is said, under the statutes of 1792, a use is *executed*, only in deeds of bargain and sale, lease and release, and covenants to stand seized. 1 Lom. Dig. 188. Whether the statute is in force in Vermont, *quæ*. Williston v. White, 11 Verm. 40.

by forfeiture, clear of the use. The queen, however, relinquished them to the *cestui*.(1)

6. Under the words of the statute, "any person or persons," a corporation cannot be seized to uses, nor an alien. And where lands are conveyed to a citizen and an alien to the use of another, the share of the alien shall be forfeited.(2)

7. Under the word *seized* in this statute, a person may hold any estate of freehold to uses. If the estate is less than a fee-simple, the use will continue while the estate lasts, but no longer. Thus it is said to be now settled, though formerly doubted, that a tenant in tail may be seized to uses. If the use is in fee, it is a fee-simple, determinable upon the death of the tenant in tail without issue. So, a tenant for life may be seized to a use, which will terminate at his death.(3)(a)

8. Under the words of the statute, any kind of real property, whether corporeal or incorporeal, in possession, remainder or reversion, may be conveyed to uses, provided the estate is in the ownership of the grantor at the time of conveyance. And, if the estate is a rent, it may be so limited, though created *de novo* by the conveyance.(4)(b)

9. A use requires a *cestui in esse*, and cannot therefore take effect, if limited to a person not *in esse*, or an uncertain person.(5)

10. A *cestui* may take any estate known to the law.(6)

11. All persons may be *cestuis que use*, who are capable of holding lands at common law. Corporations are expressly named in the statute.

12. In general, the statute of uses is not applicable, unless the feoffee to uses and *cestui* are different persons. Where the same person is both feoffee and *cestui*, he will never take by the statute, except there be a direct impossibility or impertinency for the use to take effect by

(1) Pimble's case, Moo. 196; Co. Lit. 12 a, Fox v. Phelps, 20 Wend. 437; Payne v. Sale, 2 Dev. & B. 455.

(2) Bac. Read. 42, 57; King v. Boys, Dyer, 283.

(4) Yelverton v. Yelverton, Cro. Eliz. 401; 22 Vin. 217; Read. 43.

(3) Jenkins v. Young, Cro. Car. 231; Read. 57; Plov. 557; Co. Lit. 19 b; 1 Cruise, 376; Dyer, 186 a; Crawley's case, 2 And. 130;

(5) 1 Cruise, 380.

(6) Ib.

(a) On the other hand, if the party seized to uses takes a fee, the *cestui* may do the same without words of inheritance. Devise to A and B, and their heirs, to the use of C for life, after his death, to the use of D and E, as tenants in common. Held, D and E took a fee-simple. Knight v. Selby. 3 Man. & G. 92.

If one take an estate *in trust* for another and his heirs, the legal estate of the trustee is commensurate with the equitable estate of the *cestui que trust*, which is a fee simple. Newhall v. Wheeler, 7 Mass. 189.

The trustee takes an estate large enough for the purposes of his trust, and no larger. Norton v. Norton, 2 Sandf. 296.

In 1794, A executed a deed to B and six others, as "trustees of Methodist Society; *habendum* to said grantees, in their capacity aforesaid of trustees;" the *cestui que trust* being an unincorporated association. In 1848, B became the sole survivor of such grantees; his title having never been extinguished, by any release or other act of his. After the grant, the Society used and occupied the premises, for more than fifteen years, in support and furtherance of the object contemplated by the deed. In an action of ejectment, brought by B, against members of the Methodist Society, assuming to act officially, it was held, 1. That B and the other grantees had a freehold estate of such a duration as was necessary to effect the purposes of the trust; 2. That the title of B had not been divested by the occupation of the defendants, such occupation not having been adverse to B's title. Burrows v. Holt, 20 Conn. 459.

(b) Limitations in trust to preserve contingent remainders, when such trusts were legal, were not executed by the statute of uses. Vanderheyden v. Crandall, 2 Denio, 9.

the common law. The words of the statute are, "seized to the use of some *other* person."⁽¹⁾

13. Hence the principle above stated, that the estate of the *cestui* cannot exceed that of the feoffee, is inapplicable to this case. Thus, where a conveyance is made to a man and wife, *habendum* to the use of them and the heirs of their bodies; they take an estate tail, as they would if the words "the use of," had been omitted. It is not a use divided from the estate, but the use and estate go together. It is no limitation of the use, but a limitation of the estate. So, a conveyance to one, to hold to him and his heirs, "to the use and behoof" of him and his heirs forever, passes the fee by the common law; the words meaning only "for his and their sole benefit," and indicating in how ample and beneficial a manner the grantee is to take the estate, without return of any service whatever to the grantor. The same construction is given, in case of a conveyance to one and his assigns, *habendum* to him and his assigns, to the only use and behoof of him and his assigns during his life; or a conveyance to A, to hold to him and his heirs, to the only use of them during the lives of B, C and D.⁽²⁾

14. But there are other cases of similar character, where a use is executed by the statute, in order to satisfy the parties' intention. Thus, where a conveyance is made to a person and his heirs, to the use of him and the heirs of his body; or where one covenants with another, that he and his heirs will stand seized to the use of himself and the heirs of his body; or to the use of himself for life, remainder over in fee; in each of these cases, the use is executed by the statute according to the limitation.⁽³⁾

15. Finally, there must be a use in *esse*, in possession, remainder or reversion.⁽⁴⁾

16. It was formerly supposed that the statute of uses, being a mere act of Parliament, transferred to the *cestui que use* only a *civil* seizin, or seizin *in law*. But the well-established doctrine now is, founded upon the words "shall be in lawful seizin, estate and possession to all intents, constructions and purposes in the law," that the *actual possession* of the land vests in the *cestui*.⁽⁵⁾

17. By virtue of a saving clause in the statute, where a feoffee to uses previously had an estate in the sameland, such estate shall not be merged or destroyed by the conveyance to uses. It is said, the intention of that statute was not to destroy prior estates, but to preserve them.⁽⁶⁾

18. And where land was first leased for years, and afterwards conveyed to the lessee and others in fee, to their use, to the intent that a common recovery shall be had against them to the use of a stranger, which was afterwards done; held, although there was a temporary merger till the recovery was suffered, yet, when this took place, it had relation back to the conveyance, and restored the term for years.⁽⁷⁾

19. Upon the same principle, it seems, where the subsequent convey-

(1) Read. 63.

(2) Jenkins v. Young, Cro. Car. 230; Dyer, 186 a, n.; Meredith v. Jones, Cro. Car. 244; 1 Gilb. Rep. 16-17; 2 Booth's Cas. and Opin. 281; Wilson v. Cheshire, 1 M'Cord's Cha. 233.

(3) Read. 63; Sammes' case, 13 Rep. 56.

(4) Chudleigh's case, 1 Rep. 126 a.

(5) Co. Lit. 266 b; Gilb. Uses, 230; Bliss v. Smith, 1 Alab. (N. S.) 273.

(6) 1 Cruise, 385; Ferrers v. Fermor, Cro. Jac. 643.

(7) Ferrers v. Fermor, Cro. Jac. 643; 1 Ventr. 195; Fountain v. Coke, 1 Mod. 107.

ance to uses, in England, is by *lease and release*, (a form not practiced in the United States,) this lease, although prior to the release, does not merge the old estate for years; although, by accepting it, the lessee admits the lessor's power to make a lease. The lease, being made expressly to enable the lessee to accept a release to uses, shall not be construed as made to his own use; and, if the old estate for years were extinguished, it is revived by the release.(1)

20. The preamble to the statute of uses sets forth an intention to restore the ancient common law, and to extirpate such limitations and conveyances as had grown up under the form of uses, inconsistent therewith. Hence it was at first held, that, under that statute, uses must be limited according to the rules of the common law; so that no uses of inheritance would be created, without the same technical expressions required in common law conveyances. In other words, the *estate* in the use, when it became an interest in the land under the statute, became liable to all the rules of common law estates.(2)

21. But, on the other hand, the *qualities*, which had attended uses in equity, followed them when they became an estate in the land itself. The complex and modified interests annexed to uses were engrafted upon the legal estate. Hence, the same departures from the common law, in regard to the limitation of estates, have been allowed since the statute as before. To these reference has already been made; and they will hereafter be more fully considered, under the titles of *Remainder*, *Powers* and *Devise*. It is sufficient to state here, in general, that a fee in a use may be limited upon a fee; that a freehold estate may be made to commence *in futuro*, without any preceding estate to support it; and that the party who creates the uses may reserve to himself a power of revoking them, and appointing new uses in their place. It is said, that in the two former cases, the uses, being limited to take effect upon the happening of some contingency specified in the deed, come *in esse* by act of God; while in the latter case they arise by the act of man. Both are future or contingent uses till the act is done; and afterwards, by the operation of the statute, actual estates.(3)

22. Both before and since the statute of uses, if a person convey land without consideration, and without anything to show a different intent; the conveyance is held to be made to his own use, and not that of the grantee; and such a use is *executed* by the statute, so that in fact no estate passes from the grantor, but he remains seized as before. The law will not presume that a man intends to give away his estate. Such a use is called a *resulting* use.(4)

23. It is said, that so much of the use, as the owner of the land does not dispose of, remains in him.(5) Thus, in England, if he levy a fine or suffer a recovery, without consideration, and without declaring any uses, the whole estate remains in him as before, whether in possession or reversion; while, if certain uses are declared, he retains all that is left of the old estate, after these uses are satisfied. So, if one convey land to the use of such person or persons, and for such estate and es-

(1) Cook v. Fountain, Bac. Abr. *Lease R.*

(2) 1 Rep. 129 b; Corbet's case, 1 Rep. 87 b.

(3) 4 Kent, 289; Ib. 290; Hopkins v. Hopkins, 1 Atk. 591; 1 Cruise, 393.

(4) Abbot v. Burton, 11 Mod. 182; Dyer, 146 b.

(5) Co. Lit. 23 a, 271 a; Dyer, 166 a; Armstrong v. Wolsey, 2 Wil. 19.

tates, as he shall appoint by his will, or to the use of himself and his intended wife after marriage; till such appointment is made, or till such marriage occurs, the use results to him.(1)

24. The use will result, according to the estate which the parties who create or declare it had in the land, being but a trust and confidence, and therefore not subject to technical estoppels and conclusions. Thus, if husband and wife join in a conveyance of her land, the use results to her alone. So in case of joint tenants. So, if a particular tenant and the reversioner join in the deed, each takes back his former respective estate; and, if the former declare uses and not the latter, a use results to the latter alone. And if one having no interest in the land joins the owner in the deed, nothing results to the former.(2)

25. If uses are declared, but to take effect from and after the death of the grantor, a use results to him for life.(3)

26. A, in consideration of the marriage of B, his son, conveys to the use of B, for life, remainder to B's wife for life, remainder to B's first and other sons in tail, remainder to the heirs male of the body of A. Inasmuch as the estates to B, his wife and issue, may terminate before A's death, a use results to him expectant upon such termination.(4)

27. But if an intermediate remainder is limited to trustees, in trust to support contingent remainders, but to permit the grantor to receive the rents and profits for life; no use results to him.(5)

28. Where a use expressly declared is the same which would result to the grantor, the declaration is void, and he takes a resulting use. Thus, where a remainder is limited to the use of his own right heirs, he retains a *reversionary* interest, the limitation being void.(6)

29. Resulting uses arise from those conveyances, which operate by a change of possession; such as a feoffment, or, in the United States, a grant. Substantially the same principles apply to those conveyances, in which the owner nominally does not part with possession, and of which the only one known in this country, is a *covenant to stand seized*. In this case, so much of the use as is not expressly disposed of remains in the covenantor, under the name of a use by implication. Thus, where one covenants with another, to stand seized to the use of the heirs of his own body by a certain wife, as he can have no heirs while living, a use by implication remains to him for life. So, if no use arises for want of consideration or any other cause, a use by implication arises to the covenantor.(7)

30. No use will result, where any circumstance shows a manifest intent to the contrary. Thus, where a recovery is suffered, or a conveyance is made, to the intent or on condition, that the party receiving the land shall make an estate limited in a certain way; no use results, because then he would be unable to make an estate, as provided for. But, if this is not done in reasonable time, it seems, a use will result.(8)

(1) Co. Lit. 23 a, 271 a; Dyer, 166 a; Clere's case, 6 Rep. 17 b; Woodliff v. Drury, Cro. Eliz. 439.

(2) Beckwith's case, 2 Rep. 58 a; Dyer, 146 b; Davis v. Speed, Show. Cas. in Parl. 104; Roe v. Popham, Doug. 24.

(3) Penhay v. Hurrell, 2 Vern. 370; 2 Free. 258.

(4) Wills v. Palmer, 1 Cruise, 295.

(5) Tippin v. Coson, 4 Mod. 380; 1 Lord Ray. 33.

(6) Read v. Errington, Cro. Eliz. 321; Fenwick v. Mitforth, Moo. 284; Slade's case, 2 Rep. 91 b.

(7) Pibus v. Mitford, 1 Vent. 327.

(8) Hummerston's case, Dyer, 166 a, n. 9; Winington's case, Jenk. Cent. 6 Ca. 44.

31. So, where the grantee is to make an estate to such person as the grantor shall name, and it is stipulated that he shall be seized to no other use than the one specified; the grantee holds to his own use till an appointment is made, or, if the grantor dies without making one, to the use of his heirs.

32. As resulting uses depend upon intention, parol evidence is admissible in regard to such intention. The statute of frauds, requiring uses to be proved by some writing, is applicable only where *third persons* are beneficially interested.(1)

33. No use will result, where an estate is expressly limited to the grantor, with which a resulting estate would be inconsistent.

34. Thus it is said, if a feoffment in fee be made to the use of the feoffor for life or for years, no use results, because the particular estate would merge in the fee, if they were held by one person. Otherwise, if it were an estate tail, and not for life or for years; because that might exist with the fee-simple.(2)

35. So, where one limits an estate to the use of himself for years, remainder to trustees, remainder to his heirs; no estate for life results to him, because the term for years would merge therein.(3)

36. The doctrine of resulting uses applies only to conveyances in fee-simple; not to the creation of lesser estates in tail, for life or for years, though made without consideration, or the declaration of any uses. This distinction is founded partly upon usage, but chiefly upon the principle, that the tenure, rent and liability to forfeiture, incident to these lesser estates, constitute of themselves a sufficient legal consideration. The same rule applies, where a tenant for life or for years assigns his estate. And, even though he declares the use of part of the estate, no use results to him for the remainder.(4)

37. A, a tenant for life, conveys to B, to the use of B for the life of A and B, and, if B died, living A, remainder to C. B dies, living A; C enters, leases to D, and dies, living A. Held, there was no resulting use to A, but D should continue to hold as special occupant, during A's life.(5)

38. As a devise imports a bounty, it will always be to the use of the devisee, unless a contrary intent is manifest, and no use will result to the heirs of the devisor. But, where one is a devisee to uses, which from any cause fail, a use results to the heir.(6)

(1) *Roe v. Popham*, Doug. 25; *Altham v. Anglesea*, 11 Mod. 214.

(2) *Dyer*, 111 b, n. 46.

(3) *Adams v. Savage*, 2 Salk. 679; *Rawley v. Holland*, 2 Abr. Eq. 753; 21 Vin. 188, pl. 11.

(4) Bro. Abr. *Feoffment al Use*, pl. 10; *Dyer*, 146 b; *Perk.* 534-5.

(5) *Castle v. Dod*, Cro. Jac. 200.

(6) 1 Cruise, 300.

CHAPTER XXII.

TRUSTS.—EXPRESS TRUSTS.

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| <ol style="list-style-type: none"> 1. Trusts in general. 3. Trusts in real estate. 4. Uses preferred to. 5. Classifications of trusts. 8. How created—use upon a use. 11. Where the uses require a legal estate in the trustee. 12. Intention of parties. 16. Trusts for married women. 24. Limitations with authority to mortgage, &c. | <ol style="list-style-type: none"> 27. Trust ceases when the objects are effected. 32. Or when the <i>cestui</i> alienates. 34. Lands subjected to payment of debts—not necessarily a trust estate. 36. Where the estate is less than freehold—a trust. 37. Express trust, how created—statute of frauds, &c.—need not be declared, but only <i>proved</i>, by writing. |
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1. TRUSTS, in general, constitute one of the most common relations known to the law. It has been said that a trust exists, wherever one person is managing the funds of another. A trust, technically speaking, may be defined, as an equitable right, title or interest in property, distinct from the legal ownership thereof.(1.)

2. Where one person is in possession of property which he is bound to deliver to another, and he fails to do so, equity raises an implied trust, which is subject to the rules and principles of trust estates. Whatsoever is the agreement concerning any subject, real or personal, though in form and construction purely personal and suable at law only, yet in equity it binds the conscience and raises a trust.(2)(a)

3. A trust, in relation to real estate, is a *use not executed by the statute of uses*. Before this statute, a use and a trust were substantially the same thing, and the statute itself uses the words synonymously.(b) But

(1) *Hulse v. Wright*, Wright, 61; 2 Story on Equ. 230; *Crompton v. Ballard*, 1 Shaw, N. S. 251; *Garrard v. Lauderdale*, 3 Sim. 1; Talbott v. Todd, 5 Dana, 199; *Pooley v. Budd*, 7 Eng. L. & Equ. 229. (2) *Wamburzee v. Kennedy*, 4 Des. 477.

(a) A testator devised to each of his five children a large amount of personal and real estate, "subject to the payment of one hundred dollars" each, to A, when she should arrive at the age of eighteen. Held, this payment was a trust to be performed by the children respectively, and not a duty imposed upon the executor. *Philips v. Humphrey*, 7 Ired. Equ. 206.

Such legacy is a lien on the property; and a purchaser of a portion of it, with notice, was held liable to pay to A the proportion of her legacy, which the legatees and devisees of whom he purchased were bound to contribute respectively, and had failed to do. Ib.

Where a husband, by his will, gave the entire profits of all his estate to his wife during her life, and entrusted to her the education and maintenance of his children, and provided, also, for the maintenance and education of his children "out of the profits" of his estate; held, the wife took an estate, coupled with a trust for the education and support of the children; that the property was not liable for the debts of the wife; and that, if she refused to protect the same from being seized for her debts, it was the duty of the administrator of her husband to do so. *Lucas v. Lockhart*, 10 S. & M. 466.

A devisee, who accepts a devise charged with debts or legacies, is in equity a trustee, to the extent of such charge, and equity will compel the execution of such trust. *Mahar v. O'Hara*, 4 Gilm. 424.

(b) It is said, the word "trust" referred rather to the person in whom the confidence was reposed; "use," to the party beneficially interested. 1 Steph. 329, n.

A deed to A, B, and C, their heirs, &c., in trust for the only proper use of the grantors during life, and then for the use of their grandchildren, conveys the legal estate as an executed use, and not a trust. *Jones v. Bush*, 4 Harring. 1.

the judicial construction given to this act has rendered it inapplicable to several cases, which will be presently mentioned; and, in such cases, the estate of the party beneficially interested is now termed, not a use, but a *trust*. It is an estate, for the most part, recognized only by courts of equity, and not by courts of law.(1)

4. In Massachusetts, before the Supreme Court had the Chancery jurisdiction which it now possesses in relation to trusts, upon principles of public policy, it was held that the court would, if possible, construe a limitation to be an executed use rather than a trust.(2)

5. Trusts are either *express* or *implied*. The distinction between these two kinds of trusts will be explained hereafter, in considering the somewhat extensive subject of *implied* and *resulting* trusts. (See ch. 23.)

6. Trusts are further divided into *executed* and *executory*. The former are those "accurately created and defined by the parties," and are construed like legal limitations. They are not subject to revocation. Executory trusts are "where something remains to be done to complete the intention of the parties, and their act is not final:" or where the trustee has some duty to perform, requiring that the title remain in him.(3) Executory trusts are construed liberally.(4)(a)

7. Lord Hardwicke seems to have rejected the distinction above-mentioned, of executed and executory trusts; holding that an executed trust is, in fact, a use executed by the statute, and that all trusts, from their very nature, are executory, because they involve an obligation upon the trustee, at some time or other, to convey the legal estate to the *cestui* or for his benefit, whether the party creating the trust expressly so ordered or not. They are to be executed by *subpœna*.(5)

8. There are three direct modes of creating a trust. The first mode is by limiting a use, or trust upon a use. In this case, the latter *cestui* cannot take an executed use, because the statute requires that the feoffee be seized of *lands* or *tenements*, which a use is not. Thus a con-

(1) 2 Ventr. 312; Ayer v. Ayer, 16 Pick. 330; Fisher v. Fields, 10 John. 494; Bloughton v. Langley, 2 Ld. Ray. 878; Watkins v. Holman, 16 Pet. 25; Conway, 4 Ark. 302; Shohar v. Hauser, 4 Dev. & B. 96; Trotter v. Blocker, 6 Por. 269; Kennedy v. Kennedy, 2 Ala. N. 572.

(2) Newhall v. Wheeler, 7 Mass. 198; Davis v. Hayden, 9, 519; 2 Blackf. 198.

(3) 2 Story, on Equ. 246-7, and n.; Jervoise v. Northumberland, 1 Jac. & Walk. 550; Ryecroft v. Christy, 3 Beav. 238; Berry v. Williamson, 11 B. Mon. 245; Porter v. Doby, 2 Rich. Equ. 49; Schley v. Lyon, 6 Geo. 530. (4) 1 Story, 74, 247, 250. See Bunn v. Winthrop, 1 John. Cha. 336.

(5) Bagshaw v. Spencer, 1 Coll. Jurid. 413.

(a) The rule in Shelley's case does not apply to them. Porter v. Doby, 2 Rich. Equ. 119. Of this nature are *marriage articles*, which are always construed liberally in favor of the issue, for whose benefit they are chiefly designed. The same principle does not apply to settlements in wills, which are a mere bounty. And equity will not enforce marriage articles in favor of *volunteers*, or other parties than the wife and issue or their representatives. But if enforced for the latter, they will also be enforced in favor of the former. See Neves v. Scott, 13 How. 268.

A testator devised property to A in trust, to apply the proceeds to the maintenance of B and C during life, and, on their decease, to the heirs of B. Held, an executory trust, and that, on the death of B, the estate vested in his heirs as purchasers. Porter v. Doby, 2 Rich. Equ. 119.

Where a trust is merely voluntary, and the transaction, on which it is based, is still executory; it is not a proper subject of equity jurisdiction. Clarke v. Lott, 11 Ill. 105.

veyance or devise to A, to the use of B, in trust for or to the use of C, gives C a trust, the legal estate being executed in B.(1)(a)

9. So, where there is an appointment to uses, under a power, or a covenant to stand seized with one person to the use of another; the *cestui* takes only a trust estate.

10. With regard to devises, it has been held, that, where there is no necessity for the trustee's taking the legal estate, and the intention is clearly otherwise, the above rule shall not be adopted. And, in one case, this principle was extended even to a deed.(2)

11. A second mode of creating a trust, is the limitation of an estate to one for the use of another, in such a way as requires that the former should be in possession or receipt of the profits; as where it is provided, that he shall *take the profits and deliver them* to the *cestui*, or that he shall *pay over the profits* to him, or permit him to take the *net* rents and profits, subject to a rent-charge, and with remainders over. A provision that the *cestui* should *take* the profits, or even that the feoffee should *permit him to receive them*, would make an executed use; because, in order to carry it into effect, the trustee need not be in possession. But, in order to *receive* rents and profits for another's use, the trustee must have the legal estate. If this is in the *cestui*, a mere power in trust to the trustee is of no effect. A trust for the support of *infants* requires that the trustee be *pernor* of the profits.(3)

12. In case of a *devise*, whether the trustee or the *cestui* shall take the legal estate, will depend upon the intention of the testator, as appearing from the circumstances. If the trustee is to do any act requiring a legal estate, it will vest in him, notwithstanding he is to permit the *cestui* to receive the rents and profits. Thus, where the trustee is to pay annuities, or, after deducting taxes, repairs and expenses, to pay over the surplus, or, to apply the rents and profits to the maintenance and education of a son; the trustee takes a legal estate.(4)

12 a. Devise of land, to be sold, and the proceeds paid to certain devisees; held, the title vested in the heirs at law, in trust for the devisees.(5)(b)

(1) *Marwood v. Darrill*, Cas. Temp. Hard. 91; *Whetstone v. Bury*, 2 P. Wms. 146; *Att'y-Gen. v. Scott*, For. 138; *Hopkins v. Hopkins*, 1 Atk. 581; *Venables v. Morris*, 7 T. R. 342, 438; *Franciscus v. Reigart*, 4 Watts, 108; *Doe v. Passingham*, 6 Barn. & C. 305; *Vander &c. v. Yates*, 3 Barb. Ch. 242

Wood v. Wood, 5 Paige, 114; 2 Pick. 460; *Franciscus v. Reigart*, 4 Watts, 109; *Ayer v. Ayer*, 16 Pick. 330; *Wroth v. Greenwood*, 1 Horne & H. 389; *Tilly v. Tilly*, 2 Bland, 442. See *Doe v. Bolton*, 11 Ad. & El. 188; *Morton v. Barrett*, 9 Shepl. 257; *Stuart v. Kissam*, 3 Barb. 493; *Upham v. Varney*, 15 N. H. 462.

(2) 1 Cruise, 304, cites *Boteler v. Alington*, 1 Bro. Rep. 72; *Doe v. Hicks*, 7 T. R. 433; *Curtis v. Price*, 12 Ves. 89.

(4) *Fearne's Opin.* 422; *Chapman v. Blissett*, For. 145; *Shapland v. Smith*, 1 Bro. R. 75; *Silvester v. Wilson*, 2 T. R. 444; *McCosker v. Brady*, 1 Barb. Ch. 329.

(3) Bro Abr. *Feoffment al. Use*, 52; *Broughton v. Langley*, 2 Lord Raym. 873;

(5) *Burgin v. Chenault*, 9 B. Mon. 285.

(a) It was once doubted whether this doctrine was adopted in Massachusetts. *Thatcher v. Omans*, 3 Pick 528. The principle is roughly handled by Lord Mansfield in *Goodright v. Wells*, 2 Dougl. 774.

(b) Where land is devised to trustees, in trust to sell, and apply the proceeds to certain specified objects, without any limitation as to the continuance of the trust; the title will continue in the trustees until the land is sold, or until a court of equity, upon the application of the beneficiary of the trust, or some person having a right to call the trustees to an account, shall remove them. *Duke, &c. v. Graves*, 9 Barb. 595.

In an action of ejectment, brought by such trustees, the defendant, who shows no title, cannot object that, by their delay in executing the trust, the plaintiffs are divested of the title. *Ib.*

13. And the same test of *intention* has been applied to a conveyance.

14. A conveys land to B, C and D, selectmen of the town of N., *habendum* to them or their successors, in trust for the use of N. forever; upon the condition, however, that, if A shall support himself and indemnify the town against his support, the deed, as also a bond conditioned for such support, to be void. Held, as the bond belonged to B, C and D, not to the town, and as the deed was merely collateral to the bond, such construction should be given to the former, as would best effect its object, according to the presumed intention of the grantor; and therefore B, C and D took a trust, not an executed use.(1)

15. A, holding a note and mortgage against B, devises them to C, B's son, on condition that he allow B to occupy the land for life, and upon the trust of supporting certain persons named. Held, this was a trust, not an executed use, and that B had no legal life estate, liable to be taken by his creditors.(2)

16. Where a *cestui que trust* is a married woman, and the provision is made for her separate benefit, clearly and distinctly, the law usually vests the legal estate in the trustee, and gives her only an equitable interest, because this will best effect the object in view. No particular form of words is necessary.(a) The husband may be himself a trustee for the wife.

(1) Norton v. Leonard, 12 Pick. 152; 16 Pick. 330. (2) Merrill v. Brown, 12 Pick. 216.

Where a will, valid on its face, conveys real estate in trust, and the objects are clearly defined, and are not, at the time the will takes effect, illegal, the trustees acquire a perfect legal title; and, in an action of ejectment brought by them against a stranger and intruder, without color or claim of title adverse to that of the plaintiffs, the latter cannot be required, in the first instance, to make any further proof of title, than to prove the execution of the will. They are not bound to show who are the *cestuis que trust*. Ib.

If facts have transpired since the death of the testator, or any other circumstances exist, by which the trust has come to an end, it is incumbent on the defendant to prove them. Ib.

Where a testator devised all his real estate, in America or the West Indies, to trustees, in trust to sell, dispose of, or otherwise convert the same into money, and apply the proceeds, first in payment of his debts, and the residue in purchasing real estate in Scotland, to be conveyed and settled for the uses and trusts expressed in a settlement or deed of disposition which he had executed of his estates in Scotland; held, if the will was good and legal on its face, to pass the title to the trustees, it was sufficient for the purpose of an ejectment brought by them, for a portion of the lands devised; and that they were not bound to produce and prove the deed of disposition referred to in the will. Ib.

(a) Devise to A and his heirs forever, in trust for B, a *feme covert*, for life, and to such uses as she, notwithstanding any coverture, shall appoint; and, after her death, to the use of her heirs. Held, an equitable fee-simple in the first *cestui que trust*. Armstrong v. Zaue, 12 Ohio, 287. See Blacklow v. Laws, 2 Hare, 49.

A, being the only son of his mother, B, by her first husband, and B being his heir, devised land to B, "to hold to her, her heirs and assigns, to be for the sole use of her, her heirs, executors, administrators and assigns." The mother had a second husband, who was intemperate and without capacity, and she lived apart from him, and supported herself by labor. Held, she took the property to her own separate use, and it was not liable for the husband's debts. Smith v. Wells, 7 Met. 240.

W conveyed land and slaves to L, in trust for his wife E during her life, and, after her death, to her children, with power to E, by and with the consent of the trustee, to sell and reinvest the proceeds upon the same trusts. L purchased a tract of land, stock and growing crops from A, and hired his slaves to assist in making the crop. In payment she gave her notes, secured by mortgages on her trust property. Held, it was competent for her to make this contract. Wayne v. Myddleton, 2 Kelly, 383.

A testator directed, that his daughter's share of his estate should be held in trust for her use, during the joint lives of herself and her husband, and, in case of her husband's death, the trust-money to be paid to her; and, in case of her husband's surviving her, her share to

17. Thus, a mother, *in consideration of love and good will* for her daughter, a married woman, conveys land to one "in trust, and for the sole use and benefit" of the daughter during her life. Held, a trust estate.(1)

18. Devise in trust, for the equal use and benefit of the four sisters of the testator, two of whom were *femes covert*, in fee, to be managed as the trustees should think most for the interest of the parties. Held, a trust.(2)

19. Devise to trustees and their heirs, in trust for a married woman and her heirs; and that the trustees should, from time to time, pay and dispose of the rents to the said married woman, without the intermeddling of her husband. Held, a trust, and not an executed use.(3)

20. Devise of rents to a married woman for life, to be paid by the executors into her own hands, without the intermeddling of her husband. Lord Holt held, that the trustees took the legal estate. The other judges thought otherwise.(4)

21. Devise to trustees and their heirs, in trust to pay several legacies and annuities, and then to pay the surplus rents into the proper hands of a married woman, and, after her death, that the trustees should stand seized to the use of the heirs of her body. Held, during her life, the trustees took a legal estate; but, after her death, a use was executed in her heirs.(5)

22. In such cases, it has been said, the trustees take the legal estate by way of an executed use.(6)

23. A testator devised to his grand-children, the children of A, his daughter, all his estate, to be equally divided between them at her death. He also devised the use of the estate for the support of A and her children, during her life; and, to carry into effect this pro-

(1) *Ayer v. Ayer*, 16 Pick. 327. See 1 Horne and H. 389; *Stuart v. Kissam*, 3 Barb. 493; *Mass. St.* 1852, 67; *Porter v. Bank, &c.*, 19 Verm. 410. See *Stanton v. Hall*, 2 Russ. & My. 175; *Tyler v. Luke*, 4 Sim. 144; *Rogers v. Ludlow*, 3 Sandf. Ch. 104; *Dickerson*, 7 Barr, 255.

(2) *Bass v. Scott*, 2 Leigh, 356.

(3) *Nevill v. Saunders*, 1 Ver. 415.

(4) *South v. Allen*, 5 Mod. 101; *Bush v. Allen*, Ib. 63; *South v. Alleine*, 1 Salk. 228.

(5) *Say v. Jones*, 1 Abr. Eq. 383; *Say v. Jones*, 3 Bro. Parl. Cas. 113.

(6) *Harton v. Harton*, 7 T. R. 652.

be paid to her children. Held, the husband interposing no claim, that, as against other legatees, her children were entitled at her death to interest accrued, but not reduced to possession, during her life. *Yundt's Appeal*, 1 Harris, 575.

In New York, a trust, authorizing the trustee to control, manage, sell and dispose of the trust estate, and the income, and pay over the same to a married woman for her support and maintenance; is substantially a trust to receive the rents and profits, and apply the same to her use, within the statute of trusts, and is therefore valid. *Campbell v. Low*, 9 Barb. 585.

Where husband and wife convey land belonging to her to a trustee, in trust to sell the same for the use of the grantors; the land being unsold, the trustee is not entitled to hold it, as against a subsequent *bona fide* mortgagee without notice, in satisfaction of debts due to him from the husband, before the mortgage was executed. *Siter v. McClanachan*, 2 Gratt. 280.

And parol evidence, in such case, is not admissible, to show that such was the agreement at the time of making the deed of trust. *Ib.*

So, the trustee, being also a prior mortgagee of the same land, cannot tack debts due him from the husband to his prior mortgage, to the prejudice of the subsequent mortgagee. *Ib.*

Contrary, it would seem, to the general rule, it has been held in South Carolina, that a devise to a wife, "to be by her freely enjoyed to every intent and purpose, as her own in every respect," did not create a separate estate in her. *Wilson v. Bailer*, 3 Strobb. Eq. 258.

vision, he appointed A and B trustees of the estate. Held, a trust estate.(1)

24. A conveyance or devise to trustees and their heirs, in trust to sell or mortgage, to raise money for payment of debts, passes the whole legal estate to the trustees; so that a subsequent limitation in trust gives only an equitable interest to the *cestui*.

25. Devise to trustees, their heirs and assigns in trust, that they and their heirs should first, by the rents and profits, or by sale or mortgage, raise money for payment of debts; after which, to the trustees, for five hundred years, without impeachment of waste, upon divers trusts. After the termination of this term, devise to the trustees, their heirs and assigns; they to stand seized in trust to uses as follows: for one moiety "I give and devise to the use and behoof of A for life," &c. Held, A took only an equitable, not a legal interest; because the whole legal estate passed to the trustees, and would have passed even without mention of their heirs, as necessary to the execution of the trust; and no legal remainder could therefore be limited upon it (2)

26. Conveyance to the use of trustees and their heirs, in trust to sell, and with the proceeds purchase other lands, to be settled upon by the grantors; with a proviso that, until a sale were made, the rents should be received as before. Held, the use of the estate was executed in the trustees, and that the proviso did not reserve any legal interest or title to the grantors.(3)

27. But where the legal estate is vested in a trustee for the accomplishment of particular purposes, it will cease when those purposes have been effected, and a use will be executed in the party who is next beneficially interested. This has been already seen in some of the cases relating to married women.(4)

28. Devise to trustees, in trust from the rents, &c., to pay two life annuities; after payment thereof, in trust, from the residue of the rents to pay to A a certain sum in trust. After payment of the annuities and said sum, devise to B for life. The trustees were empowered to grant building and other leases. Held, the trustees took the legal estate for the lives of the annuitants, with a term in remainder sufficient to raise the sum mentioned, subject to which B took a legal estate for life.(4)

28 a. A husband conveyed to A, "her executors, administrators, and assigns," all the estate which he had in the land of his wife, in virtue of his relation as husband, in trust for the wife, "giving her full power through her trustee to dispose of said property, collect rents, or do any other matter or thing, relating to said property, without let or hindrance" of the husband. Held, the trustee took an estate for the life of the wife only; and that, on the death of the wife, living the

(1) Donalds v. Plum, 8 Conn. 447.

(2) Bagshaw v. Spencer, 1 Coll. Jurid. 378; Wright v. Pearson, Fearn, 126.

(3) Keen v. Deardon, 8 E. 248.

(4) Doe v. Simpson, 5 E. 162. See Doe v. Ellis, 4 Ad. & El. 582; — v. Needs, 2 Mees. & W. 129.

(a) So it is held, that where one is appointed trustee, by a marriage contract, for the sole purpose of protecting the wife's property from the control of her husband, the trust is executed immediately on the termination of the coverture, whether by her death or otherwise, and the property vests in her representatives. Liptrot v. Holmes, 1 Kelly, 381.

husband, the trust, not having been executed, ceased, and he was entitled to his estate by the curtesy in the premises.(1)

29. A conveyance was made in New York, before the Revised Statutes were passed, to A in fee, in trust for her daughter B, in fee, provided B did not die under age, and without issue; if she did, then for the sole use of A in fee. A dies in the minority of B, leaving B her sole heir. Held, the trust ceased with A's death, and the absolute estate vested in B.(2)

30. Devise of a certain sum, to be for the separate use of A, the daughter of the testator and the wife of B, for her life, free from the debts of B. B died, and A married a second husband. The trust for the separate use of A ceased with the death of B.(3)

31. Conveyance in trust, for the separate use of A for life, remainder upon her death, to such child or children of A as may be then living, or who shall marry or attain twenty-one years. Held, this created an executed trust, and a vested legal estate, in A's children on her death.(4)

31 a. Where the estate was not merely given in trust to the husband, for the use and benefit of the wife, but for her separate use, thereby creating a separate estate in her; held, when the powers of the trustee ceased by the limitation contained in the trust itself, he could no longer hold the trust estate in his hands; and, if he died without transferring it to the *cestui que trust*, or disposing of it for her benefit or use, the court should decree for her immediate possession.(5)

31 b. Where a trustee, under a deed of trust for the separate use of a married woman, agreed by articles to convey the trust to A, in consideration of certain sums to be paid for the maintenance of his *cestui que trust*, and he subsequently conveyed the property to A, and took a mortgage to secure a bond given for the purchase-money; held, the articles were merged in the conveyance and mortgage; and the trustee was entitled to recover the unpaid balance after the death of his *cestui que trust*.(6)

31 c. A, having a long term in certain premises, conveyed them to a trustee to receive the rents and profits, and apply them to the support of B, during her natural life, and, after her death, to C, her heirs and assigns. Held, the trust ceased at the death of B, the residue of the term then vested in possession in C, and the trustee could not afterwards maintain ejectment against a stranger therefor.(7)

32. Upon a similar principle, a trust estate, created for the benefit of the *cestui*, may be terminated or converted into a legal estate, in consequence of some act done by such *cestui*, which vests his interest in third persons.

33. A testator devised property to trustees, to be applied to the support, &c., of A for life, as they should think proper; the application for his benefit to be at their entire direction; and A to have no power in any way to sell, mortgage, or anticipate the rents. A, being insolvent, made an assignment under the insolvent act to B. The Court of Chancery decreed a conveyance of the land to B.(8)

(1) Norton v. Norton, 2 Sandf. 296.

(2) Dekay, 4 Paige, 403.

(3) Benson v. Benson, 6 Sim. 126.

(4) Spann v. Jennings, 1 Hill's Cha. 324.

(5) Waring v. Waring, 10 B. Mon. 331.

(6) Dinsmore v. Biggert, 9 Barr, 133.

(7) Nicoll v. Walworth, 4 Denio, 385.

(8) Green v. Spicer, Tam. 396.

34. Where lands are devised in trust, merely subjecting them to payment of debts will not vest a legal estate in the trustee.

35. Devise of real and personal estates to trustees and their heirs, to the intent that they should first apply the personal estate in payment of debts; and as to the real estates, subject to debts, devise to A for life, &c. Held, as there was nothing to show that the trustees were to be active in the payment of debts, although convenience would so suggest, they did not take the legal estate.(1)

36. The third case, in which the trustees take the legal and the *cestui* only an equitable interest, is where the estate limited to the former is *less than a freehold*, and therefore not executed in the *cestui* by the statute of uses; which makes use of the word *seized*, a word applicable only to freehold estates.(2)

37. The English statute of frauds, (3 Cha. II., c. 3, sec. 7,) requires all creations or declarations of trusts in real estate to be manifested and proved by some writing signed by the party, or by his last will. Parol trusts are contrary to the letter and spirit of the statute of frauds, and are calculated to let in all the litigation, uncertainty and mischief which that act intended to prevent.(3)(a)

38. It is said, that this statute did not extend to the Provinces, and was never adopted in the State of Massachusetts.(4) But a similar provision has been made, it is believed, in nearly every State in the Union.(b)

39. In Ohio, before the statute of frauds, passed in 1810, a parol trust was good.

40. In North Carolina, parol declarations of trust are valid.(5) So also in some cases in Pennsylvania.(c) (See sec. 58.) But the declaration must be made by the grantor of the estate. If made by the nominal grantee, it will be invalid, unless founded on the consideration that

(1) Kenrick v. Beaucherc, 3 B. & P. 175; (Jenifer v. Beard, 4 Har. & McHenry, 73.) 589; Parker v. Bragg, 11 Humph. 212; Miller v. Cotten, 5 Geo. 341.

(2) Bac. Read. 42; Dyer, 369 a.

(4) Russel v. Lewis, 2 Pick. 508.

(3) Per Sergeant, J., Graham v. Donaldson, 5 Watts, 452. See Smith v. Gray, 1 Humph. 491; Robson v. Harwell, 6 Geo. 1 v. Foy, 2 Hayw. 131.

(a) A declaration of trust need not be *sealed* as well as signed. But it is held, that if such declaration is unsealed, a *consideration* must be proved. Thompson v. Branch, 1 Meigs, 390.

(b) The re-enactment, in 1813, of the New York act of 1801, for the incorporation of religious societies, without re-enacting the statute of frauds, may be regarded as a modification or amendment of the statute of frauds, so far as to make a use or trust, in favor of a religious society, an exception to the provision of the statute of frauds, which required that declarations of trust should be in writing. Voorhees v. The Presbyterian, &c., 8 Barb. 135.

Proof by parol, that the vendor of land and the agent of the vendee, by whom the purchase was made, understood, at the time of the purchase, that it was made upon a certain trust, does not show that the vendee himself so intended and understood the transaction, and is insufficient to establish a parol trust. Harris v. Barnett, 3 Gratt. 339.

By the statute of frauds of Illinois, all trusts, except resulting trusts, to be valid, must be created or evidenced in writing. Hovey v. Holcomb, 11 Ill. 660.

(c) A trust in real estate, coeval with a deed for the same, may be proved by parol. Wetherell v. Hamilton, 3 Harris, 195.

A devise, made on the parol promise of the devisee, to hold the estate devised in trust for herself and another, creates a valid trust. McKee v. Jones, 6 Barr, 425.

Where a mother, at the request of her son, devised her land to her daughter, to hold in trust for herself and the son; held, this created a valid trust, although made for the purpose of avoiding the creditors of the son. Ib.

the purchase-money was paid by the *cestui*; and in that case it is superfluous, because a trust results by implication.(1)

41. A trust, in order to be valid, need not be *created* by writing, nor at the time the land is purchased; it is sufficient that there is any written evidence of its existence, showing its creation or acknowledgment even after the purchase; as, for instance, a letter signed by the trustee, and acknowledging the trust. But such acknowledgment must show not only the existence, but the precise nature and terms of the trust. And the trustee's own admission is said to be very weak evidence of the trust.(2)

42. If the writing be lost, its contents may be proved by parol evidence, as in other cases.(3)

43. A pamphlet, published by the trustee, was held a sufficient declaration of the trust.(4)

44. A written acknowledgment of a trust, created by parol, will bind a purchaser from the trustee.(5)

45. A gives a bond to B to secure an estate for him, and B enters. This is a sufficient creation or declaration of trust.(6)

46. A conveys land to B, and B gives back an unsealed writing, stating that B had *paid* A a certain sum and taken a deed of the land, and had agreed to let A "have the improvement or sell, provided he should pay said sum in three years, and interest." The land was worth more than the sum named. Held, the word *paid* should be construed to mean *lent* or *advanced*; that the effect of the agreement in regard to a sale was, to authorize A to *negotiate* for such sale, and an engagement by B, he having the legal estate, to carry it into effect; and that B held *in trust* for A.(7)

47. A, by a covenant, authorizes B to convey his (A's) land, and retain one-third of the money or property received for it as a compensation for his services. B covenants to pay and deliver to A the other two-thirds. Held, a good declaration of trust.(8)

48. *An act of the legislature* may operate as the creation or declaration of a trust. Thus, the State of North Carolina having made provision in public lands for the revolutionary officers and soldiers; held, an equitable fee-simple in the lands thereby vested in the latter, and the State became a trustee, with the usual liabilities incident to that office.(9)

49. An admission of a trust by an answer in Chancery is sufficient to bind a trustee.(a)

(1) *Kisler v. Kisler*, 2 Watts, 324.

(2) *Forster v. Hale*, 3 Ves. jun. 696; *Fisher v. Fields*, 10 John. 495; *Arms v. Ashley*, 4 Pick. 71; *Conwell v. Evil*, 4 Blackf. 67; *United, &c. v. Woodbury*, 2 Shepl. 281; *Duke, &c. v. Graves*, 9 Barb. 595; *Brown v. Brown*, 1 Strobb. Equ. 363.

(3) *Orleans v. Chatham*, 2 Pick. 29.

(4) *Barrell v. Joy*, 16 Mass. 223.

(5) *Rutledge v. Smith*, 1 M'Cord's Cha. 119.

(6) *Orleans v. Chatham*, 2 Pick. 29.

(7) *Scituate v. Hanover*, 16 Pick. 222.

(8) *Armstrong v. Campbell*, 3 Yerg. 201.

(9) *Pinson v. Ivey*, 1 Yerg. 296.

(a) To affect one with knowledge of a secret trust, who was purchasing land from the apparent owner, in whom the legal title was vested, it must be shown that he was fully aware of the precise terms of the trust before he completed his purchase. Indefinite and uncertain admissions will not authorize the positive denials of the answer. *Conner v. Tuck*, 11 Ala. 794.

50. A, in consideration of £80, made an absolute conveyance to B. A brings a bill in equity to redeem. B, in his answer, insisted that the deed was absolute, but confessed that, after payment of the £80 and interest, he was to hold in trust for A's wife and children. Held, this was a legal declaration of trust.(1)

51. Where an execution was levied on rents and profits for a term, and the creditor afterwards executed a written unsealed instrument, reciting that the note on which the judgment was founded belonged to another in part, and promising to pay him the rents and profits, or allow him the use and improvement of the estate after satisfying his own debt; held, a sufficient declaration of trust.(2)

52. Such declarations, however, must be under the party's hand, and clear and explicit. Thus, letters addressed by a son to his father and brothers, equivocal in their language, were held insufficient to prove, that the former held an estate which he bought at a sale on execution against the father, in trust for the latter. So with loose accounts, in which the father was charged and credited in connection with such purchase.(3)

53. Parol evidence is admissible, to control or explain such ambiguous declarations.(4)

54. It has been held in the United States Court, that if a grantee, in an account subsequently stated, credit the grantor with the proceeds of sale of a part of the land, this raises a trust.(5)

55. A trust cannot be established by parol evidence, even though this goes to confirm other written evidence, in showing the title to the land not to be in the supposed trustee, or to rebut parol evidence, which shows a fraudulent conveyance by such trustee.

56. A, the husband of B, conveys to C, her father, all his interest in her land, for a nominal, but no actual consideration. C, being insolvent, afterward re-conveys to B, taking her note for a small sum, with the mutual intent to protect the land from creditors. The land is afterwards taken by C's creditors. A, upon conveying to C, gave him a bond against exercising any control over B's estate. B always occupied the land. Held, no trust was legally proved which would constitute a valuable consideration for the deed of C to B, and that C's creditors should hold the land.(6)

57. It has been held in Massachusetts, that the statute, establishing Chancery jurisdiction of trusts, had no effect upon the prior statute which excludes parol evidence of them.(7)

58. It is held, that where a transaction may be viewed as "*ex maleficio*," as where one purchases at sheriff's sale in trust for another, and refuses to fulfil the trust; the statute of frauds does not apply.(a) But

(1) *Hampton v. Spencer*, 2 Vern. 288.

(2) *Arms v. Ashley*, 4 Pick. 71.

(3) *Steere v. Steere*, 5 John. Chan. 1.

(4) *Ib.*

(5) *Prevost v. Gratz*, 1 Pet. Cir. 366.

(6) *Smith v. Lane*, 3 Pick. 205.

(7) *Black v. Black*, 4 Pick. 234.

(a) So where lands were bid on at a sale under execution by one who professed to act as the friend of the debtor, and this was understood by those present at the sale, who were thereby prevented from bidding; and the purchaser agreed in an instrument under seal, sent to the debtor, to pay off the execution debts, and the other liens, and to pay debts due to himself, and then to convey the remainder of the lands to the debtor, or his heirs; and the debtor released his title to the purchaser, who not only paid all the existing debts, but judg-

where an execution plaintiff purchased the land sold, agreeing with the defendant to reconvey on payment of his judgment, and took possession, greatly improved the land, and occupied for ten years; held, he was not bound to fulfil the agreement.(1)

59. In cases of fraud, accident or mistake, it seems, Chancery will interfere to enforce a parol trust. But, where A conveyed to B by an absolute quit-claim deed, expressing a valuable consideration, it was held in Chancery, that A could not prove by parol evidence, either upon the principles of the common law or the statute of frauds, an agreement by which B was to hold in trust for him, and subsequently execute a writing to that effect; and that B acknowledged the agreement, and was solicitous to have it fulfilled, but by negligence, accident, or some unaccountable cause of delay, the execution was delayed till B's death. And, as the evidence went to show an *express trust*, it would not sustain the claim of an *equitable lien* for advances of money.(2)

60. If a trustee executes a trust created by parol, he will be bound by it.(3)

CHAPTER XXIII.

TRUSTS. IMPLIED AND RESULTING TRUSTS.

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| 1. Implied trusts—not within the statute of frauds. | 43. Election of <i>cestui</i> . |
| 2. How proved. | 44. Conveyance without consideration. |
| 6. General classification of. | 49. Declaration of trusts in part. |
| 8. Distinction between an express and implied trust. | 53. Consideration to be determined afterwards. |
| 9. Cannot contradict a deed. | 54. Trusts illegal, &c. |
| 10. Contract to convey land. | 55. Trusts failing or exhausted. |
| 12. Purchase by one person with the money of another; parol evidence, &c. | 56. Trusts to be afterwards appointed. |
| 28. Cases not within the rule. | 57. Renewal of leases, &c., in trustee's name. |
| 34. Aliens. | 64. Conveyance obtained by fraud. |
| 35. Rules in different States. | 65. Conveyance to a father in the name of a child. |
| 40. Purchase with trust money. | 82. Conveyance to husband and wife, &c. |

1. IMPLIED trusts are those which arise or are created, not by express act or declaration of parties, but *by construction or implication of law*. These are not affected by the English statute of frauds, or by the American statutes on the same subject, being in general specially

(1) *Graham v. Donaldson*, 5 Watts, 451-2. |
 (2) *Dean v. Dean*, 6 Conn. 285. |

(3) *Elliott v. Morris*, Harp. Equity, 281.

ments obtained after the purchase against the debtor, and then conveyed some of the lots to the heirs of the debtor; and the whole were finally divided between the heirs and debtor; held, the lands were purchased and held in trust by the purchaser, and were subject to the debts of the debtor; and that the burden of debts, which before the division of the lands would have been a common one, ought to be borne proportionably. *Lytle v. Pope*, 11 B. Mon. 297.

excepted from their operation, or, if not, held to be excepted by necessary intendment; (a) and may be created, since, as before that statute, without any instrument in writing. They are usually called *resulting trusts*. (1)

2. It is said, an implied trust is more difficult of proof, but, when proven, has the same effect as an express one. (2)

3. It was said by Lord Nottingham, "the law never implies, the court never presumes, a trust, but in case of absolute necessity. Otherwise the Lord Chancellor might construe or presume any man in England out of his estate." (3)

4. A distinguished commentator remarks, that this is too strong language, and suggests the following substitute:

5. "A trust is never presumed or implied as intended by the parties, unless, taking all the circumstances together, this is the fair and reasonable interpretation of their acts and transactions." (4)

6. Implied trusts are: 1. Those which stand upon the presumed intention of the parties; 2. Those independent of such intention, and forced upon the conscience of the party by operation of law, as in case of fraud or notice. (5)

7. It is remarked by the court in Pennsylvania, that in England there are two kinds of resulting trusts: 1. Where a deed is made to A, but the purchase-money is B's, the purchaser's; in which case, a trust results to B. (b) 2. Where trusts are expressly declared for a part of the estate; and then a trust results for the residue. There are other cases, where a specific lien is allowed, upon land purchased in part with money withdrawn from a trust fund. But these are not, technically, resulting trusts. (6)

8. The distinction between *express* and *implied* trusts has been thus stated. A trust, which results to a purchaser by operation of law, must be a pure unmixed trust of the ownership and title of the land or estate itself. Where there is a mere interest in the proceeds, or a lien upon the land as security, or a claim upon the money to be raised by a sale or mortgage of it; these are subjects of express agreement, and require potential ownership in the trustee. They are too complex, and partake too much of the nature of contracts, to belong to the class of pure and simple trusts, the sole operation of which is to vest the estate in the actual purchaser, in exclusion of the nominal grantee, and not to regulate the equitable rights and interests of those, for whose benefit the legal owner may be under a moral obligation to hold or apply it. An implied trust seems often to partake of the character of

(1) Walk Intro. 311; Slaymaker v. St. John, 5 Watts, 27; Hagthorp v. Hook, 3 Hayw. 57; Neale v. Hagthorp, 3 Bland, 582; Elliott v. Armstrong, 2 Blackf. 198; Jenison v. Graves, Ib. 440; Holmes v. Trout, 1 McL. 9; Brooks v. Dent, 1 Md. Ch. 523; Hollis v. Hayes, Ib. 479; Stephenson v. Thompson, 13 Illin. 186.

(2) Miami Ex. Co. v. Bank of United States Wright, 249.

(3) Cook v. Fountain, 3 Swanst. 585; (1 J. J. Mar. 3; 1 Bibb. 609.)

(4) 2 Story's Comm. on Equ. 439.

(5) Ib. 438. See 1 Lom. Dig. 200.

(6) Kisler v. Kisler, 2 Watts, 324; 2 Story, 443.

(a) The Rhode Island statute contains no exception, but this is implied. Hoxie v. Carr, 1 Sumn. 186-7.

(b) A pays with B's money, and takes a deed to himself: no trust results. A pays with his own money, and takes the deed to B: this makes a resulting trust. (But see 2 Story, 445.) Blair v. Bass, 4 Blackf. 519; Foster v. Trustees, &c., 3 Alab. N. S. 302.

an *executed use*, being saleable on execution and authorizing an ejectment against the trustee.(1)

9. In general it is said, no resulting trust can arise, in contradiction to the terms of a deed.(2)

10. It has been already seen, (p. 30,) that equity regards money, which has been agreed to be turned into land, as land. From this principle arises an important class of implied trusts. After a written contract for conveyance of land, and payment of the price, the holder, until a conveyance is actually made, becomes a trustee for the other party. So, a subsequent purchaser with notice from him. And such purchaser must be joined in a suit for specific performance.(3)

11. After payment of the price, if the vendor and purchaser conspire to protect the land from creditors of the latter, Chancery will give relief.(4)

12. Where one person pays the money for the purchase of land, but the conveyance is made to another, (as has been stated, sec. 7,) the former has a resulting trust in the land. So, also, where a joint conveyance is made to both, whether to hold concurrently or successively; (a) and such payment of the money may be proved by parol evidence.(5)

13. But the money must be paid before or at the time of the conveyance, in order to raise a resulting trust.(b) A subsequent advance of money, either to the grantee or the grantor, may be evidence of a new loan, or the ground of some new agreement; but will not attach, by relation, a trust to the original purchase; for the trust arises out of the circumstance, that the moneys of the real, not the nominal, purchaser, formed *at the time* the consideration of that purchase, and became converted into the land.(6) And the mere *charging* of a third person with the price of the land, by the nominal purchaser, will not raise a trust for the former.(7)(c)

(1) *White v. Carpenter*, 2 Paige, 238-9. See *Doe v. Rock*, 1 C. & Mar. 549.

(2) *Hoxie v. Carr*, 1 Sumn. 188.

(3) *Davie v. Beardsham*, 1 Cha. Ca. 39; *Acherley v. Vernon*, 9 Mod. 78; *Astor v. L'Amoreux*, 4 Sandf. 524; *Stone v. Buckner*, 12 S. & M. 73.

(4) *Forsyth v. Clark*, 3 Wend. 637.

(5) 2 Story, 443; 2 Vent. 361; *Riddle v. Emerson*, 1 Vern. 109; *Willis v. Willis*, 2 Atk. 71; *Lloyd v. Spillett*, Ib. 150; *Sugd. on Vend.* 2, 152; 3 Mas. 347; 2 John. Cha. 405; *Cox v. Grant*, 1 Yea. 166; *Baker v. Viuing*, 30 Maine, 121; *Thomas v. Walker*, 6 Humph. 93; *Murdock v. Hughes*, 7 S. & M. 219; *Coates v. Woodworth*, 13 Illin. 654; *Livermore v. Aldrich*, 5 Cush. 431; *Williams v.*

Hollingsworth, 1 Strobb. Eq. 103; *Mahorner v. Harrison*, 13 S. & M. 53; *Stephenson v. Thompson*, 13 Illin. 186. See *Work v. Work*, 2 Harr. 316; *Tarpley v. Poage*, 2 Tex. 139; *Watson v. Le Row*, 6 Barb. 481; *Dudley v. Bosworth*, 10 Humph. 9; *Hollis v. Hays*, 1 Md. Ch. 479; *Lindsey v. Platner*, 23 Miss. 576.

(6) *Botsford v. Burr*, 2 John. Cha. 409; *Hoxie v. Carr*, 1 Sumn. 188; *Seward v. Jackson*, 8 Cow. 406; *Foster v. Trustees, &c.*, 3 Alab. N. 302; 13 S. & M. 53; *Smith v. Sackett*, 5 Gilm. 534; *Alexander v. Tams*, 13 Illin. 221; *Perry v. McHenry*, Ib. 227. But see *Harden v. Harden*, 2 Sandf. Ch. 17.

(7) *Steere v. Steere*, 5 John. Ch. 19.

(a) This is said to be a clear result of all the cases, without a single exception. 2 *Sugd.* 152.

(b) The claimant must have occupied a position originally, which would entitle him to be substituted for the grantee. *Alexander v. Tams*, 13 Illin. 221; *Perry v. McHenry*, Ib. 227.

(c) So where A agreed to convey land to B, upon his paying so much money at specified times, and a part had been paid; held, there was no resulting trust. *Conner v. Lewis*, 4 Shepl. 268. But if A buys land and takes a deed in the name of B, B advancing the purchase-money and taking A's notes therefor, with the agreement to convey to A upon being repaid; this may be considered as a loan of the money, and a resulting trust to A. *Page v. Page*, 8 N. H. 187.

14. It is not to be understood, that actual *payment of money* is necessary to constitute a resulting trust. Any other *valuable consideration* will undoubtedly have the same effect. Thus, the agreement of one person to form a settlement and commence improvements upon lands, to be conveyed to another for his benefit, is a sufficient consideration to raise an implied trust for the former.(1)

15. To constitute a resulting trust, the parol evidence of a payment by the real purchaser must be clear and undoubted, especially after a long time has elapsed; of so positive a character as to leave no doubt of the fact, and at the same time so clearly defining the trust, as that the court may see what is requisite for its due execution. Evidence of naked declarations, made by the nominal purchaser, is most unsatisfactory, being so easily fabricated, and from the impossibility of contradicting it. And, on the other hand, the implication resulting from this fact, called by Lord Mansfield "an arbitrary implication," may be rebutted by parol evidence to the contrary.(a) Before the statute of frauds, a resulting trust might be controlled by a verbal declaration of trust; and, as this statute does not in any way affect implied trusts, the old law remains unaltered. More especially is such evidence admissible to rebut a resulting trust, where the purchase is made by a father, partly in the name of his son, although the father, during his life, took the profits of the land. But parol evidence is inadmissible to rebut a resulting trust, arising from written instruments, unless the latter be loose and ambiguous.(2)

16. It is said to be doubtful, whether parol evidence is admissible to prove a resulting trust, against the answer of the trustee denying it. And, in cases of this nature, the party claiming in opposition to the legal title should not delay asserting his right, as a stale claim would meet with little attention.(3) The lapse of twenty-six years has been held to bar the claim of a resulting trust.(4)

17. It has been said, that the admission of parol evidence to raise a resulting trust, where the consideration is expressed to be paid by the nominal purchaser, and there is nothing in the deed which implies the contrary, is limited to the life of such purchaser; that even his own confession cannot be proved by the testimony of a third person, but must be made under a judicial examination upon oath, or by the party's own answer in equity, which, after his death, of course cannot be had.

(1) *Malin v. Malin*, 1 Wend. 625.

(2) *Malin v. Malin*, 1 Wend. 625; *Livermore v. Aldrich*, 5 Cush. 431; *Finch v. Finch*, 15 Ves. 43; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; 1 John. Cha. 59; 2, 416; *McGuire v. McGower*, 4 Des. Cha. 491; 2 Sug. 153; *Bellasis v. Compton*, 2 Vern. 294; 5 John. Ch. 1; *Dorsey v. Clark*, 4 Har. & John.

551; 3 Mas. 362; 3 Littell, 399; *North Hempstead v. Hempstead*, 2 Wend. 109; 2 Sug. 158; *Harrison v. Mennomy*, 2 Edw. Cha. 251; *Carey v. Callan*, 6 B. Mon. 44.

(3) 2 Sug. 154-5; *Fisher v. Tucker*, 1 M'Cord's Cha. 169-76; *Elliott v. Armstrong*, 2 Blackf. 198; *Jenison v. Graves*, Ib. 440.

(4) *Shaver v. Radley*, 4 John. Cha. 316.

(a) B paid the purchase-money of an estate conveyed by a third person to A, who agreed to convey it to B, subject to a mortgage; and A and B afterwards agreed, that A should raise additional money by another mortgage, and convey the estate to B, subject to the two mortgages. B subsequently accepted of A a deed of the estate subject to the two mortgages, the latter of which was never in fact made. Held, the presumption of a resulting trust, raised by the first agreement, was rebutted by the subsequent agreement, and the acceptance of the deed. *Livermore v. Aldrich*, 5 Cush. 431.

But Mr. Sugden doubts the correctness of this opinion, and refers to some very late authorities against it.(a) Judge Story thinks, that any declaration or confession made by the party in his life is sufficient evidence. So, also, any expression or recital in the deed itself; a memorandum or note made by the nominal purchaser; papers left by him, and discovered after his death; and, it seems, his answer to a bill of discovery.(1)

18. In New York, Kentucky and Indiana, parol evidence is received against the answer of the purchaser denying the trust, and, it seems, even after the purchaser's death. But such evidence shall be received with great caution.(2)(b)

19. It has been held, that a resulting trust might be proved by evidence merely circumstantial; as, for instance, the poverty of the nominal purchaser, and his inability to pay for the estate.(3) This, it seems, must come in aid merely of other proof.

20. A resulting trust may be rebutted as to a part of the land itself, or a part of *the interest* in the land.(4)

21. It has been said, that no trust will result, unless the party interested pay the *whole* consideration. This doctrine, however, seems to have been overruled in England,(5) and, in Pennsylvania, a purchase with trust-money, *in whole or in part*, gives to the owner of the money a proportional interest in the land. So, in Kentucky, where slaves were purchased by A, *in part*, with the money of B; held, a trust resulted to B *pro tanto*. So, where land is purchased by several persons, and a joint deed received, a trust results in favor of each, to the extent of the amount paid or secured by him. And, in enforcing specific performance, conveyances will be decreed to each, in like proportion. And parol evidence may be admitted to show the amount so paid or secured.(6)(c)

22. It is held in New York, that to constitute a resulting trust, the transaction must vest an absolute title in the *cestui*, making the trustee a mere conduit-pipe or channel to convey the estate to him. It is not sufficient that, under a contract with the trustee, the *cestui* is to have a

(1) 2 Story, 444 n.; Lloyd v. Spillett, 2 Atk. 150 n.; 2 Sug. 156-7.

(2) Boyd v. M'Lean, 1 Johns. Ch. 532; Snel-ling v. Utterback, 1 Bibb. 609; 4 Blackf. 539.

(3) Willis v. Willis, 2 Atk. 71.

(4) Benbow v. Townsend, 1 My. & K. 506.

(5) Crop v. Norton, 9 Mod. 235; Wray v. Steel, 2 Ves. & Beam. 322, 355.

(6) Kisler v. Kisler, 2 Watts, 324; 3 Bibb, 15; Shoemaker v. Smith, 11 Humph. 81; Pierce v. Pierce, 7 B. Mon. 433; Brothers v. Porter, 6, 106.

(a) Particularly the case of *Lench v. Lench*, 10 Ves. 511, in which Sir Wm. Grant remarked, that whatever doubts might have been formerly entertained on the subject, it is now settled, that (after the death of the alleged trustee) money may be followed into the land in which it was invested; and a claim of this sort may be supported by parol evidence. A devisee may claim on account of money paid by the testator. *Mahorne v. Harrison*, 13 S. & M. 53. A resulting trust may be proved *against* heirs by parol admissions of the ancestor. *Harder v. Harder*, 2 Sandf. Ch. 17.

(b) In Indiana, the bill must be supported by two witnesses, or one with corroborating circumstances. *Blair v. Bass*, 4 Blackf. 539.

(c) A bought land and paid one-third of the purchase-money, the remainder to be paid in instalments. Before the instalments became due, A died, and his widow, out of her own funds, paid the remaining two-thirds. The widow afterwards sold the land to B, and, after her death, the heirs of A petitioned for partition, and the land was sold. Held, a resulting trust arose in favor of those claiming under the widow, and they are not estopped from asserting their rights, by the setting off of dower to the widow at the partition. *Thompson v. Benoe*, 12 Mis. 157.

lien upon the estate, or a share in the proceeds of sale. Nor can there be a resulting trust *for a certain amount of money*. If the trust results only in part, it must be *for a specified portion of the estate*, so as to make the parties tenants in common.(1)

23. But, in the same State, if a part only of the purchase-money be paid by the *cestui que trust*, the land will be charged with the money advanced, *pro tanto*.(2)(a)

24. It has been held, that where a *partner* buys real estate in his own name with the partnership funds, without any previous agreement with his co-partners, although the joint business is that of dealing in lands, there is no resulting trust in favor of the latter. Hence, a note, given by the former in his own name for such purchase, does not bind the latter.(3)

25. But a contrary doctrine has been held in Pennsylvania, Arkansas and Kentucky; and in equity, land purchased with partnership funds and on joint account is held *partnership property*; and, though the grantees be called in the deed *tenants in common*, parol evidence is admissible to prove the facts, and rebut the very slight presumption arising from this phrase.(4)

26. So, it has been held in Pennsylvania, that if A buy land in his own name, under an agreement that B shall be equally interested with him, they are tenants in common.(5)

27. Though the evidence shows that a part of the land conveyed was intended as a gift; if a consideration was paid for another part, the whole being included in one deed, which expresses a consideration generally; there is a resulting trust for the whole.(6)

28. A grantor with warranty cannot set up a trust for himself, on the ground of an interest in the purchase-money, as being the proceeds of

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| (1) White v. Carpenter, 2 Paige, 238. | Hart v. Hawkins, 3 Bibb, 506; Hoxie v. Carr, |
| (2) Botsford v. Burr, 2 John. Cha. 410. | 1 Sumn. 182; 2 Wash. C. C. 441; McGuire |
| (3) Forsyth v. Clark, 3 Wend. 637; Pitts | v. Ramsay, 4 Eng. 518. |
| v. Waugh, 4 Mass. 424. | (5) Stewart v. Brown, 2 Ser. & R. 461. |
| (4) Phillips v. Cramond, Whart. Dig. 580; | (6) Malin v. Malin,* 1 Wend. 653. |

* This case relates to the notorious *Jemima Wilkinson*, called by her followers "the Universal Friend." They supposed that her peculiar character and office disqualified her to hold property in her own name. The counsel who argued against the trust remarked, that her followers were the only witnesses for the trust. "They believed they were testifying in a controversy between their God and a mortal; and can it be supposed that they believed they sinned, when they obeyed the mandates of their Deity, uttered not from Sinai, but from the mouth of their God?"

(a) Where a party seeks the benefit of a purchase made for him in the name of a trustee, who has paid the purchase-money, but to whom he is indebted for other advances, he shall not be relieved, but upon payment of all the moneys due to the trustee. 1 Story Equ. 78. A trust estate can be sold on execution, only where the *cestui* might immediately and unconditionally claim a conveyance from the trustee; not where the latter would be first entitled to a reimbursement of his expenses. Thus, where A purchased land, and the deed was made to B, his daughter, who became liable for part of the consideration; held, although done expressly to protect from A's creditors, they could not take the land in execution; because B had a claim upon the land to the amount of her liability. The remedy must be in equity. *Gowing v. Rich*, 1 Ired. 553.

So, where a person purchases land sold under execution, as the friend or agent of the debtor, but in his own name, pays part of the purchase-money, and gives his own bond for the remainder, the land cannot be levied on by a creditor of the debtor, without first indemnifying the purchaser. *Heth v. Young*, 11 B. Mon. 278.

sale of other land, in which the alleged trustee had only a life interest, and of which the grantor owned the reversion.(1)

29. Where land owned by two persons is conveyed to a third, and reconveyed to one of the grantors, the other grantor has no resulting trust in the estate.

30. The wife of A owning lands in tail, they join in a conveyance to B in fee, who reconveys to A in fee. More than a year afterwards, A conveys to C. Upon a bill in equity by a creditor of A, to set aside the last conveyance, as fraudulent against creditors; held, no trust could arise out of these conveyances for A's wife and children, and that such trust was not legally proved by a declaration of it in the answer to the bill, which could have only the weight of parol evidence.(2)

31. The principle of a resulting trust, as arising from the payment of the purchase-money by one, and a conveyance to another, is not applicable, where one man buys land merely to *benefit another*, and admits, that, if the latter will repay him the purchase-money, he will convey the land;(a) or, where a man verbally employs an agent to purchase land for him, but pays no part of the price. These facts constitute a mere *conventional* trust, or trust by contract, which is void unless proved by writing. So, where a conveyance is executed conformably to a written agreement, no resulting trust can be raised by parol evidence.(3)(b)

32. A and B agree, by parol, to purchase land; A to make the purchase, and B to pay one-half of the price and take one-half of the land. This is a case within the statute of frauds, and no trust results to B.(4) So, if A buy in his own name and upon his own credit, the stat-

(1) *Squire v. Harder*, 1 Paige, 494.

(2) *Jones v. Slubey*, 5 Har. & John. 372.

(3) *Dorsey v. Clarke*, 4 Har. & John. 551;

St. John v. Benedict, 6 John. Ch. 111. See *London v. Fairclough*, 2 Man. & G. 674.

(4) *Parker v. Bodley*, 4 Bibb, 102. See *Willink v. Vanderveer*, 1 Barb. 599.

(a) The mere violation of a parol agreement, in relation to land purchased by one for the benefit of another, will not raise an implied trust in favor of the latter, unless accompanied with fraud or *mala fides*. As, for instance, when one purchases at an execution sale, for the benefit of the debtor. In such case, if there be fraud, the vendee will hold in trust for the creditors, and also for the debtor, unless he was privy to the fraud. *Robertson v. Robertson*, 9 Watts, 36; *Hains v. O'Connor*, 10, 343, 320; *Jackman v. Ringland*, 4 W. & S. 149; *McCalloch v. Cowber*, 5, 427. See *Willink v. Vanderveer*, 11 Barb. 599. If done to defraud creditors, a creditor may file a bill in equity to set aside the conveyance, so far as to satisfy his judgment. *Jackson v. Forrest*, 2 Barb. Ch. 576. Where A procured a deed from B, upon a promise to hold the land for C; held, such promise might be proved by B; and, if A had sold the land, that C might recover the price paid from him. *Miller v. Pearce*, 6 W. & S. 97. Where land was purchased at the land office by A in trust, and with the understanding that he should deed to the two claimants B and C, to B all west of a certain road, and to C the residue, and B furnished A with the necessary entrance money for his portion of the land, prior to the purchase; held, A, as trustee, was responsible to B for his portion of the land. *Russell v. Lode*, 1 Greene, 566.

It has been held that a trust may result, where the purchase-money is advanced by a third person as a loan or gift to the *cestui*. *Getman v. Getman*, 1 Barb. Ch. 499.

Where a clerk in a store pilfers from his employer, and with the money purchases land, he cannot be held as the trustee of the land for the benefit of his employer, so as to enable him to compel a conveyance of the legal title. *Campbell v. Drake*, 4 Ired. Eq. 94.

(b) But where A paid for land, and B agreed to procure a deed for him, but took a deed to himself; held, A might maintain a bill in equity against B. *Pillsbury v. Pillsbury*, 5 Shepl. 107.

ute of frauds is applicable; and it cannot be proved by parol evidence, that the purchase was made for another's benefit.(1) So, where a son conveyed land to his father, nominally as a purchaser, but in reality as a trust, to enable the father to raise money for the son by mortgage, and the father died without raising the money; held, though the son had a lien for the price of the land, parol evidence of the trust was inadmissible. Judge Story says, this case stands upon the utmost limits of the doctrine of the inadmissibility of parol evidence as to resulting trusts.(2)

33. A purchase by a third person at sheriff's sale, with the money or on account of the judgment debtor, raises a trust for the latter.(3)

33 *a*. Where a judgment was recovered in the name of A, and with his knowledge and consent, for the benefit of B, and an execution issued thereon was levied on the land of the debtor, which was set off to A; held, the legal estate thereby vested in A, in trust for B, and A was bound to release his title to B, who might maintain a bill in equity for such conveyance. B having brought his bill in equity, in the alternative, either for a conveyance, or for a compensation in damages, and it appearing that A had previously sold and conveyed the land, and received the purchase-money, and thereby disabled himself from making a conveyance; held, B was entitled to recover the amount of the purchase-money and interest, or, at his election, a sum equivalent to the present value of the land.(4)

33 *b*. A, finding himself insolvent, gave to his sureties, on a guardian's bond, a note for the deficiency in his guardian account; they sued the note, and obtained judgment and partial satisfaction, by levying on real estate and having it set off to them jointly. After the levy, &c., one of the sureties, B, paid the deficiency in the guardian's account. Held, up to the time of that payment there existed a resulting trust in favor of A, the principal; that the right to insist upon this trust was not barred by the lapse of time, which bars the action for contribution; and that facts necessary to establish the trust might be shown by parol evidence. Held also, that upon the payment by B, a new trust arose in favor of the sureties themselves, in the proportions in which they had contributed towards the deficiency, and the necessary expenses and taxes.(5)

34. No trust shall result to an alien.(*a*) It would be a fraud upon the rights of the State and the laws of the land. If the alien is to have the proceeds of the land, after satisfaction of certain express trusts by a sale, the surplus *escheats*, and may be reached in equity by the State. So, if the alien is to have the rents and profits, the State may claim them in equity.(6)

(1) *Fowke v. Houghtier*, 3 Marsh. 57.

(2) *Leman v. Whitley*, 4 Russ. 422; 2 Story on Eq. 442 n.

(3) *Deatly v. Murphy*, 3 Mar. 477; *Denton v. M'Kenzie*, 1 Dessau. 289; *Pegues v. Pegues*, 5 Ired. Equ. 418.

(4) *Peabody v. Tarbell*, 2 Cush. 226.

(5) *Brooks v. Fowle*, 14 N. H. 248.

(6) *Phillips z. Cramond*, Whart. Dig. 580; *Leggett v. Dubois*, 5 Paige, 114; 3 Leigh, 492.

(*a*) But, where there was a devise in trust to sell and divide the proceeds among certain persons, some of whom were aliens; and a sale was accordingly made under a decree; held, the owner could not claim any part of the money. *Du Hourmelin v. Sheldon*, 4 My. & C. 525.

35. In New York, where, as will be seen (ch. 26,) the whole doctrine of uses and trusts has been fundamentally changed, no trust shall result to a party who pays the purchase-money for land, except so far as to make the land liable for his debts existing at the time.(1)(a)

36. In Massachusetts, Maine and New Hampshire, (substantially) it is provided by statute that no trust shall be valid without writing, "excepting such as may arise or result by implication of law;" and that no trust shall be valid against a subsequent conveyance or seizure on legal process, unless the purchaser or creditor had notice, express or implied.(2)

37. It had been previously decided in Massachusetts, that payment of the purchase-money of land raised no trust in favor of the party paying it, though the grantee gave him a bond to convey to his order. Also, that there was in such case no fraud, which would render the land liable to creditors of the real purchaser. Perhaps such a transaction might constitute an unlawful conspiracy.(3)(a)

38. The Court in New Hampshire remark,(4) that Massachusetts is the only State where resulting trusts have not been treated as excepted from the operation of the statute of frauds. In the same case they remark, that the usual clause in deeds, acknowledging receipt of the consideration, states only who *paid the money*, not who *owned it*. The ownership is a mere inference or presumption from the payment, and therefore, *on general principles*, may be rebutted by parol evidence. Besides, such clause is a mere *receipt*, which is always open to contradiction. And the evidence in question does not go to *defeat the conveyance*. Moreover, the statute of frauds provides, that no grant, assignment, &c., of a trust *by any person*, shall be valid without a writing. But a resulting trust is a mere *creature of the law*. Hence, it is concluded, that the statute would not apply to resulting trusts, even if there were no excepting clause.

(1) 1 N. Y. Rev. St. 728.

(2) Mass. Rev. St. 408; N. H. Rev. St. 244-5; Me. Rev. St. 374. See Mass. St. 1844, 289.

(3) *Storer v. Batson*, 8 Mass. 442; *Jenney v. Alden*, 12 Mass. 375; *Northampton, &c. v.*

Whiting, Ib. 104.

(4) *Pritchard v. Brown*, 4 N. H. 399-400-1; *Page v. Page*, 8, 187, (holding that a resulting trust may be either raised, rebutted, or discharged by parol.) See *Brooks v. Fowle*, 14 N. H. 248.

(a) Land paid for by A was conveyed to B, in order to secure it from A's creditors. A took possession under a lease from B, and his creditors levied upon the land as A's property. Held, they could not recover possession from B by writ of entry. *Howe v. Bishop*, 3 Met. 26. Whether, under similar circumstances, B could have maintained his title as *demandant*, A being in possession, *qu.* That he could not, see *Goodwin v. Hubbard*, 15 Mass. 210.

It has been recently held, that a trust resulting by implication of law is not within the statute of frauds of Massachusetts, (Rev. Sts. c. 59, sec. 30;) but may be proved by parol. *Peabody v. Tarbell*, 2 Cush. 226. Also, that the Supreme Court has jurisdiction of implied as well as of express trusts. *Whitten v. Whitten*, 3 Cush. 191.

If it appear on the face of a bill in equity, brought to enforce a trust, not arising by implication, and concerning land, that it vests in parol; the statute of frauds may be relied on under a demurrer. *Walker v. Locke*, 5 Cush. 90. The following important case, recently decided in the Circuit Court of the United States for the district of Massachusetts, may be cited as illustrating the doctrine of resulting trusts, in connection with other important points of equity jurisprudence.

A purchased at auction, from D, a lot of land, and, on the failure of A to comply with the terms of sale, D entered and took possession, but, on application by A was enjoined from making sale thereof. A new arrangement was then made, by which D placed a warranty

39. Similar observations have been made by Judge Story.⁽¹⁾ He remarks, in reference to a resulting trust, that the parol evidence does not establish any fact, inconsistent with the legal operation of the words of the deed; but merely *engrafts a trust upon the legal estate*; and that the exception of resulting trusts from the statute of frauds is merely *affirmative*.

40. Where property is given to one, in trust to buy lands for another's benefit, and he does purchase lands, equity will presume that he intended to act in pursuance of the trust. So where one *covenants* to lay out money in lands, or pay it to trustees to be thus laid out. But the mere fact of his buying land will not be sufficient to create a resulting trust in favor of the other party, without some other ground to pre-

(1) *Hoxie v. Carr*, 1 Sumn. 186-7. In Michigan, even an implied trust is invalid, against creditors and purchasers for consideration and without notice. But registration of the deed is sufficient notice. Rev. St. 261

deed in the hands of P, in escrow, agreeing that it should be rendered to A on a certain day, provided, that by such day A had complied with certain terms of payment, A making a deposit of \$1,000 as forfeit money. A then proceeded to build on said land, but, failing in his means, was unable to comply with his agreement. D then threatened to sell the premises, and A filed a second bill in equity to restrain the sale, and an injunction was granted, and an interlocutory decree was passed, that if A should perform his agreement before a certain time, the injunction should stand continued, but otherwise should be dismissed. A failed to perform his agreement, and the bill was accordingly dismissed. In the intermediate time, however, between the decree and the dismissal of the bill, A, having expended large sums on the building, and exhausted his resources, applied to E for aid to raise money to complete the building, and discharge the debts. It was arranged between them, that an absolute conveyance should be made by D to E, which was done, and on the same day A executed a release of all interest to E, to complete the title, excluding, in terms, "all claims and demands made by, through, or on account of A, and also excepting any claim or demands arising out of any contract made by or with A," and admitting that A had no legal or equitable right in the same. E then assumed the ostensible ownership of the property, and A was employed in superintending the execution of the building, and procured securities to assist in raising funds, and procured work to be done on his own account. E afterwards sold the premises to K. A bill was then brought by A against E and K, setting forth, that, at the time of making the absolute conveyance to E, although no paper to such effect was executed, yet it was understood between E and A, that the premises were to be held by E, in trust for the benefit of A, and the conveyance was made absolute solely for the purpose of freeing the premises from all claims by or through A, and that E was only to receive a remuneration for any services which he might perform, and an indemnification for his expenses, and then to reconvey the estate to A; and also, that K was not a *bona fide* purchaser, for a valuable consideration, without notice. Held, the circumstances showed no sufficient motive, on the part of A, to make an absolute and unrestricted conveyance, but were perfectly consistent with the parol trust as set up by the bill; 2. as a decree in the equity suit was not a dismissal upon the merits, it did not constitute an absolute bar to a future suit; 3. the release by A, though absolute in its terms, was indispensable to guard the property against A's creditors, so as to induce capitalists to advance funds, and, therefore, was not inconsistent with a parol trust, and the evidence showed E to be acting as A's agent; 4. if E, knowing that A intended he should act as agent, did really intend to act for his own benefit solely, the concealment from A of such purpose was a fraud in equity; 5. This was a parol trust, resulting from agency, and resting upon honorary obligations, and as such, equity would enforce it; 6. It was not within the statute of frauds, being a resulting trust as to A, and a trust as to E merely for his liabilities, compensation and expenditures; because it was a case of agency, of constructive fraud, and of part performance; 7. K was not a *bona fide* purchaser without notice, because, even if uninformed of the actual state of the title and A's claim, he had sufficient notice of the claim and controversy, to put him on inquiry, which was sufficient notice in equity. 8. Though A might never have been able to fulfil his agreement with E by discharging the incumbrances and remunerating him; yet this did not in equity extinguish A's rights, though it might furnish reason for foreclosing his right and ordering a sale upon E's application. *Jenkins v. Eldredge*, 3 Story, 181.

sume that the land was purchased with the trust-money. It has been said, that the evidence of this fact must be clear.(1)

41. Hence, where the trustee had died after such purchase, leaving no personal assets; it was held that the party, claiming to be *cestui que trust*, stood only on the footing of a simple contract creditor, and had no lien upon the lands purchased.(2)

42. Where the trust money is identified, a trust will result, according to some authorities, although the investment is not in pursuance, but in *violation*, of the trust. But others hold, that in such case the party intested has a mere lien.(3)

43. Where a trust results, in consequence of a payment of the purchase-money of land, either by the *cestui* or another for his benefit, the *cestui* may, at his election, claim the money instead of the land.(4)

44. Another case of resulting trust is this: Where land is conveyed *without consideration*, express or implied, and no other distinct use or trust is stated, a trust results to the grantor. But the consideration may be either good or valuable. This rule is conformable to the ancient law of uses, by which the burden of proof was on the feoffee to show a consideration, and not on the feoffor to show a trust, (for himself.)(5)(a)

45. The doctrine of resulting uses first introduced the notion, that there must be a consideration expressed in the deed, otherwise a trust would result. But this rule as to implied trusts does not embrace every voluntary conveyance, and the smallest consideration is sufficient to prevent a trust from resulting to the grantor.(6)

46. Where a deed expressed the consideration of five shillings and of natural love and affection; held, this would be sufficient to prevent any resulting trust in favor of the grantor. But it is not conclusive, even with the addition of the clause, "and other valuable considerations." Thus, if the recitals of the deed show that it is made for the payment of creditors, and that unless they are paid the deed shall be void; a trust results to the grantor, for the surplus over such payment.(7)

47. There can be no resulting or implied trust between a lessor and lessee, because the covenants in the lease are a sufficient legal consider-

(1) 2 Story, 457.

(2) Perry v. Phelps, 4 Ves. 108; Perry v. Phelps, 17, 173.

(3) 2 Story, 457, and n.

(4) Phillips v. Cramond, 2 Wash. C. 441; 2 Story, 457, and n.

(5) Norfolk v. Browne, 1 Ab. Eq. 381; Prec. in Cha. 80; 2 Story on Eq. 440-1; Bacon on Uses, 317.

(6) Hagthorp v. Hook, 1 Gill. & J. 296-7; 2 Story, 442.

(7) 1 Gill. & J. 296-7.

(a) It has been held in Maine, that where an absolute conveyance purports to have been made for a good or valuable consideration paid by the grantee, the presumption of law is, that the estate is held by him for his own use, and this presumption cannot be rebutted by parol evidence. Philbrook v. Delano, 29 Maine, 410.

More want of consideration in a deed will not of itself alone raise a resulting trust. *Ib.* To a bill, charging that a person since deceased had made a conveyance to the father of his wife, of a certain described estate, without any consideration, but for the express purpose of keeping the property safe for the use of his wife and children, and praying for a reconveyance of the land to the children, but containing no allegation of any declaration of trust in the conveyance, or that any written declaration of trust had been made; there was a demurrer on the ground that parol proof was inadmissible in such case to establish a trust. The demurrer was sustained. *Ib.*

It seems, it would not be necessary that such a bill should set forth the manner in which the alleged trust was to be established by proof, and that the demurrer might have been overruled, to admit any written evidence or declaration of trust to be introduced. *Ib.*

ation. But there may be an implied trust between the assignor and assignee of a lease.(1)

48. It is said, that, in case of voluntary settlements and wills, if there is no declaration of the trust of a term, it results to the settler; otherwise, where it is a settlement for valuable consideration, and in the nature of a contract for the benefit of a wife or children.(2)

49. Where land is conveyed or devised to a trustee upon certain specified trusts, the residue of the estate, which remains after those trusts are satisfied, results to the grantor or his heirs.(3)

50. Devise to a trustee for ninety-nine years, in trust for the payment of certain debts, and an annual allowance to the sons of the testator, remainder to his eldest son for life, remainder to his first and other sons in tail, and a like remainder to the second son. The specified debts having been paid, other creditors of the sons bring their bill in equity, praying that the term may be attendant on the inheritance, and held liable for their claims. Held, inasmuch as the trust of the term was satisfied, the remainder of it resulted to the first son of the testator.(4)

51. Devise of freehold, leasehold and copyhold to A, B and C, *tenendum*, the freehold and leasehold in trust for A. Held, the copyhold descended to heirs.(5)

52. Although the same technical words are not required to create an estate by will as by deed, yet, when created, the same circumstances will raise a resulting trust to the heirs of the deviser in the former case, and to the grantor himself in the latter.(6)

53. There are several other distinct cases, in which a trust results by operation of law. Thus, where land is conveyed for a consideration, to be determined by the price for which the grantee shall sell it; a trust results to the grantor till such sale is made, in the same way as if the grantee had been expressly empowered to sell the land for the grantor's benefit.(7)

54. Where the legal estate in lands is conveyed, and trusts are annexed to it which are either illegal or contrary to public policy, the latter are void; and either the donee will take the absolute estate, or the whole trust result to the donor, as one or the other construction will best suppress the illegal purpose. Thus, where *slaves* were conveyed, in trust to permit them to live together, and be industriously employed, and the donee to control their morals, &c.; held, inasmuch as emancipation or a qualified slavery is contrary to public policy, and as the deed showed that the slaves were not to be the *property* of the donee, a trust resulted to the donor.(8) Upon a similar principle, it has been seen, (sec. 34,) no trust will result to an alien.

55. So, where the trusts or objects of a limitation fail or are exhausted, a trust results.(9)

56. Where one conveys land to trustees for such uses and purposes as he shall appoint, and fails to make an appointment, a trust results to him and his heirs.(10)

(1) *Pilkington v. Bayley*, 7 Bro. Parl. Ca. 383; *Hutchins v. Lee*, 1 Atk. 447.

(2) *Brown v. Jones*, 1 Atk. 191; 1 Cruise, 314.

(3) 2 Story, 442.

(4) 1 Cruise, 314.

(5) *Stubbs v. Sargon*, 2 Keen, 255.

(6) *Stevens v. Ely*, 1 Dev. Eq. 493.

(7) *Prevost v. Gratz*, 1 Pet. 367.

(8) *Stevens v. Ely*, 1 Dev. Eq. 493.

(9) 2 Story, 443.

(10) *Fitzg.* 223.

57. Where a trustee renews a lease in his own name, he shall hold it for the benefit of the *cestui que trust*. It is said, if a mortgagee, executor, trustee or tenant for life, having a limited interest, gets an advantage by being in possession or behind the back of the party interested in the subject, or by some contrivance in fraud; he shall not hold the same for his own benefit, but hold it in trust.(1)

58. And this rule applies, although the trustee requested a renewal for the *cestui*, before obtaining it for himself; more especially where the *cestui* is an infant. The court will, in such case, order an assignment of the lease to the infant; an account of the profits since the renewal; and that the trustee be indemnified from the covenants in the lease.(2)

59. A assigns to B a lease of land as security. Afterwards, for a consideration expressed but not actually paid, A agrees to give up one-half of the land to B. B takes possession, surrenders the old lease, and takes a new and extended one. Held, the agreement to give up the land appeared on the face of it to be procured by undue influence, and by taking advantage of the former assignment; that the maxim, "once a mortgage always a mortgage," was applicable; and that A should have the benefit of the new lease, on payment of the amount due B.(3)

60. So where one partner, negotiating for a lease for the firm, received a large sum of money from the lessor for himself; held, he took it in trust for the firm.(4)

61. Upon the same principle, a purchaser with notice, from one having only a limited interest in the property, becomes a trustee for those beneficially entitled.

62. Thus, where A had a temporary right to certain slaves, the ultimate property being in minor children, and B, having notice of the title, purchased them from A; held, B should be a trustee for the children. Otherwise, with a purchaser from B without notice.(5)

63. If two parties are interested together, by mutual agreement in writing, for the purchase of land, and a purchase is made accordingly; one cannot appropriate the benefit exclusively to himself, but any private advantage makes him a trustee for the other. Whether the same rule applies, where the agreement is parol, *quære*.(6)(a)

64. Where a conveyance of land has been obtained *by fraud*, the grantee is in equity a trustee for the grantor. So, any party, in possession of land by fraud, is in equity a trustee for the person beneficially interested.(7)

(1) *Holeridge v. Gillespie*, 2 John. Cha. 33-4.

(2) *Keach v. Sandford*, Sel. Cas. in Chy. 6; *Blewett v. Millett*, 7 Bro. Parl. 367; *Killick v. Fleane*, 4 Bro. 161; *James v. Dean*, 11 Ves. 383; *Fitzgibbon v. Scallan*, 1 Dow. 261; *Taster v. Marriott*, Amb. 668; *Owen v. Williams*, Ib. 784; 5 Bro. Parl. 10.

(3) *Holeridge v. Gillespie*, 2 John. Cha. 30.

(4) *Fawcett v. Whitehouse*, 1 Russ. & My. 181.

(5) *Wamburzee v. Kennedy*, 4 Dessaus. 474; *Phyfe v. Wardell*, 5 Paige, 268.

(6) *Flagg v. Mann*, 2 Sumn. 487.

(7) 2 Atk. 150; *Brown v. Lynch*, 1 Paige, 147; *Perkins v. Hays*, 1 Cooke, 166.

(a) One of several heirs entered upon the land, retained possession, received the rents, built upon it, and took out a patent for himself and in trust for the others, and the land was taxed in their names. Held, no disseizin of the other heirs. *Hart v. Gregg*, 10 Watts, 189.

65. An exception to the rule of resulting trusts, in favor of the party who pays the purchase-money of an estate, is where a *father* buys land, and takes a conveyance to his *minor child*.^(a) Such transaction, founded upon the consideration of blood and affection, is held *an advancement* to the latter, made in fulfilment of the parental obligation of support. In ordinary cases, from the payment of the price the law presumes an implied trust in favor of the real purchaser, which, however, may be rebutted by parol evidence. But, in this case, the presumption is the other way, subject to be controlled by the same kind of evidence. And though, during the child's infancy, the father takes the profits, the law will intend that he does this as guardian; or, if there be a power of attorney, as agent for the son. So, if the father occupy the land during his life, lay out money in improvements, devise the estate to other parties, and by his will provide otherwise for the son; the latter shall still hold the land. So, although the son gave receipts to tenants for the use of the father. An infant cannot be presumed to have been intended for a trustee.⁽¹⁾ In an early case, however, the extreme youth of the child was regarded as a reason for not considering the purchase as an advancement⁽²⁾

66. Where the estate purchased by a father is conveyed to the minor son and a stranger jointly, the law still construes it an advancement for the child, more especially if the other grantee disclaims. In such case, it is said, if the child should die before the other grantee, the latter would then be a trustee for the father, and bound to re-convey to him. And this would seem to be the object of joining him in the deed, as well as the affording protection to the infant.⁽³⁾

66 *a*. The grantee of a farm, having mortgaged it for the price, lived upon it 33 years, till his death. He did no labor upon the farm, but his four youngest sons carried it on, and paid for it by their labor. Held, a trust resulted in their favor.⁽⁴⁾

66 *b*. Where a father purchased tract A in his own name, with the money of his son, and then agreed with him that the amount thus paid should go into tract B, the possession of which was delivered to the son by the father under a contract for a sale, paying a yearly sum to the father for life; and the son gave notice to his tenant of tract A, who then paid rent to the father; and the assessments were respectively charged, and the son continued in possession of tract B: held, there was evidence for a jury of a parol sale, which was not within the statute of frauds.⁽⁵⁾

67. A father agreed with his minor son to give him his own earnings, but the father occasionally received them, and, being then solvent, purchased lands of equal value, himself paying the price, but taking

(1) *Parish v. Rhodes*, Wright, 339; *Astreen v. Flanagan*, 3 Edw. 279; *Phillips v. Gress*, 10 Watts, 158; *Scawin v. Scawin*, 1 Y. & Coll. Cha. 65; *Skeats v. Skeats*, 2 Y. & Coll. Cha. 9; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Plunkett v. Lewis*, 3 Hare, 316; *Grey v. Grey*, 1 Chan. Cas. 296; *Ford v. Katharine*, Finch R. 341; *Mumma v. Mumma*, 2 Vern. 19; *Dennison v. Goehring*, 7 Barr, 175.
 (2) *Binion v. Stone*, Nels. Cha. R. 68; *Jackson v. Matsdorf*, 11 John. 96; *Sampson v. Sampson*, 4 Ser. & R. 333.
 (3) *Lamplugh v. Lamplugh*, 1 P. Wms. 111.
 (4) *Harder v. Harder*, 2 Sandf. Ch. 17.
 (5) *Lee v. Lee*, 9 Barr, 169.

(a) So where one takes a conveyance in trust for his children, the trust will be enforced, though he himself paid the price. *Dennison v. Goehring*, 7 Barr, 175.

the deed in the son's name. The father occupied without rendering any account, and afterwards became insolvent. Held, the land was not liable to the father's creditors, the circumstances not justifying any presumption of fraud, inasmuch as the receipt of the son's earnings furnished an equitable consideration for the conveyance to him.(1)

68. But where a father, being indebted, buys and pays for an estate, and the conveyance is made to his children, and, upon a bill in equity by creditors of the former, the father and children deny any advancement; this, with other slight circumstantial evidence, will be sufficient to charge the land with the father's debts.(2)

69. Parol evidence is admissible, in such case, to rebut the presumption of a resulting trust.

69 *a*. Where a father purchases land, and, for the purpose of defrauding his creditors, has the conveyance made to a son; although no trust thereupon results in favor of the father, yet, the fact of his having paid the purchase-money, constitutes a good consideration for a subsequent agreement between the grantee and the father and another son, for a division of the land between the two sons; and, where such division is made and acted upon for several years, each son occupying his share, and making expenditures in consequence of the division, and upon the faith of it, the grantee will not be allowed to repudiate the agreement and claim the whole land.(3)

70. The same principle has been applied to a purchase made by a grandfather in the name of his grandson—the father being dead; and is also applicable, it seems, to a purchase made in the name of a natural child, if described as the child of the purchaser; because there is an obligation on the parent to provide for such children. So, also, to the case of an *adopted* child, or a nephew.(4)

71. After the emancipation of a child from parental custody and support—as by his coming of age, marriage, advancement, &c.—a purchase by the father in his name will not, in general, be deemed an advancement, but will create a trust for the father. But the emancipation or advancement must have been complete, and not merely partial. A child having only a reversion expectant on a life estate, will be considered as unadvanced; and, even if he have been advanced, this will make no difference, if the father consider him as unadvanced. A purchase in the name of a child of full age, however, is to be considered as of equivocal effect, to be determined by the actual occupancy of the land during the father's life. If the father occupy, it will be considered as a trust for him; if the son, as an advancement.(5)

72. The principle above stated, making a transaction which would ordinarily create an implied trust, as between parent and child an *advancement*, is applicable, not only where payment of the purchase-money by the former is the ground of the trust, but also where he conveys property to trustees, declaring the trusts only in part.

73. A father, by deed, reciting his wish to provide for himself during

(1) *Jenney v. Alden*, 12 Mass. 375.

(2) *Doyle v. Sleeper*, 1 Dana, 531.

(3) *Proseus v. McIntyre*, 5 Barb. 424.

(4) *Ebrand v. Dancer*, 2 Cha. Ca. 26; *Lloyd v. Read*, 1 P. Wms. 608; *Fearne's Opin.* 327; *Astreen v. Flanagan*, 3 Edw. 279; *Currant v. Jago*, 1 Coll. Cha. 261. See

McDaniel v. Zelf, 8 Humph. 58; *Wait v. Day*, 4 Denio, 439.

(5) *Finch R.* 341; *Elliott v. Elliott*, 2 Cha. Ca. 231; *Pole v. Pole*, 1 Ves. 76; *Sug. on Ven.* 2, 166; *Gilbert Lex Præto.* 271; 1 *Cruise*, 320.

his life, and his family afterwards, conveys his property to his son upon the trusts thereafter mentioned. He then declares trusts of a part of the property for his wife, daughter and niece. The son maintained the father many years. Held, there was no resulting trust for the father.(1)

74. Where a father purchases land, and takes the conveyance to himself and a son jointly, although it was formerly held that the law would construe the transaction as an advancement to the son, it seems to be now settled, that they shall take together, each a moiety of the estate; and, upon the father's death, his share will be held liable in a Court of Chancery to his creditors, more especially where the father occupied the estate during his life, and it constituted the only assets for payment of his debts. In making this decision, it was said by the Court, that although "*stare decisis*" should be their governing maxim, yet the doctrine of advancement had been already far enough extended, and ought not to be adopted in this case; where the form of conveyance showed a clear intention, on the part of the father, to be a joint owner of the estate. *A fortiori* the same principle would apply, in case of a limitation to the father for life, remainder to the son in fee.(2)

75. The principle of the above-mentioned case has been questioned by very high authority; unless the case proceeded on the ground of fraud.(3)

75 *a*. Where a deed was taken in the name of a son, the purchase-money paid by him and his father, and the proportion which each paid was uncertain, the court refused to establish a resulting trust in favor of the father.(4)

76. It seems, parol evidence is not admissible to prove a trust for the father. The trust ought to appear upon very plain and coherent and binding evidence.(5)

77. No subsequent declaration by the father will be sufficient to raise a trust, where it is clear that an advancement was originally intended. Thus, a devise by him will be of no effect.(6)

78. But, it seems, such devise to a third person, accompanied by a devise of other lands to the son, will put the latter to his election.(7)

79. Where the conveyance is proved to have been made by the father for a special purpose; as, for instance, to sever a joint tenancy; a trust will result to him.(8)

80. Some distinction, in relation to this subject, has been suggested between sons and daughters. But it is shrewdly remarked, that, while daughters are less frequently advanced, they are also much less suitable for trustees, than sons.(9)

81. It is said, the presumption of advancement to a child ought not to be frittered away by nice refinements.(10) In a leading case upon

(1) *Cook v. Hutchinson*, Keen, 42.

(2) *Scroop v. Scroop*, 1 Cha. Ca. 27; *Stileman v. Ashdown*, 2 Atk. 477.

(3) 2 Sug. on Ven. 170.

(4) *Baker v. Vining*, 30 Maine, 121.

(5) 2 Sug. on Ven. 166-8.

(6) *Woodman v. Morrell*, 2 Free. 32; *

Mumma v. Mumma, 2 Vern. 19.

(7) 2 Sug. on Ven. 169.

(8) *Baylis v. Newton*, 2 Ver. 28; *Jackson v. Matsdorf*, 11 John. 96.

(9) Sug. on Ven. 172.

(10) 2 Story, 446.

* But in this case, the bill in equity of the father, claiming the land, was itself held to disprove a trust.

this subject,(1) Ch. J. Eyre remarks, that the relation of a child rebuts a resulting trust, *as a circumstance of evidence*; but that it would be a more simple view of the matter, to regard a child as a *purchaser for valuable consideration*, upon the same principle by which the consideration of natural love and affection raised a use at common law. This construction would shut out evidence on the other side, the introduction of which is "getting" into a very wide sea." Thus, where a son is *provided for*, the resulting trust is said not to be rebutted, though a father is the only judge what shall be a *provision*. So, the conveyance is termed a *prima facie* advancement. Hence, the principle has been subjected to great uncertainty and variation.

82. A wife cannot be trustee for her husband. Hence, a purchase in the names of the husband, the wife, and a third person, A, for their lives and the life of the longest liver of them, gives to the wife an estate for life, and after her death an estate to A, in trust for the executors of the husband. So, where a man purchases an estate in the names of himself, his wife and daughter, he cannot by a mortgage bind the land after his own death, and during the lives of the wife and daughter.(2)

83. It is suggested, however, that a purchase in the name of a wife may be fraudulent against creditors. But, it seems, the St. of 13 Eliz. is not applicable to such case, because the husband might give her the money which is paid for the land, and therefore creditors are not harmed. It seems *actual* fraud is necessary to avoid the transaction.(3)

84. If a husband purchase land in his own name with the money of the wife, a trust results to her, as against his heirs at law or mere volunteers, but not creditors; and a purchaser from the husband will be charged therewith.(4) On the other hand, in case of a deed made to the wife, the husband paying or securing the price, even with the expectation that it will be ultimately paid by her; although the law presumes an advancement, yet, if done to defraud his creditors, a trust results to him, and the land is liable for his debts.(5)

84 a. Where a wife, acting under a power of attorney from her husband, authorizing her, among other things, to receive and collect all money and other property due to him, for her own use, purchased land with money so received, and took a conveyance thereof to herself; and, after the death of the husband, a bill in equity, alleging these facts, and also that the husband never intended that such purchase should be a provision for the wife, or her separate property, was brought by the heirs at law of the husband against the widow, for a conveyance of the land so purchased by her; it was held, on demurrer to the bill, that, upon the allegations therein contained, there was no resulting trust in favor of the husband or his heirs.(6)

84 b. Certain land was bought for a wife, and the price paid partly from the proceeds of her own real estate, to the sale of which she assented only on condition the proceeds should be thus invested, and partly by the husband. Held, the land was not liable to sale on exe-

(1) Dyer v. Dyer, 2 Cox, 92.

(2) Kingdome v. Bridges, 2 Vern. 67; Back v. Andrews, Prec. in Ch. 1; Back v. Andrews, 2 Vern. 120; Jenks v. Alexander, 11 Paige, 619.

(3) Sug. on Ven. 171-2; 11 Paige, 619.

(4) Methodist, &c. v. Jacques, 1 John. Cha. 450; Brooks v. Dent, 1 Md. Ch. 523.

(5) Guthrie v. Gardner, 19 Wend. 414; Hopkins v. Carey, 23 Miss. 54.

(6) Whitten v. Whitten, 3 Cush. 191.

cution against him, nor were the execution purchasers entitled in equity to a conveyance.(1)

84 c. Where real estate was purchased and paid for in part with the money or funds of the husband, and, with his assent, the conveyance taken to a trustee, who simultaneously gave a mortgage on the estate for the residue of the purchase money; and also, with the husband's assent, executed a declaration of trust that the premises were held to the sole and separate use of the wife, subject to the mortgage; held, the rights of creditors not being in question, the declaration of trust was valid and binding upon the husband, and he had no interest in such estate.(2)

84 d. If a husband sells his wife's land for his own benefit, under an agreement with her to purchase other land for her of equal value with that sold, and he afterwards, conformably to the agreement, makes such purchase, and causes the vendor to execute the conveyance to his wife; the lands so conveyed will not be subject in equity to the husband's debts, contracted subsequently to his payment for the land, but before the execution of the conveyance.(3)

85. In case of a partition between two *femes covert*, tenants in common, and mutual releases made to their respective husbands; each holds in trust for his wife. But, if only a pecuniary consideration is recited, a purchaser without notice will gain the absolute title.(4)

CHAPTER XXIV.

TRUSTS. NATURE, ETC., OF A TRUST ESTATE.

1. Analogous to legal estates.
2. Alienation of.
3. Curtesy.
9. Dower.
16. Subject to debts.
27. Merger.

29. Actions by and against the *cestui*, &c.
36. Conveyance of the legal estate, when presumed.
39. Trust, how affected by lapse of time, and the statute of limitations.

1. A TRUST being a use not executed by the statute of uses, it was held, in some early cases, that trust estates were to be regarded as identical in their incidents with uses prior to this statute. But a different doctrine is now settled. Although a *cestui que trust* has no legal estate, yet, in the consideration of a court of equity, where only, for the most part, his title is recognized,(a) he is the real owner of the land. He has an equitable seizin of it, corresponding in all respects with the legal seizin that is acknowledged in courts of law. In this respect, as in many others, equity follows the law; and it is said, if there were not the same rules of property in all courts, all things would be, as it were,

(1) *Williams v. Williams*, 6 Ired. Equ. 20.
(2) *Martin v. Martin*, 1 Comst. 473.

(3) *Barnett v. Goings*, 8 Blackf. 284.
(4) *Weeks v. Hoas*, 3 Watts & S. 520.

(a) Judge Story (on Equity, 2, 228) places trusts under the *exclusive* jurisdiction of equity.

at sea, and under the greatest uncertainty.(1) All the *canons of descent* apply to trusts.(a) They are alienable(b) and devisable. So they are subject to the same classification—into inheritances, freeholds, and estates less than freehold; estates in possession, remainder and reversion; and estates several and undivided—with legal estates. The same rule also applies to them as to entailments and perpetuities.(2) It has been said, however, that though limitations of trusts cannot be *carried farther*, in the way of perpetuity, than legal interests; yet, it seems, they may be *more liberally expounded*.(3)

2. Any legal conveyance or assurance by a *cestui que trust* shall have the same effect and operation upon the trust, as it should have had upon the estate in law, in case the trustees had executed their trust. But, by a clause in the statute of frauds, universally adopted in the United States, all grants and *assignments* of trusts must be in writing, and signed by the party. And, it seems, the effect of an assignment by the *cestui que trust* is not to change the estate of the trustee, but only to pass to the assignee precisely the *cestui's* own interest in the land.(4)(c)

3. A trust estate is subject to *curtesy*.(5) Thus, a man devised lands to trustees in fee, in trust to pay his debts, and convey the surplus to his daughters, A and B, equally. A brings a bill for partition. C, the husband of B, being a defendant, alleges in his answer, that he married B under the belief of her owning the legal estate; that she was in receipt of the profits at the time of marriage, and the trust was

(1) *Nourse v. Finch*, 1 Ves. 357; *Watts v. Ball*, 1 P. Wms. 108; *Shrepnel v. Vernon*, 2 Bro. 271; *Burgess v. Wheate*, 1 Eden, 206; 2 Story, 236-7; *Chaplin v. Chaplin*, 3 P. Wms. 234; *Cudworth v. Hall*, 3 Dess. Cha. 260; *Cashborne v. English*, 2 Abr. Eq. 728; *Duffy v. Calvert*, 6 Gill, 487.

(2) Co. Lit. 290 b, n.

(3) *Brailsford v. Heyward*, 2 Dess. 293; Walk. Intro. 340.

(4) 2 Cha. Cas. 78; *Elliott v. Armstrong*, 2 Blackf. 198; *Blake v. Foster*, 3 T. R. 494.

(5) 1 Vir. Rev. C. 159; Alab. L. 247; Clay, 169-70; *Robison v. Codman*, 1 Sumn. 128; 1 Story's Eq. 74.

(a) Where real estate was placed in the hands of a trustee, to be conveyed to the appointee of A, or, on failure of an appointment, to her heirs, and she died without making one; held, as she had no legal title, the property could not be sold, in the ordinary course of administration, under a license, for payment of her debts. *Coverdale v. Aldrich*, 19 Pick. 391. An heir of A having made a general assignment, for his creditors, of all his lands, tenements, &c., goods, &c., and all his right, title and interest in and to the same; held, his share in the above real estate passed thereby. *Ib.*

(b) Where a *cestui que trust*, by a sealed instrument, "sold, assigned and transferred" to A his "one-fourth interest in a house and lot," being the house and lot in which he had an equitable interest; held, this was an executed contract, and conveyed all the interest of the grantor. *Rogers v. Colt*, 1 New Jersey, 704.

(c) It would seem to be otherwise with a use, prior to the statute of uses. St. 1 Rich. III, ch. 1, provided that the conveyance of one having a use should be good against the feoffees to use. It will be seen (*infra*, sec. 23) that a sale on execution against the *cestui* has the same effect. Where a conveyance was made to trustees, to receive the rents for the uses of the *cestui*, during his life, then to his heirs; held, the *cestui* could neither aliene nor pledge his interest, nor authorize the trustee to sell it. *Van Eps v. Van Eps*, 9 Paige, 237. A conveyance made by the *cestui* is not illegal for *maintenance*, though the trustee sets up an adverse claim. *Baker v. Whiting*, 3 Sumn. 476.

Where the grantor, in a deed of trust to secure a debt, gives a deed to the *cestui que trust*, such deed passes only the equity remaining in the grantor after he made the deed of trust; the legal title remains in the trustee. *Brown v. Bartee*, 10 S. & M. 268.

And if, on a sale of the land by the trustee, under the deed of trust, it is purchased by the *cestui que trust*; he will have the entire estate in the land; and a sale of the same land on execution, issuing upon a judgment recovered against the grantor in the deed of trust, will pass no estate. *Ib.*

not discovered till after her death. Held, C was entitled to curtesy.(1)(a) But, where land is given to trustees for the separate use of a married woman, the husband is not entitled to curtesy.

4. Devise to trustees in fee, in trust to apply the rents and profits to the sole and separate use of the testator's daughter A, for her life, with a power of disposal and appointment to her. She having made no appointment, her husband claimed to be tenant by the curtesy, on the ground that the inheritance descended to her. Held, the whole legal estate was in the trustees; that, although A had the (equitable) inheritance, she had no seizin in deed during coverture, and the husband had no equitable seizin, and could not have possession or take the profits; that the testator had treated the wife as a *feme sole*, and neither in law or equity was there any claim to curtesy.(2)

5. Money agreed or directed to be laid out in land may, in equity, be subject to curtesy.

6. A woman devises to her daughter A £300, to be laid out by her executors in land, which was to be settled to the use of A and her children, remainder over. The money was never thus laid out. After A's death and that of her issue, her surviving husband, by a bill in equity, prays that the land may be purchased and settled on him for life, or the interest of the money paid to him for life. Held, he should have the interest of the money.(3)

7. It is said that, notwithstanding some opinions to the contrary, the husband shall have curtesy in an equitable inheritance of the wife, though the rents, &c., are to be paid to her separate use during coverture. The receipt of them is a sufficient seizin. But, if a devise is made to a wife for her separate and exclusive use, and with a clear and distinct expression that the husband is not to have any life estate or other interest, but that the same is to be for the wife and her heirs; Chancery will consider him as a trustee, and not allow any curtesy.(4)

7 a. Devise in trust to the use of the testator's daughter, to her separate use, to be disposed of as she might think proper; after the death of her husband, the trust to terminate, and the daughter's title become absolute. She died before her husband, leaving children. Held, the husband was entitled to curtesy, whether the trust was determined or not by her death.(5)

8. Since a trust itself is subject to curtesy, it seems to follow of course that a legal estate, to which a trust is annexed, is not thus subject. It is said, that tenant by the curtesy cannot stand seized to a use, for he is in by the act of law, in consideration of marriage, and not in privity of estate. But, *in equity*, such tenant would be affected by the use or trust.(6)

9. In England, there is, at law, no *dower* in a trust estate, whether

(1) *Watts v. Ball*, 1 P. Wms. 108; *Md L. 701*; *Cunningham v. Moody*, 1 Ves. 174; *Dodson v. Hay*, 3 Bro. R. 404.

(2) *Hearle v. Greenbank*, 1 Ves. 298; *Ib.* 3 Atk. 695; *Cockran v. O'Hern*, 4 W. & Co. Lit. 29 a, n. 6; *Cochran v. O'Hern*, 4 Serg. 95; *Jarvis v. Prentice*, 19 Conn. 272.

(3) *Sweetapple v. Bindon*, 2 Vern. 536; (5) *Payne v. Payne*, 11 B. Mon. 138.

(6) 2 Story, 234, n. 4.

(a) In Maryland (*Md. L. 701*), curtesy is allowed in equities, but not to the prejudice of any claim for the price of the land, or other lien.

the husband have himself parted with the legal title before marriage, reserving only a trust; or whether a trust estate has been directly limited to him by a third person. The same rule applies, where the husband purchased an estate in the name of a trustee, who acknowledges the trust after his death.(1) It has been said, that a trust does not differ from a legal estate, except in regard to *dower*.(2) (See ch. 31, s. 4.)

10. This point was first settled in the 12th year of Ch. II, and has been since, though with apparent reluctance, uniformly adhered to.(a) The grounds of decision are said to have been, partly the universal understanding of the community, and corresponding practice of conveyancers, to depart from which would produce great confusion of titles, and defeat the intention of numerous limitations; and partly the phraseology of the statute of uses, which in its preamble recites, that by means of uses women had been defeated of their dower; which incident must still belong to trusts, a trust being since the statute what a use was before.(3)(b)

11. A distinguished English judge (Sir Joseph Jekyll) was of opinion, that the rule of precluding a widow from dower in a trust was applicable, only where the husband created the trust by some act of his own, as by purchasing an estate in the name of a trustee, thereby showing a clear intent to cut off the claim of dower; and not where the land came to the husband by the act of a third person. The same judge also held, that the widow should have dower, where a time is fixed for the trustee's conveying the legal estate to the husband, but the latter dies before such conveyance is made; upon the principle, that what ought to be done by a trustee, is regarded in law as actually done.(4)

12. These distinctions, however, have been since rejected, and the rule against the right of dower in a trust estate held to be a universal one. The cases, in which the above-named suggestions of Sir J. Jekyll were made, are said to have turned upon their own peculiar circumstances, and not to warrant any general conclusion.(5)

(1) *Colt v. Colt*, 1 Cha. R. 134; *Bottomley v. Fairfax*, Prec. in Cha. 336; 1 Story on Equ. (3d ed.) 74; *Ray v. Ring*, 5 Barn. & Al. 561; *Hamlin v. Hamlin*, 19 Maine, 141; *Cooper v. Whitney*, 3 Hill, 95.

(2) *Ambrose v. Ambrose*, 1 P. Wms. 321; *Danforth v. Lowry*, 3 Hayw. 68.

(3) *Chaplin v. Chaplin*, 3 P. Wms. 235; *Att'y Gen. v. Scott*, For. 138.

(4) *Banks v. Sutton*, 2 P. Wms. 708; *Fletcher v. Robinson*, For. 139.

(5) *Godwin v. Winsmore*, 2 Atk. 525; *Forder v. Wade*, 4 Bro. R. 525; For. 139. See *Knight v. Frampton*, 4 Beav. 10; *Hamblin v. Hamblin*, 1 Appl. 141, adopting the English rule.

(a) But, by St. 3 & 4 Wm. IV, ch. 105, sec. 2, a widow may claim dower *in equity* from any beneficial estate or inheritance in possession, except joint tenancy, in which she is not dowerable at law. 1 Steph. 349-50.

(b) Another reason of the distinction made between curtesy and dower in trusts is said to be, that there had long been an understanding among the people, that a trust estate was not subject to dower, and numerous conveyances and settlements had proceeded upon this supposition. During coverture, a woman could not alienate without her husband; and therefore it was not deemed necessary to obtain her concurrence in a transfer of the land. But no one would purchase an estate subject to curtesy, without the assent of the husband. Therefore, the allowance of dower would operate injuriously upon purchasers, while that of curtesy would not, because they had provided against it. 2 Story, 237, n. 1; *D'Arcy v. Blake*, 2 Sch. & Lef. 387.

13. But the widow of a trustee shall not have dower.(1)(a)

14. In the United States, the rule against allowing dower in trusts has been extensively changed. In North Carolina, Virginia,(b) Illinois, Indiana, Tennessee and Ohio,(c) a widow has dower in all equitable estates. In Pennsylvania, generally, only in legal estates; but she has dower in a trust, by an immemorial usage, which has never been questioned. So, in Maryland, by statute.(2)

15. In Ohio, equitable estates are enumerated, as "all the right, title and interest, &c., held by bond, article, lease, or other evidence of claim."(d) But while, in legal estates, dower is allowed of all lands owned during coverture, in equitable estates it is limited to such as the husband held at his death.(3)

16. By the English statute of frauds, and by the late St. 1 & 2 Vict., c. 110, s. 11, trusts are made liable to the debts of the *cestui que trust*, and declared to be assets in the hands of his heir. The contrary had previously been held by the courts, in analogy to the old law of uses. In North Carolina, equitable estates are declared to be personal assets; in Indiana, assets by descent in the hands of the heir. In Georgia and South Carolina, a trust estate is assets by descent.(4)

17. Land held in trust cannot be sold by the administrator of the trustee, as assets. Nor is it bound by a judgment, even though confessed, and for the purchase-money;(e) nor can it be taken upon execution against the trustee.(5)

18. Although the aid of a court of equity is required, to obtain possession of a trust estate after the death of the *cestui*, yet, when obtained, it is legal, not merely equitable assets.(6)

(1) Robison v. Codman, 1 Sumn. 121; Cooper v. Whitney, 3 Hill, 101; Derush v. Brown, 8 Ohio, 412.

(2) 1 Vir. R. C. 159; Illin. R. L. 627; Purd. Dig. 221; 1 N. C. Rev. St. 614; 2 S. & R. 554; Ind. Rev. L. 209; Ten. St. 1823, 46; 4 Griff. 909; M'Mahan v. Kimball, 3 Blackf. 6.

(3) Walk. Intro. 312, 324; Smiley v. Wright, 2 Ohio, 507. See ch. 10, sec. 15.

(4) Bennet v. Box, 1 Cha. Cas. 12; 1 N. C. Rev. St. 278; Ind. Rev. L. 276; Prince, 916; 2 Brev. Dig. 316.

(5) Robison v. Codman, 1 Sumn. 121; Elliott v. Armstrong, 2 Blackf. 198; 2 Story, 242; 4 J. J. Mar. 599; Williams v. Fullerton, 12 Met. 346; Wilhelm v. Tolmer, 6 Barr, 296.

(6) 2 Atk. 293.

(a) Five persons purchased land for the joint use of all, and agreed, in writing, that one should take a deed, and pay over shares of the proceeds to the others. Upon a bill for partition, held, the wife of the trustee had gained no inchoate right of dower. *Castor v. Clarke*, 3 Edw. 428.

(b) Independently of a statutory provision, there would be no dower. *Claiborne v. Henderson*, 3 Hen. & M. 322.

(c) Chancellor Kent says, this is said to be the rule as to trusts in New Jersey, Pennsylvania, Maryland, Virginia, Kentucky, Mississippi, Ohio, Illinois and Alabama. 4 Kent, 45; Clay's Dig. 157. In Kentucky, a transfer by the husband bars dower in equitable estates. *Lawson v. Morton*, 6 Dana, 471.

(d) In Indiana, dower is allowed in property contracted for, in proportion to the price paid. Rev. St. 238-9.

(e) A and others, who had liens upon real estate of a corporation, held for church and school purposes, agreed to purchase the estate at sheriff's sale. It was accordingly purchased by A, and conveyed to him by the sheriff, and he executed a declaration of trust, that he would hold the same to sell and pay to himself and his associates certain specified amounts, any remainder of the proceeds of the sale to be paid to the use of the corporation. Held, A had such an interest in the estate as could be bound by a judgment against him; and, on a sale by a trustee appointed by the court, in the room of A, the share of the proceeds, formerly payable to A, was to be paid to his judgment creditor, in preference to one to whom he had transferred the same by an assignment subsequent to the judgment. *Drysdale's Appeal*, 3 Harris, 457.

19. In Massachusetts, Pennsylvania and Ohio, a trust estate cannot be taken in *execution* by a creditor of the *cestui*. In Ohio, it may be reached by a process in Chancery. It is held, that an equitable title to land, which is not complete and perfect, and especially an imperfect equity of a complicated character, is not the subject of sale under execution. The creditor must resort to a court of chancery, in order to reach such an equity.(1)

20. Trusts are liable to debts in North Carolina, Maryland, Virginia, Kentucky,(a) Georgia, New York, New Hampshire and Indiana, more especially, implied trusts.(2)

21. In Tennessee, where land has been sold under a deed of trust, it is redeemable, as in case of sales on execution and chancery decrees. In the same State, the English statutes, subjecting trusts to execution, are held to be in force. But they are applicable only to trusts created by or resulting from a *conveyance*, not to those which are merely *constructive* or *covenanted to be raised*. Thus, the interest of one holding an *obligation for land* is not subject to execution.(3)

22. In New Hampshire, although the statute upon the subject provides only for levying executions upon estates in fee, it is the immemorial usage to levy them upon lesser estates, and upon trusts. So, a devise in trust, to permit the *cestui* to occupy and receive the income, vests in him an interest which is liable to be taken on execution. It is an executed use.(4)

23. In North Carolina, the statute, subjecting trusts to legal process against the *cestui*, applies only to those cases where the estate is held solely in trust for the defendant. A sale on execution passes not only his interest, but the trustee's also. Hence, where there are other trusts, as, for instance, to sell and pay debts, a sale on execution against the *cestui* would injuriously affect third persons.(5) So, in New York, a trust is not subject to an execution against the *cestui*, unless the trustee holds the legal title as a *clear simple trust*, for the judgment of debtor alone.(6)

24. A married woman, for whose benefit a trust has been created, even by herself before marriage, cannot, by her own act, subject the estate to be taken on execution.

25. A woman, before marriage, conveyed her property, in trust for herself, to her brother. The deed provided, that she and her future husband should remain in possession, so long as they made a proper

(1) Walk. Intro. 312; Russell v. Lewis, 2 Pick. 508; Merrill v. Brown, 12 Ib. 216; Ashhurst v. Given, 5 Watts & S. 323; Hopkins v. Carey, 23 Miss. 54; Eyrick v. Hetrick, 1 Harr. 488. See Mathews v. Stephenson, 6 Barr. 496.

(2) 1 N. C. Rev. S. 266; 1 Vir. Rev. C. 159; 1 Ky. R. Lr. 443, 653; Prince, 916; 4 N. H. 402-3; Ontario, &c. v. Root, 3 Paige, 478; Blair v. Bass, 4 Blackf. 539; Pool v. Glover, 2 Ired. 129; Lynch v. Utica, &c., 18

Wend. 236; M'Meehen v. Marman, 8 Gill & J. 57; Gowing v. Rieh, 1 Ired. 553; Upham v. Varney, 15 N. H. 462; U. S. Dig. 1848, 127.

(3) Tenn. St. 1823, 23; Shute v. Harder, 1 Yerg. 1.

(4) Pritchard v. Brown, 4 N. H. 402-3; Upham v. Varney, 15 N. H. 462.

(5) Harrison v. Battle, 1 Dev. Eq. 537; Davis v. Garrett, 3 Ired. 459.

(6) Ontario, &c. v. Root, 3 Paige, 478.

(a) In this State, the trust estate is liable in Chancery. And, pending a suit against the heir of the *cestui* for a debt due from the latter, the estate cannot be sold upon an execution against the heir himself. Gillispie v. Walker, 3 B. Mon. 505. A *cestui*, who is not party to a sale of the estate on execution, may be relieved in equity, after discharging the equitable claims of the purchaser. Cassidy v. M'Daniel, 8 B. Mon. 519.

use of the property, and that, whenever they should use it improperly, it should be at the trustee's disposal. The husband and wife were always in possession. They joined in giving a note, in settlement of a claim against him; upon which judgment was recovered, and her interest in the estate sold on execution, the creditor having notice of the trust. The purchaser, being the judgment creditor, brings an action of trespass to try title; held, Chancery would restrain such action by an injunction.(1)

26. Where a trustee *by his own act* transfers the estate, the *cestui* may, at his election, hold him answerable. But, where the alienation takes place by a decree against the trustee, the only remedy of the *cestui* is by a resort to the adverse claimant, and the property in his hands.(2)

27. A trust merges in the legal estate, when both become united in one person, because a man cannot be trustee for himself.

27 a. Where a trustee of land for the use of his children devised to them all the residue of his estate; held, the legal estate in such parcel was vested in the children, either under the residuary devise or by descent, and that their equitable estate was merged therein.(3)

28. But the rule is applicable, only where the legal and equitable estates are co-extensive and commensurate. If the former is an absolute, and the latter only a partial estate, there will be no merger, because it might be an injury to the party.(4) So, where a trustee is one of the beneficiaries of the trust, he takes a legal estate to the extent of his interest.(5)

29. How far a *cestui que trust* may support or defend against *an action for the land*, as between himself and the trustee, or himself and a third person, upon the strength of his equitable title, seems to be a point unsettled in England, and with us variously decided in the different States. Lord Mansfield held, that the *cestui que trust* might maintain ejectment, if the trust was clearly proved, but not otherwise; while Lord Kenyon ruled, that, where the legal estate is outstanding in another person, the party not clothed with that legal estate cannot recover in a court of law, whether the action is brought by the trustee or by a stranger.(6)

30. In New York, the *cestui que trust* cannot defend himself in an ejectment brought by the trustee, by showing that he is the beneficiary of a resulting trust,(7) more especially unless such interest is clear and precise. Thus, a patent for lands was granted to A, B & C, for themselves and their associates, being a settlement of *Friends* on the west side of S. lake, to have and to hold the same to said three persons, as tenants in common for themselves and their associates. The plaintiff, claiming under the patentees, brings ejectment against the defendant, a member of the society, who had paid a proportion of the purchase money. Held, the defendant's title was too uncertain, to prevail against the plaintiff's legal claim. But, where the trust is wholly nominal, and

(1) *Wilson v. Cheshire*, 1 M'Cord's Cha. 233.

(2) *Cobb v. Thompson*, 1 Mar. 513.

(3) *Cooper v. Cooper*, 1 Halst. Ch. 9.

(4) *Wade v. Paget*, 1 Bro. 363; *Brydges v. Brydges*, 3 Ves. 126; *Nicholson v. Halsey*, 1 John. Ch. 422; *Gardner v. Astor*, 3, 53.

(5) *Mason v. Mason*, 2 Sandf. Ch. 432.

(6) *Armstrong v. Reirse*, 3 Burr. 1901; *Goodtitle v. Knot*, Cowp. 46; *Doe v. Pott*, Dougl. 721; *Roe v. Reade*, 8 T. R. 122; 1 Pet. 299; *Ib.* 430; *Denn v. Allen*, 1 Penning 50; *M'Henry v. M'Call*, 10 Watts, 456.

(7) *Moore v. Spellman*, 5 Denio, 225; *Jackson v. Van Slyck*, 8 John. 488.

executed in the *cestui*, a third person cannot set it up as against the *cestui*.⁽¹⁾

31. In Pennsylvania, a *cestui que trust* may maintain ejectment, where possession is necessary, to give him such enjoyment of the property as it was intended he should have; and the legal title of the trustee cannot be set up against him by a third person. Thus, where the owner of a farm dedicates a portion of it to a charity, as to a school, without a conveyance, and afterwards conveys his farm to another; the grantee becomes only trustee, in respect to the portion so dedicated, for the *cestui que trust*; and, if he ousts them, they may maintain ejectment.⁽²⁾

32. So, a purchaser of land may bring ejectment against the vendor upon a mere agreement, after tender of the price; and the vendor against the purchaser, if the price be not paid.⁽³⁾

33. In Massachusetts, if the trustee bring a real action against the *cestui*, upon the plea of "*nul disseizin*," the former shall prevail. But the tenant may plead specially the trust, and that he is in possession as tenant at will, taking the rents and profits. In Maryland, such action will lie, unless, from the facts, a conveyance is to be presumed. In Alabama, the *cestui* cannot defend on the ground of improper conduct by the trustee.⁽⁴⁾

34. In Ohio, a trust cannot be taken advantage of in ejectment, and a court of law will not notice it.⁽⁵⁾

35. A *cestui* may maintain ejectment, after the purposes of the deed of trust have been satisfied, but the trustee or his grantee may do the same.⁽⁶⁾

35 a. The trustee, after the time fixed for payment by the terms of a trust deed, is invested with the legal title, and at law is the proper party to contest the legal sufficiency of the deed, and a verdict for or against him, if obtained without collusion and fraud, is binding and conclusive on his *cestui que trust*.⁽⁷⁾

36. Where the circumstances of a case are such, as to require or justify the presumption that the legal estate has been conveyed to the beneficial and equitable owner; the jury may be instructed to rely upon such presumption and give their verdict in favor of the latter. This presumption arises from long-continued possession by the *cestui* and those under whom he claims. Although somewhat analogous to the title acquired by an *adverse occupancy*; it is not precisely similar, because the possession may have been held under the equitable, instead of the legal title. But the presumption, in this case, is founded upon the principle, that the law will consider as done that which ought to have been done. Like the presumption of a grant, it does not proceed upon the belief, that the thing presumed has actually taken place, but

(1) Jackson v. Sisson, 2 John. Cas. 321, (containing a learned examination of cases by Mr. Justice Kent.) Welch v. Allen, 21 Wend. 147.

(2) Kennedy v. Fury, 1 Dall. 72; Smith v. Patton, 1 S. & R. 80. See Ross v. Barker, 5 Watts, 391; Swayze v. Burke, 12 Pet. 11; Huston v. Wickerham, 8 Watts, 519; Presbyterian, &c. v. Johnston, 1 W. & Serg. 56; School, &c. v. Dunkleberger, 6 Barr, 29.

(3) Hawn v. Norris, 4 Binn. 77; Minsker

v. Morrison, 2 Ye. 344; Mitchell v. De Roche, 1, 12.

(4) Russell v. Lewis, 2 Pick. 510; Newhall v. Wheeler, 7 Mass. 199; Matthews v. Ward, 10 Gill & J. 443; Mordecai v. Tankersly, 1 Ala. N. S. 100.

(5) Walk Intro. 316.

(6) Hopkins v. Ward, 6 Munf. 41; — v. Stevens, 2 Rand. 422.

(7) Marriott v. Givens, 8 Ala. 694.

is adopted from the principle of quieting the possession, and the impossibility of discovering in whom the legal estate, if outstanding, is actually vested. Mere possibilities are not to be regarded. The court must govern itself by a moral certainty; for it is impossible, in the nature of things, there should be a mathematical certainty of a good title. Hence, though the evidence of actual reconveyance be slight and inconclusive, yet, if it can be ascertained at what period the legal estate ought to have been reconveyed, such reconveyance may be presumed.(1)(a)

37. Bill in equity, for specific performance of an agreement to purchase land. Defence—a want of title in the plaintiff. It appeared that the land was conveyed in 1664, by way of indemnity against eviction from another estate, with a provision for reconveyance of one moiety, after the expiration of two lives, and eleven years thereafter. For one hundred and forty years, no claim appeared to have been made under this deed; but the grantor, and those claiming under him, were always in possession, although the deed was once mentioned in an instrument relating to the land, made in 1694. Held, a reconveyance might be presumed, as to one-half, at the time stipulated, and, as to the other, when the danger of eviction might reasonably be considered at an end, which must have been in much less time than one hundred and forty years; and that the title was good.(2)

38. But where a trust was presumed, from strong circumstances, once to have existed; after the lapse of forty years, and the death of all the original parties, it was also presumed to be extinguished (3)

39. On the other hand, the question may arise, how far the rights of a *cestui que trust* are impaired by mere lapse of time. On this point, it is held, that *express, technical, direct* or *pure* trusts, clearly proved, of which Chancery has proper, peculiar and exclusive jurisdiction, are not within the statute of limitations, though liable to be barred after the lapse of a reasonable time without enforcement; but *implied* or *constructive* trusts are; and if the evidence of a trust is doubtful, adverse possession will have much effect in barring a party's rights. The period of limitation does not commence, till the *cestui* knows of some adverse act of the trustee. And where the owner of the equitable title is in possession, and afterwards evicted by him having the mere legal title; the statute begins to run only from the time of eviction. Implied trusts have been de-

(1) Jackson v. Pierce, 2 John. 226; Jackson v. Moore, 13, 516; Hillary v. Waller, 12 Ves. 250-4; Lyddall v. Weston, 2 Atk. 19; Eldridge v. Knott, Cowp. 215; Doe v. Davis, 1 Ad. & Ell. (N. S.) 430. See Flournoy v. Johnson, 7 B. Mon. 693.
(2) Hilary v. Waller, 12 Ves 239.
(3) Prevost v. Gratz, 6 Wheat. 481.

(a) Courts sometimes presume extinguishment of a title, in order to sustain, but rarely to disturb, the possession. Adair v. Lott, 3 Hill, 182. Where a deed was made to trustees for the use of a church, which was afterwards incorporated; held, after a long time, a conveyance from the trustees to the corporation would be presumed. Dutch, &c. v. Mott, 7 Paige, 77.

But, where the legal estate is vested by a will in executors or trustees, to effectuate the purposes of the will, and a release of their estate would be a breach of duty; no presumption in favor of such release can be allowed. Brewster v. Striker, 2 Comst. 19.

Delivery and acceptance of a conveyance in trust will be presumed, after possession held by the *cestui que trust* for more than twenty-five years, although the trustee be a lunatic at the time of the conveyance, and continue so. Eyrick v. Hetrick, 1 Harris, 488.

fined, as those of which courts of law have jurisdiction.(1) The Supreme Court of the United States have said, that, where a trust is clearly established, more especially if there has been fraud, *on principles of eternal justice*, lapse of time shall be no bar to relief.(2)(a)

(1) 3 Hayw. 153; *Shelby v. Shelby*, 1 Cooke, 182; *Kane v. Bloodgood*, 7 John. Ch. 111; *Falls v. Torrance*, 4 Hawk. 413; *Van Rhyn v. Vincent*, 1 M'Cord's Cha. 313; *Oliver v. Piatt*, 3 How. 333; *White v. White*, 1 Md. Ch. 53; *McDonald v. Simms*, 3 Kelly, 383; *Evarts v. Nason*, 11 Verm. 122; *Finney v. Cochran*, 1 W. & Serg. 118; *Talbott v. Todd*, 5 Dana, 199; *Singleton v. Moore*, Rice, 110; *Bohannon v. Ithresley*, 2 B. Monr. 438; *Moore v. Green*, 3 B. Monr. 413; *Nicholson v. Lauderdale*, 3 Humph. 200; *Lloyd v. Currin*, Ib. 462; *Porter v. Porter*, Ib. 586; *Piatt v. Oliver*, 2 Blackf. 268; *Walton v. Coulson*, 1 M'L. 120; *Maury v. Mason*, 8 Por. 211; *Haskell*, 3 Y. & Coll. 617; *Wedderburn v. Wed-*

derburn, 4 My. & C. 41; *Att'y, &c. v. Fishmongers', &c.*, 5 My. & C. 16; *Price v. Blakemore*, 6 Beav. 507; *Bank, &c. v. Beverly*, 1 How. 134; *Baker v. Whiting*, 3 Sumn. 476; *Couch v. Couch*, 9 B. Mon. 160; *Thomas v. Brinsfield*, 7 Geo. 154; *Varick v. Edwards*, 11 Paige, 290; *Murdock v. Hughes*, 7 S. & M. 219; *Lexington v. Bridges*, 7 B. Mon. 565. See *McDonald v. Sims*, 3 Kelly, 383; *Perkins v. Cartwell*, 4 Harring. 270.

(2) *Prevost v. Gratz*, 6 Wheat. 498; see 2 Story, 735, *et seq.*; *Planters', &c. v. Farmers', &c.*, 8 Gill & J. 449; *Wood v. Wood*, 3 Alabama, (N. S.,) 756; *Smith v. Ramsey*, 1 Gilm. 373.

(a) Where a will authorizes the executors to sell lands for payment of debts; a trust is hereby created, and the lien upon the lands continues, till a presumption of payment arises from lapse of time. Such lien is not limited with regard to time, as in ordinary cases. *Alexander v. McMurray*, 8 Watts, 504; *Steel v. Henry*, 9, 523. When an action is brought by a *cestui que trust*, to enforce against the trustee the provisions of the trust deed, and he does not deny the complainant's interest in the trust estate, but defends upon other grounds; the limitation to the suit is the time applicable to sealed instruments. *Flint v. Hatchett*, 9 Geo. 328.

One having the legal title to land conveyed it to a purchaser, having no notice of any trust, and he after eighteen years devised the land. Held, after the lapse of thirty years, a person claiming a trust in the property was barred. *Coxe v. Smith*, 4 John. Cha. 271.

It has been said, that, as between trustee and *cestui*, the former does not cease to stand in that relation by any wrongful act in regard to the estate, except at the election of the latter. Also that trusts are excepted from the statute of limitations, only as between the trustee and *cestui*. *Falls v. Torrance*, 4 Hawk. 413; *Fisher v. Tucker*, 1 McC. Cha. 176; *Llewellyn v. Mackworth*, 15 Vin. 125.

CHAPTER XXV.

TRUSTS—CESTUI AND TRUSTEE—THEIR RESPECTIVE INTERESTS, RIGHTS AND DUTIES, AS BETWEEN THEMSELVES, AND IN RELATION TO THIRD PERSONS.

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| <ol style="list-style-type: none"> 1. Incidents of a trust—right of <i>cestui</i> to a conveyance. 5. <i>Cestui</i> not prejudiced by any act, &c., of trustee. 6. Change of estate by trustee. 7. Executory agreement — binding in favor of <i>cestui</i>. 8. Conveyance by trustee to third persons—notice of trust, &c. 22. Authorized sale by trustee—liability of purchaser to the <i>cestui</i>. 37. Joint trustees—conveyances and receipts by. 38. Liability of trustee to <i>cestui</i>. Release of debts. 39. Sale of land. 40. One trustee, whether liable for another. 41. For what amount trustees shall account. | <ol style="list-style-type: none"> 42. Exchange of lands. 43. <i>Cestui's</i> remedy against trustee. 44. Compensation and allowance to trustee. 49. Trustee shall not purchase the trust estate. 68. Exceptions. 73. Disclaimer and release by trustee. 75. Trustee cannot delegate his power. 76. Statutory provisions as to joint trustees. 77. Joint trustees in New York. 78. Chancery may remove, appoint new trustee, &c. 81. Descent of trust to heirs. 82. Who may be trustees. 83. Trust <i>fastens</i> on the estate. 85. How affected by escheat, &c. |
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1. THE three leading incidents of a trust, as of a use at common law, are *pernancy of the profits, execution of estates, and defence of the land.*(1) The first and last of these properties seem not to require any particular comment. With regard to the second, it is said, that, where a *cestui* has an absolute interest in the trust, he may compel the trustee to convey the legal estate to himself or any one whom he shall appoint.(2) Of course, the *cestui* has no such right, where the trust is created only in part for his benefit; as, for instance, where annuities are first to be paid by the trustee. And the rule seems equally inapplicable to that numerous class of cases, in which a leading object of the party, who conveyed or devised the land, was to vest the legal estate permanently in the trustee and his successors, and such object would be defeated by compelling them to part with it. The rule is, that, in the exercise of a *sound discretion*, equity will compel the trustee to transfer the legal estate, unless the intent of the party creating the trust require that he receive the profits.(3)

2. Thus, where one devised the use and improvement of land for the support of a child, providing that, so long as he should be industrious and economical, he should be entitled to the use and improvement, and to all he should raise by virtue of the improvement; the *cestui*, if shown to be incapable and of intemperate habits, though he were so in the testator's lifetime, shall not recover possession from the trustee.(4)

3. It is doubtful whether a trustee can safely make a conveyance to

(1) See ch. 20, sec. 7.

(2) 1 Cruise, 350.

(3) Bass v. Scott, 2 Leigh, 359; Jasper v. Maxwell, 1 Dev. Eq. 357; Lynch v. Utica, &c., 18 Wend. 236. See Morton v. South-

gate, 28 Maine, 41; Bishop v. Bishop, 13 Ala. 475; Flournoy v. Johnson, 7 B. Mon. 693; Hoare v. Harris, 11 Illin. 24.

(4) Root v. Yeomans, 15 Pick. 488.

execute the trust, without a decree in equity, and costs will not be awarded against him for refusing to do so. The general rule is, in case of *infants*, that a trustee cannot be excused from strict performance without a decree.(1) In Kentucky, a sale by a trustee is invalid, unless made under a decree, or unless the party creating the trust joins.(2)

4. A trustee cannot justify his refusal to convey the estate, by buying in an outstanding title.(3)(a)

5. It is the general rule of equity, that neither any act nor any omission, on the part of a trustee, shall be allowed to prejudice the *cestui que trust*.(4) To prevent this, equity will treat money as land and land as money, and consider that which ought to be done as actually done.(5) So long as the subject of an express or implied trust remains in the hands of the trustee, or of his heirs, executors, administrators or devisees, the Court of Chancery will lay hold of it for the benefit of the *cestui*.(6)

6. Where a *cestui* is of age, the trustee has no right, unless expressly empowered, to change the nature of the estate; to convert land into

(1) 2 Story on Equity, 243; Wood v. Wood, 5 Paige, 597. See Armstrong v. Zane, 12 Ohio, 287; Williams, 3 Bland, 190; Wampler v. Shipley, Ib. 183; Winder v. Diffenderfer, 2, 167; Jones v. Stockett, 426; Orchard v. Smith, 319; Dorsey v. Gilbert, 11 Gill & J. 87; Calvert v. Godfrey, 6 Beav. 97.

(2) 1 Ky. Rev. L. 449.

(3) Kellogg v. Wood, 4 Paige, 578.

(4) Lechmere v. Carlisle, 3 P. Wms. 215; Banks v. Sutton, 2, 715. See Neate v. Pink, 8 Eng. L. & Equ. 205.

(5) See ch. 1.

(6) Ridgely v. Carey, 4 Har. & McHen. 198.

(a) The legislature may constitutionally order a conveyance from the trustee to the *cestui*. Dutch, &c. v. Mott, 7 Paige, 77. Where land is given in trust to convey to the *cestui* at such a time, with a power of sale during the trust, and a conveyance is not then made; the trustee cannot afterwards sell, though the trust continues. Grieveson v. Kirsopp, 2 Keen, 653. See Wood v. White, Ib. 664.

An equitable tenant for life, under a will, may have possession, upon giving security to fulfil its provisions; and, although the trustee had previously leased to one having notice, the court still appointed a receiver to let to the tenant for life, with security. Baykes v. Baykes, 1 Coll. 537.

In decreeing a conveyance of the legal estate by a trustee, equity will not require a general warranty deed; but only a special warranty against his own acts. Hoare v. Harris, 11 Illin. 24. It is said, the court will not take the legal estate from a trustee, and vest it in the party entitled, till a refusal to act by the party entitled to a conveyance. Hodgson, &c., 4 Eng. L. & Equ. 182.

To a bill filed by a *cestui que trust* against the trustees and the other *cestuis que trust*, for the purpose of obtaining a conveyance of the complainant's share of the legal title to real estate, alleged to be in the trustees, and for partition, the defendants pleaded that neither the complainant nor the trustees were, nor was either of them, in possession of the premises at the commencement of the suit. Without denying the allegation in the bill, that the trustees held the legal title as trustees for the complainant and the other *cestuis que trust*, in different undivided proportions; held, the complainant was entitled to a decree establishing the alleged trust, and directing the conveyance of the complainant's share of the legal estate to him, whenever the trustees could legally make such conveyance, notwithstanding the whole premises were, at the time, held adversely to both parties. Bradstreet v. Schuyler, 3 Barb. Ch. 608.

A trustee, who permits the debtor to retain possession of the estate, waste it, and use it as his own, is responsible for the injury to the trust fund, out of his own estate. Harrison v. Mock, 10 Ala. 185.

It is no ground for staying a decree upon a claim for the execution of a trust, that a bill has been filed for its execution, embracing, in addition, other objects. Scott v. Hastings, 5 Eng. Law and Eq. 64.

money, or the converse. Otherwise, it seems, if the *cestui* is an infant.(1)(a)

7. Even where a trust consists in a mere *executory agreement* between the trustee and a third party, such agreement cannot be revoked, to the prejudice of the *cestui*. Thus, where a father contracts in writing for the purchase of land, in trust for his son, the trust will be enforced, although the vendor has since, with the father's consent, devised the land to another person. So, where an owner of land contracts to convey to one person, and conveys to another, having notice of such contract; the purchaser takes subject to all the rights and equities of the former contracting party.(2)

8. But, if a trustee convey the land held by him, for valuable consideration, to one ignorant of the trust, the latter shall hold it, discharged therefrom. It has been seen,(3) that a creditor of the trustee cannot take the land to satisfy his debt; and in this respect it seems to make no difference, whether the creditor has notice of the trust or not.

(1) 2 Story, 242; *DeBevoise v. Sandford*, 1 Hoffm. 192. See *Couch v. Couch*, 9 B. Mon. 160. (2) *Taylor v. James*, 4 Des. 1; *Glover v. Fisher*, 11 Illin. 666. See *John. Cha.* 136. (3) Ch. 24.

(a) Where a trustee disposes of the trust property, the *cestui que trust* may claim the thing received in exchange, if it can be identified. *Piatt v. Oliver*, 3 McLean, 27; *Turner v. Petigrew*, 6 Humph. 438. And this, although the property received in exchange may have greatly increased in value. *Ib.* If the increased value be the result of skilful labor, the rule may be different. *Ib.* Thus, a *cestui que trust* may follow the trust fund into land purchased with it by the trustee, whether the contract for the purchase be executed or executory. *Brothers v. Porter*, 6 B. Mon. 106. So, money paid into court by the Liverpool dock trustees, in respect of leaseholds for years, taken by them under the powers of their Act of Parliament, was ordered to be reinvested in the purchase of copyholds of inheritance. *Coyte's, &c.*, 3 Eng. Law and Eq. 224.

Where a change in the nature of the estate takes place by operation of law, the property will be still held on the same terms as before, with respect to the mutual rights of the trustee and *cestui*. Thus, real and personal property was devised in trust, the rents, issues and income to be paid to the *cestui*. A part of the real estate being taken for a railroad, and the damages paid to the trustee; held, this sum was not *income, &c.*, to be paid to the *cestui*, but a substituted capital, of which he was merely entitled to the interest. *Gibson v. Cooke*, 1 Met. 75.

Devise to a trustee, his heirs and representatives, in trust, to invest and re-invest the land, from time to time, in stocks or other safe securities, and pay the income, with \$200 annually of the principal, to the testator's daughter for life; afterwards to pay and transfer the whole of the trust fund to her children. Held, by necessary implication, the trustee had power to sell the real estate, discharged of the trust. *Purdie v. Whitney*, 20 Pick. 25. See *Rathbun v. Colton*, 15 Ib. 471.

An assignment by a trustee, purporting to transfer the trust property, although insufficient to pass the interest of the *cestuis que trust*, may pass the individual interest of the trustee. *Piatt v. Oliver*, 3 McLean, 27.

Whether a trustee has an equitable right to convey, is a question purely of equitable jurisdiction, and cannot be entertained by a court of law. *Canoy v. Troutman*, 7 Ired. 155.

At law, a sale by a trustee conveys the legal estate, and the title of the purchaser is not affected by the trustee's having exceeded the power to sell, given by the trust deed, nor by a misapplication of the proceeds of the sale. These are equities, which belong to another tribunal. *D'Oyley v. Loveland*, 1 Strobh. 45.

Where land was conveyed by an unsealed writing, in trust, to pay certain debts; held, it was not sufficient in itself to authorize the trustee to sell, but, as it was an equitable lien on the land, he should obtain authority to sell, by praying for a decree to sell for the purposes of the trust. *Linton v. Boly*, 12 Mis. 567.

The court has no power, upon the petition of the grantor, the *cestui que trust*, and the trustees, to order a sale of real estate held in trust and partly for the benefit of infants, although a sale would be beneficial to the *cestui que trust*, where such a sale would be contrary to the provisions of the grant, and the remainder-men are uncertain. *Turner*, 10 Barb. 552.

But a mortgage by the trustee, though, like a judgment, it is a mere incumbrance, will pass a title to an ignorant mortgagee, discharged of the trust.(1) In order to pass a perfect title to the purchaser from a trustee, there must be both a want of notice and a valuable consideration. Neither is sufficient of itself. Hence a gratuitous grantee without notice, and a purchaser for consideration with notice, shall be alike held chargeable with the trust. It seems, if there is a partial consideration, the purchaser will hold only *pro tanto*.(2)

9. To constitute the notice requisite to charge a purchaser, it is sufficient that he have such information as ought to put him on inquiry.(3)

10. The pendency of a suit in equity by the *cestui* against the trustee—after the service of a subpoena and filing the bill—is implied notice.(4)

11. But not a recital in a deed between third persons, though registered.(5)

12. Possession of the land by the *cestui* is implied notice of the trust.(6)

13. The purchaser from a trustee is chargeable, if he have notice of the trust, though he have no notice who is the *cestui*. But it is held, that he must have known the precise terms of the trust.(7)

14. Where an insolvent trustee sells, partly for cash and partly in payment of his own debt, a mortgage given to him on the face of it as trustee, the purchaser is chargeable with the trust.(8)

15. But where a survey of wild land, without an entry in the book of entries, constitutes no appropriation, notice of such survey to one holding a subsequent land-warrant does not affect his title.(9)

16. If an executor, not in advance to the estate, dispose of the property for his own private purposes, whether in payment of a debt or for a new pecuniary consideration; the purchaser, having notice, is chargeable with the trust.

17. A, an executor, empowered to sell lands, sells them, and takes a deed of trust for the price, which he afterwards assigns as security for his own debt. The assignment refers to the deed of trust, which refers to the original deed, which refers to the will. Held, the assignee was chargeable with the trusts of the executor.(10)

18. So, an assignment of a deed of assignment is sufficient notice of the trusts contained in the latter.(11)

19. If a trustee repurchase the estate from a purchaser without notice, the trust will revive, as a charge upon the land, in his hands.(12)(a)

(1) *Finch v. Winchelsea*, 1 P. Wms. 278.

(2) *Manning v. 6th Parish, &c.*, 6 Pick. 18; *Page v. Page*, 8 N. H. 187; *Chaplin v. Givens*, Rice, 132; *Paine v. Webster*, 1 Verm. 101; *Wilson v. Mason*, 1 Cranch, 100; *Hagthorp v. Hook*, 1 Gill & J. 271; 1 McCord's Cha. 119-32; *Harrisburgh, &c. v. Tyler*, 3 Watts & S. 373; *Hanly v. Sprague*, 7 Shepl. 431; *Hallett v. Collins*, 10 How. 174; *Harris v. De Graffenreid*, 11 Ired. 89; *Webster v. French*, 11 Illin. 254; *Heth v. Richmond, &c.*, 4 Gratt. 482; *Buck v. Winn*, 11 B. Mon.

320; *Pooley v. Budd*, 7 Eng. L. & Equ. 229.

(3) 2 Paige, 202.

(4) *Murray v. Ballou*, 1 John. Cha. 566.

(5) *Ib.*

(6) *Pritchard v. Brown*, 4 N. H. 404.

(7) *Maples v. Medlin*, 1 Mur. 219; *Conner v. Tuck*, 11 Ala. 794.

(8) *Pendleton v. Fay*, 2 Paige, 202.

(9) *Wilson v. Mason*, 1 Cranch, 100.

(10) *Graff v. Castleman*, 5 Rand. 195.

(11) *Russell v. Clark*, 7 Cranch, 69-97.

(12) *Bovey v. Smith*, 1 Cruise, 526.

(a) Land was conveyed upon divers trusts with power to sell. The trustees, meaning to annul the trusts, re-conveyed to the grantor, who thus took the legal estate, but still bur-

20. But, in general, a purchaser without notice, from one with notice, is not chargeable with the trust.

21. So a purchaser with notice, from one without notice.(1)(a)

22. The rule above stated relates to *unauthorized* transfers by a trustee, which involve a violation of duty on his part. A different liability attaches to the purchaser of trust property, which the trustee was empowered and directed to sell, for a certain specified object. The general rule is, that the deed of a trustee conveys an absolute title at law, without proof by the purchaser that the conditions of sale have been complied with. But in equity it is otherwise.(2)

23. Where one conveys or devises land to trustees, to be sold or mortgaged for payment of specified debts or legacies, or to obtain money to be invested in funds, the purchaser, mortgagee, &c., is bound to see to the application of the money, or the land will still be liable in his hands.(3)

24. So, where land was sold under a decree in Chancery, for payment of certain debts ascertained by a report of the master; it was held, that the purchaser was charged with the application of the money.(4)

24 a. A proceeding in equity will not discharge the purchaser from seeing to the application of his purchase-money; and therefore, the *cestui que trusts* of the will are necessary parties to any proceeding looking to a conveyance.(5)

25. The same liability attaches to the purchaser, where the purchase-money is to be applied by the trustee to any other definite and specific object; as, for instance, where an Act of Parliament granted land in trust, to be sold, and the proceeds applied to the rebuilding of a printing house. And the rule is no less applicable, where lands are liable to debts without express charge, as is universally the case in the United States, than in England, where they are not thus liable; because, though no charge is superadded by the will, *as between the devisee and the creditor*, the relation of the devisees to each other is materially affected by it.(6)

26. Where the trustee is required to invest the proceeds of sale in a certain way, it seems, the liability of the purchaser extends so far only as to make him responsible for such original investment; and that he is not answerable for any subsequent misappropriation, either of the funds themselves, or interest or dividends arising from them.(7)

27. Unless the debts and legacies are specified, the purchaser is not responsible for the application of the purchase-money. That is, unless the debts are specified, he is liable for neither; the debts being payable

(1) *Bumpus v. Platner*, 1 John. Cha. 213.

(2) *Taylor v. King*, 6 Mun. 366-7.

(3) *Dunch v. Kent*, 1 Ver. 260; *Spalding v. Shalmer*, Ib. 301. See *Fyler v. Fyler*, 3 Beav. 550.

(4) *Lloyd v. Baldwin*, 1 Ves. 173; (*Lining v. Peyton*, 2 Desaus. Cha. 378.)

(5) *Duffy v. Calvert*, 6 Gill. 487.

(6) *Cotterel v. Hampson*, 2 Vern. 5; 12 Wheat. 501.

(7) 2 Booth's Cas. and Opin. 114.

dened with the trusts. He thereupon re-conveyed to the trustees, to hold for the same uses and purposes, and as fully in every respect, as under the original conveyance to them. Held, the power to sell of the trustees was revived. *Salisbury v. Bigelow*, 20 Pick. 174.

(a) Even though he had notice before the first purchase. *Bracken v. Miller*, 4 W. & Serg. 102.

first. And in this respect it is immaterial whether the land is expressly given *in trust*, or merely *charged* with debts. A charge is a devise of the estate, in substance and effect, *pro tanto*, upon trust to pay the debts.(1)

28. Although most of the cases, in which the doctrine above named has been established, seem to relate to trustees, yet there is another class of decisions, in which a distinction is made between a purchase from a mere heir or devisee, charged with payment of debts, and one from a trustee, who is *the hand to receive the money*, and whose receipt, therefore, is said to be a perpetual discharge.(2)(a) Sir William Grant

(1) *Jebb v. Abbet*, 1 Bro. 186, n.; 1 Vern. 218-9; *Andrews v. Sparhawk*, 13 Pick. 393; 261; *Williamson v. Curtis*, 3 Bro. 96; Amb. Duffy v. Calvert, 6 Gill, 487; *Cadbury v. 677; Dursley v. Berkeley*, 6 Ves. 654, n.; Duval, 10 Barr, 215.
(2) *Cuthbert v. Baker*, Sug. Ven. 378; 4 *Ver* 99.
Bailey v. Ekins, 7, 323; *Rogers v. Skillicorne*, Amb. 188; *Gardner v. Gardner*, 3 Mas.

(a) This distinction is rejected in Massachusetts, (*Andrews v. Sparhawk*, 13 Pick. 401,) but seems to be recognized in Maryland (*Duffey v. Calvert*, 6 Gill, 487) and Illinois, (*Reeve v. Allen*, 5 Gilm. 236.)

The following cases illustrate the principles stated in the text:

If a trustee, without the direction of the *cestui que trust*, dispose of and release the trust property before the purposes of the trust are performed, it does not release in equity the lien on the property. *Wolfe v. Bate*, 9 B. Mon. 208.

A trustee cannot waive rights of the *cestui que trust* by an executory contract, without a valuable consideration, and in favor of one who knew of the equities between the trustee and *cestui que trust*, and such contract will not be enforced by a court of equity, to the injury of the trust estate. *Mayrant v. Guignard*, 3 Strobb. Eq. 112.

Where the owner of a farm dedicates a portion of it to a charity, as to a school, without a conveyance, and afterwards conveys his farm to another, the grantee becomes only trustee, in respect to the portion so dedicated, for the *cestui que trusts*; and, if he ousts them from the possession of it, they may maintain ejectment against him to regain it. *School Directors v. Dunkleberger*, 6 Barr, 29.

A release from the *cestui* to the trustee will not divest any rights and equities resulting from a violation of his trust by the latter. *Iddings v. Bruen*, 4 Sandf. Ch. 3.

Where a trustee is empowered to sell trust property, for the purpose of re-investment, and sells it to one who knows the terms of the trust, and who pays for it by relieving the personal liabilities of the trustee; it seems, the property remains subject to the trust. *Butler v. Hicks*, 11 S. & M. 78.

A testator left property in trust for the sole and separate use of his daughters. At the commissioners' sale, under an order of distribution, the husband of a legatee became a purchaser, and the legacy to his wife was allowed in part payment. Held, he took the land subject to the trusts declared in the will; and a sale of the land for the debt of the husband would not, after the death of the husband, prevent the court, on her application, from restoring her to possession, and ordering an account of the rents and profits from her husband's death. *Williams v. Hollingsworth*, 1 Strobb. Eq. 103.

Land was conveyed in trust, to pay the debts of the grantor out of the rents and profits, the support of himself, his wife and children, and at his death to be divided among his children. Held, the trustees had no authority to sell, however urgent the necessity. *Mundy v. Vawter*, 3 Gratt. 518.

And a purchaser from such grantor and the trustees will be held to have notice of the trust, and be bound to know that the trustees had no power to sell. *Ib.*

But, it appearing from the title papers that the grantor had only an interest of one-fourth part of the lauds described, although an equitable interest in the whole; the purchaser, without actual notice of the equitable title, will be held a purchaser with notice, to the extent of only one-fourth part of the land. *Ib.*

The *cestuis que trust* having obtained a decree against the purchaser for such fourth part, the trustees and grantor being also parties to the suit; the purchaser is entitled to a decree over for the same against the grantor and trustees, although he has a remedy at law on their warranty. *Ib.*

A purchaser of land from one who is in fact a trustee, but who sells in his own name, may defend against payment of the purchase-money, although he has taken a deed and given his bonds, on which judgments have been entered. *Beck v. Uhrick*, 1 Harris, 636.

Where a vendee of real estate, in his answer to a bill brought by the wife and children of

remarked, that the doctrine on this subject had been carried farther than equity would warrant; and that, although where one purchased from a trustee having no right to sell, he ought to be charged with the trust, yet, where the trustee had such right, he should be able, as incident thereto, to give a receipt for the price.(1)

29. Thus, where an estate is limited to trustees for payment of debts and legacies, the trustees having raised the money, but misappropriated it; held, the creditors and legatees had no further lien upon the land, but, having once borne its burthen, it went to the heir; that the estate was debtor for the debts and legacies, but not for the faults of the trustees.(2)

30. It is a common practice to make express provision in the deed or will, that the receipt of the trustees shall be a sufficient discharge to the purchaser. In such case, the latter is of course exempt from all liability. But, if there are several trustees, the receipt of a part only will not discharge a purchaser with notice, although the others have refused to act, and conveyed their interest to their fellows. An express renunciation of the trust, however, would dispense with the necessity of a signing by the trustee who renounced.(3)

31. Where a trustee, empowered to sell the land and re-invest the proceeds to the same uses, joins in a conveyance with the *cestui*; held, in South Carolina, partly on the ground of local circumstances and usage, that the purchaser is not responsible for the disposition of the money.(4)

32. The whole doctrine of the liability of the purchaser, either from trustees or other parties authorized to sell, for the right application of the purchase-money, seems to have been overruled or very much shaken by the Supreme Court of the United States, in the case of *Potter v. Gardner*.(5) In this case, the testator devised an estate to his son A, in fee, "he paying all my just debts out of said estate. And I do hereby order, &c., that my son shall pay my debts out of the estate," &c. A sold the estate to B. The executrix and other devisees filed a bill in equity against A and B, for the purpose of charging B with the application of the money to the debts of the testator. It appeared that a part of the purchase-money was paid, by extinguishing debts due from A to third persons, and a debt due from A to B, and that another part

(1) *Balfour v. Welland*, 16 Ves. 151-6.

(2) 1 Salk. 153.*

(3) *Crewe v. Dicken*, 4 Ves. 97.

(4) *Lining v. Peyton*, 2 Dessaus. 375.

(5) 12 Wheat. 498. See *Taft v. Morse*, 4 Met. 523; *Ball v. Harris*, 4 My. & C. 264, that

where property is charged with debts and devised in trust, the trustee may sell or mortgage, and the purchaser is not bound for the application of the purchase-money. *Eland v. Eland*, *Ib.* 420.

* It does not appear that the debts were *specified*.

A, admits that he had heard that the estate was in some way devised in trust for A, his wife and children; this admission charges him with notice. *Haywood v. Ensley*, 8 Humph. 460.

The maker of a note sold an estate to the third indorser, under an agreement that the purchase-money should be appropriated to the discharge of the note, and to save harmless the second indorser. Held, the third indorser was a trustee for the second, and the assent of the second indorser to the trust would be presumed, and that the trust could not be afterwards defeated by arrangement between the maker and third indorser. *Stockard v. Stockard*, 7 Humph. 303.

remained due in the form of a note not negotiable. Held, B should be charged with such part of the purchase-money as remained unpaid, *absolutely*; and with such part as had been applied to the debts of A, *contingently*;—the decree, in regard to the latter, being in the first instance against A, and, on his failure to pay, against B. The court remark, that no question seemed to be made as to the authority of those *modern decisions*, which deny the distinction between lands charged in the hands of an heir or devisee with the payment of debts, and lands devised to a trustee for the payment of debts. In either case, the person who pays the purchase-money to the person authorized to sell is not bound to look to its application, unless the money is misapplied (as in this case) with his co-operation.(a)

33. It is said, that, where lands are devised, in trust to be sold for payment of debts, in case the personal estate shall prove insufficient for that purpose; a purchaser without notice acquires a good title as against the heir, although the personal estate is not insufficient. The law does not require him to look into the condition of the testator's estate. But implied notice is sufficient to impair his title; as, for instance, a *lis pendens*, to have an account between the heir and executor.(1)

34. This doctrine, however, is denied by high authority; and it is laid down, that, when a *power* is given to executors to sell for this purpose, deficiency of personal estate is a condition precedent to a good title in the purchaser.(2) And, inasmuch as the personal estate is by implication primarily liable, it seems the same rule is applicable, although the will does not expressly order that it be sold in the first instance.

35. An order of court, authorizing a sale of lands, is conclusive of its validity, though it turns out that there were personal assets.(3)

(1) *Culpeper v. Aston*, 2 Cha. Ca. 115; *Coleman v. McKinney*, 3 J. J. Mar. 249. (2) *Fearne's Opin.* 121; *Sug. Ven. & P.* 343. (3) *Leverett v. Harris*, 7 Mass. 292.

(a) With regard to this case it is to be observed, that, although the language of the court disavows the liability of *bona fide* purchasers, in any case, yet the facts would warrant no other decision, even according to the old rule, because the debts were not specified. Story, J., lays down the same rule, but with this important limitation. S. C. 3 Mas. 218. And the Supreme Court in Massachusetts adopt his views. *Andrews v. Sparhawk*, 13 Pick. 401.

A testator devised the residue of his real estate to his wife A, for life, (she being also executrix,) and to trustees subject to her life estate, in trust to sell and pay debts not otherwise provided for. The trustees conveyed to A, under the power, for a consideration mentioned in the deed, but not in fact paid. A mortgaged the land, and it was sold by the sheriff under the mortgage. Held, the mortgagee had priority over the creditors of the testator, who had obtained judgment within five years after his death; and he was not bound to see to the appropriation of the purchase-money of the conveyance to A. *Cadbury v. Duval*, 10 Barr, 265; *Franklin, &c., Ib.*

Where an administrator purchases real estate with funds, a moiety of which belongs to himself, and the other moiety to others, in an action of ejectment by the *cestui que trust* against a purchaser of the land from the administrator, without notice of the trust, the purchaser is entitled to be reimbursed the one-half of the purchase-money paid by him before notice of the trust, unless he has been fully compensated to the extent of that moiety out of the rents and profits. It is not, however, necessary that the amount should be tendered before suit brought. *Beck v. Ubrich*, 4 Harris, 499.

The administrator, who was a co-defendant in the ejectment suit, is entitled to be reimbursed for expenses incurred in the creation of the trust, and advances made for the benefit of the trust. *Ib.*

The administration account, settled after the suit brought, is evidence in favor of the defendants, to show the amount of money advanced by the administrator in the purchase of the land, but it is not conclusive. *Ib.*

36. Where a trustee is authorized, generally, to sell land for payment of debts, a purchaser acquires a good title, although more was sold than was necessary for this object; more especially where the sale takes place under a decree of Chancery, and with the consent of parties interested. Hence, under such circumstances, a purchaser cannot avoid the bargain, by alleging a defect in the title.(1)

37. *Joint* trustees have all an equal interest and authority, and must join in conveyances and receipts. But, where one only receives money, the others, though joining in a receipt for it, will not in general be held accountable. An express provision is almost universally inserted in trust deeds, that each trustee shall be accountable only for such sums as actually come to his hands.(2)

38. The general rule is, that a trustee shall not be allowed to derive any personal advantage from his trust. Hence, if he compound a debt due from the estate, the profit goes, not to him, but to the *cestui que trust*. But if, in good faith and with discretion, he release a debt, he shall not sustain any loss thereby.(3)

39. Where a trustee commits a breach of trust, he will be held strictly accountable for all consequences. Thus, if he wrongfully sell the estate, he shall answer to the *cestui* for its full value.(a) So, trustees who, without sufficient cause, doubted the identity of their *cestui que trust*, and, in breach of trust, paid over the trust fund to others, were ordered to make good the same, and pay the costs and interest, at 5*l.* per cent., —the accounts to be taken with rests.(b) But the law will protect a trustee who acts according to his best judgment, though he make some trifling mistakes in doubtful matters. So, he is not responsible for wrongs to the estate, in which he had no agency.(4)

40. One trustee is liable, for concealing the wrongful acts of another.(c)

41. A trustee in possession has been held bound to account for all that *might have been* received from the estate.(5)

42. Where a trustee, authorized to sell lands, and apply the proceeds to payment of debts or purchase of stock, exchanges them for other lands, he shall account for the full value of the lands exchanged.(6)

43. It has been intimated in England, and expressly decided in Massachusetts, that a *cestui que trust* may maintain an action at law against his trustee for breach of trust, as upon an implied assumpsit. Of course,

(1) Spalding v. Shalmer, 1 Vern. 303; Lutywch v. Winford, 2 Bro. R. 248.

(2) Fellows v. Mitchell, 1 P. Wms. 81; Bartlett v. Hodgson, 1 T. R. 42; Kip v. Deniston, 4 John. 26; Monell v. Monell, 5 John. Cha. 296. See Taylor v. Roberts, 3 Alab. N. 83.

(3) Robinson v. Pett, 3 P. Wms. 251; Pusey v. Clemson, 9 S. & R. 204; Forbes v. Ross, 2 Bro. 130.

(4) Smith v. French, 2 Atk. 243; 1 Harr.

& G. 11; Root v. Yeomans, 15 Pick. 488; Courtee v. Dawson, 2 Bland, 289; Chase v. Lockerman, 11 Gill & J. 185; Rainsford v. Rainsford, Rice, 343; Angell v. Dawson, 3 Y. & Coll. 308; Hester v. Wilkinsou, 6 Humph. —; Hutchins v. Hutchins, 6 Eng. L. & Equ. 41.

(5) Boardman v. Mosman, 1 Bro. 68; Rogers v. Rogers, 1 Paige, 188.

(6) Ringgold v. Ringgold, 1 Harr. & G. 11.

(a) It has been recently decided, that payment to one of two trustees binds both. Husband v. Davis, 4 Eng. L. & Equ. 342.

(b) The *cestui* may, at his election, reclaim the property; or claim other property taken in exchange. Oliver v. Piatt, 3 How. 333. Implied notice will bind the purchaser. Ib. And one joint owner will be bound by notice to the other. Ibid.

(c) See Att'y Gen. v. Holland, 2 Y. & Coll. 683; Bayley v. Rees, Holt Eq. 80.

in England, the *cestui* stands on the footing of a mere simple contract creditor. So a *cestui que trust*, after the death of the party who declared the trust, may maintain a suit in his own name against the trustee, if the latter refuse to pay over.(1)

44. It was formerly held, that a trustee could not be allowed any compensation for his services. This rule was founded upon the reasons, that by such allowance the estate might be exhausted; that it was impossible to fix upon a fair amount, one man's services being worth more, and another's less; and that the trustee had his option, whether to accept or refuse the office.(2)(a) This rule seems to be still in force in Ohio, and in New York,(b) it has been held doubtful, whether even a positive agreement with the *cestui* for compensation, made after creation of the trust, is binding. But, when a trust is undertaken without any consideration, and actually commenced, the trustee is bound to proceed and execute it with the same diligence and good faith as if he was to receive compensation.(3)

45. But where the party creating the trust directed that the trustees should be compensated, it was held, that such order should be carried into effect; and the amount of compensation was referred to a master to settle.(4)

46. It is said, the general practice in America, and especially in Massachusetts, is to allow commissions to trustees, in case of open and admitted express trusts, unless the trustee has forfeited them by gross misconduct.(5) In Massachusetts, trustees are allowed a commission of 5 per cent,(c) and the allowance thereof will not prevent that of specific charges also. In such case, the commissions are considered as a compensation for services not specially mentioned in the account. But a trustee cannot have an allowance by way of commission, on assuming his office. In Pennsylvania, an *executor* is always compensated.(d) So

(1) *Stuart v. Mellish*, 2 Atk. 612; *Twitt v. Cootzer*, 1 Harr. 461; *Newhall v. Wheeler*, 7 Mass. 198; *Gifford v. Manley*, For. 109; *Lyddell v. Weston*, 2 Atk. 19; *Gadsden v. Lord*, 1 Dess. 216.

(2) *Treat. of Equ. lib. 2, ch. 7, sec. 3.* See *Gilbert v. Dyneley*, 3 Mann. & G. 12.

(3) *Walk. Intro. 314*; *Manning v. Manning*, 1 John. Cha. 527; *Meacham v. Stearns*, 9 Paige, 398; *Iddings v. Bruer*, 4 Sandf. Ch. 223; *Switzer v. Skiles*, 3 Gilm. 529.

(4) *Ellison v. Airey*, 1 Ves. 112.

(5) *Jenkins v. Eldridge*, 3 Story, 325.

(a) Another reason assigned is, that there is much solicitude and vexation in most trusts, which cannot be compensated by money. *Barrell v. Joy*, 16 Mass. 228.

(b) After the estate of trustees ceases by the Rev. Sts. of New York, on the cessation of the objects of the trust, they have no longer a lien on the land for any unpaid charges and commissions. *Bellinger v. Shafer*, 2 Sandf. Ch. 293.

A trustee, on passing the trust estate to a new trustee, and discharging himself, was allowed commissions on stocks, bonds and mortgages, which he conveyed to the new trustee in specie, as they had remained during his own trusteeship; also, on certain houses and land, in which the proceeds of certain choses in action had been invested by a former trustee for the preservation of the property, and which were held to be personalty in equity. *De Peyster*, 4 Sandf. Ch. 511.

(c) "On the gross amount of all the property that has come to his hands," is the expression in one case, (16 Mass. 221;) "on net income from real and personal estate—income received and accounted for," is probably the more correct phrase, used in another and later case. 2 Met. 422. See *Kendall v. New England, &c.*, 13 Conn. 383; *Mitchell v. Holmes*, 1 Md. Ch. 287.

(d) So, two and a half per cent. commissions were allowed on a sale by assignees of real estate, assigned for the benefit of creditors, the purchase-money being about \$44,000, of which \$13,000 came into their hands, the residue continuing a lien, by agreement between a mortgagee and the purchaser. *Shunk's, &c.*, 2 Barr, 304.

a trustee has been allowed 3 per cent. on the price of property sold by him; in Maryland, 5 per cent. So in Virginia, North Carolina,^(a) Mississippi, and sometimes in Kentucky, compensation is made. In Delaware, upon a sale by order of court, the allowance is not over 6 per cent. on the first hundred dollars, nor over one per cent. on four thousand dollars. In Alabama, a provision in the deed for 12 1-2 per cent. will not avoid it, unless proved to be unconscionable.⁽¹⁾

47. It is said, that the *cestui que trust* ought to save the trustee harmless, as to all damages relating to the trust. Upon this principle, a trustee shall be liberally allowed all reasonable costs and charges incurred in the management of the estate. Thus, if he bring a suit to recover the land, he will not be limited, in a settlement with the *cestui*, to the taxed costs, but will be allowed the expenses actually incurred in the suit. So, he will be allowed a solicitor's fee. But he will not be allowed the expenses of actions of assault and battery brought against him, though arising from his defence of the estate. Where he has advanced money, without any probability of gaining by it personally, the amount shall be reimbursed to him; and, in Pennsylvania, may be enforced by an ejectment and conditional verdict. And it is now usual to provide expressly for the reimbursement of all costs and expenses incurred in executing the trust. If the trustee pay off an incumbrance, he may reimburse himself from the property, and leave the *cestui* to call upon the grantor on his warranty, instead of doing it himself. Taxes paid are a lien upon the land, and may be paid out of the trust fund.⁽²⁾

48. In Massachusetts and New York, a trustee will not be allowed the cost of *permanent improvements*, such as building, clearing, road-making, &c;^(b) and regard must be had to the probable duration of the trust, in determining what improvements fall under this designation. If, by means of improvements, the rent of the property is increased, the *cestui* may be put to his election, between allowing the charge and not receiving the increased rent. And the trustee shall be allowed for

(1) Barrell v. Joy, 16 Mass. 221; Rathbun v. Colton, 15 Pick. 471; Dixon v. Homer, 2 Met. 420; Jenkins v. Eldridge, 3 Story, 325; Hogan v. Stone, 1 Ala. (N. S.) 496; Shurtliff v. Witherspoon, 1 Sm. & M. 613; Wilson v. Wilson, 3 Binn. 560; Pusey v. Clemson, 9 S. & R. 204; Walker, Ib. 223; Longley v. Hall, 11 Pick. 120; Marsteller, 4 Watts, 267; Miller v. Beverleys, 4 Hen. & Mun. 415; Nathans v. Morris, 4 Whart. 389; Brown v. Wallace, 2 Bland, 59; Winder v. Diffenderffer, Ib. 207; Tyson v. Hollingsworth, Ib. 332; Andrews v. Scotton, Ib. 672; Dela. St. 1843, 507; Sherrill v. Shurford, 6 Ired. Eq. 228; Phillips v. Bustard, 1 B. Monr. 349; Warring v. Darrall, 10 Gill & J. 126; Donelson v. Posey, 13 Alab. 752; Shunk's, &c., 2 Barr. 304. See the

State v. Platt, 4 Harring, 154; — v. Rogers, Ib.; Goodburn v. Stevens, 1 Md. Ch. 420; Greening v. Fox, 12 B. Mon. 187; Barry v. Barry, 1 Md. Ch. 20; Stehman, 5 Barr, 413.

(2) Trott v. Dawson, 1 P. Wms. 780; Green v. Winter, 1 John. Cha. 29; Freeman v. Tompkins, 1 Strobb. Equ. 53; Gary v. May, 16 Ohio, 66; Amand v. Bradburn, 2 Cha. Cas. 128; Watts v. Watts, 2 M'Cord's Cha. 82; 7 Bro. Parl. 266; Pierson v. Thompson, 1 Edw. Cha. 212; Addis v. Clement, 2 P. Wms. 455; Murray v. DeRottenham, 6 John. Cha. 62; Dilworth v. Sinderling, 1 Binn. 495; Jones v. Stockett, 2 Bland, 417; Green v. Putney, 1 Md. Ch. 262; Altimus v. Elliott, 2 Barr, 62.

(a) Where a father made a conveyance of land and negroes to one of his sons, to be managed under the direction of that son, in trust that he would apply the proceeds to the support of the father and his family during the father's lifetime, and after his death sell the property and divide the proceeds among his heirs and distributees; held, the son was entitled to a reasonable compensation for his care and trouble. Raiford v. Raiford, 6 Ired. Eq. 490.

(b) Otherwise in Pennsylvania. Dilworth v. Sinderling, 1 Binn. 495.

reasonable *repairs*; but not for pulling down and rebuilding. So, it has been held in New York, that, where lands are purchased in trust, with the money of a wife, the trustee, whether the husband or a stranger, shall be allowed for permanent improvements. So, where a person holding land in trust, with a power to sell, materially improves the estate, under a belief honestly entertained, with reasonable grounds for that belief, that he is the owner of the land, and the amount received upon the sale is increased in consequence of such improvements, he is entitled to retain such excess for his own use, but no more. But where the father of beneficiaries, with consent of the trustees, made permanent improvements on the land, while their tenant; the trust containing no authority for the same; held, no allowance could be made for the improvements, as against the beneficiaries and those claiming under them. The value of improvements is estimated by their cost.(1)

49. The policy of the law requires, that the relation of trustee and *cestui* should be guarded with vigilance, and contracts between them scrutinized, that no injustice may be done the *cestui*.(2)

50. Upon this principle is founded the general rule, that a trustee shall not be allowed to purchase the trust property for his own benefit, either directly, or through an agent. It is said to be a plain point of equity, and a principle of clear reasoning, that he who undertakes to act for another in any matter shall not, in the same matter, act for himself, and make the business an object of interest. He is not acting with that want of interest, that total absence of temptation, that duty imposed upon him, that he shall gain a profit. Hence, in whatever shape a profit accrues to the trustee, whether by management or good fortune, it is not fit that benefit should remain in him. It ought to be communicated to those whose interests, being put under his care, afforded him the means of gaining that advantage. He takes the land, clothed with the same trusts as it was liable to in his hands, previous to the sale. The principle is sometimes said to be universal, subject to no qualifications or exceptions; and sometimes, though not universal, a general one. It applies not merely to trustees technically so called, but to *judicial officers*, and all persons concerned in disposing of the property of others, such as attorneys, commissioners, sheriffs, &c.(3)(a).

(1) *Williamson v. Seaber*, 3 Y. & Coll. 717; *Bridge v. Brown*, 2 Y. & Coll. Cha. 181; *Rathbun v. Colton*, 15 Pick. 471; *Trustees, &c. v. Jaques*, 1 John. Cha. 450; *Bellinger v. Shafer*, 2 Sandf. Cha. 293; *Pratt v. Thornton*, 28 Maine, 355.

(2) *Ringgold v. Ringgold*, 1 Harr. & G. 11.

(3) *Whitchote v. Lawrence*, 3 Ves. jr. 740; *Hayward v. Ellis*, 13 Pick. 272; *Howell v. Baker*, 4 John. Cha. 120; *Voorhees v. Stoothof*, 6 Halst. 145; *Turner v. Bouchell*, 3 Har. & J. 99; *Davis v. Simpson*, 5, 147; 1 Mon. 44; *Bruch v. Lantz*, 2 Rawle, 392; 2 Whart. 53; *Misso*. St. 425; 1 Ky. Rev. L. 623; *Scott v. Davis*, 4 My. & C. 87; *Jones v. Thomas*, 2 Y. & Coll. 498; *Williamson v.*

Seaber, 3 Ib. 717; *Brackenridge v. Holland*, 2 Blackf. 380; *Saltmarsh v. Beene*, 4 Port. 283; *Williams v. Powell*, 1 Ired. Equ. 460; *Field v. Arrowsmith*, 3 Humph. 442; *Ely v. Horine*, 5 Dana, 404; *Bowling v. Dobyns*, Ib. 445; *Van Eps v. Van Eps*, 9 Paige, 237; *Torrey v. Bank, &c.*, Ib. 649; *Kerr v. Murphy*, 2 Miles, 157; *Small v. Jones*, 1 Watts & S. 136; *Campbell v. Pennsylvania, &c.*, 2 Whart. 53; *Thorp v. McCullum*, 1 Gilm. 614; *Bank, &c. Torrey*, 7 Hill, 260; *Slade v. Van Vechten*, 11 Paige, 21; *Bell v. Welch*, 2 Gill. 163; *Iddings v. Bruen*, 4 Sandf. Cha. 223; *Rathbun v. Rathbun*, 6 Barb. 98; *Pratt v. Thornton*, 28 Maine, 355; *Conger v. Ring*, 11 Barb. 356; *Jenkins v. Eldridge*, 3 Story, 181; *Michael v. Michael*, 4 Ired. Equ. 349.

(a) Thus, counsel consulted respecting a title to land cannot buy in an outstanding adverse claim, and set it up against his client. *Hackenbury v. Carlisle*, 5 Watts & S. 348. An action was brought against A, an administrator, for his own benefit, but in the name of

51. The above-named principle seems to have been limited in some cases to a purchaser from an *infant cestui que trust*. But this restriction is now done away; and, although the *cestui* be of age, the transaction morally fair and honest,^(a) a higher price paid by the trustee than any one else would give, the estate taken at an appraisement or in the name of a third person; yet, upon the ground of general inconvenience, the transaction may be set aside by the *cestui*. The trustee purchases subject to that equity.⁽¹⁾

52. But, where the estate is sold under a decree in Chancery, by an open bidding before the master; or where, in case of a trust for creditors, a majority of them assent; the purchase, it seems, will be sustained. In Pennsylvania, the circumstance that a sale is a judicial one is held to make no difference. So, in South Carolina, if made at the instance of the trustee, it is held to be his sale. And the mere fact of a public sale does not make the sale valid. So where, in a sale made by executors, one of them became a joint purchaser and afterwards sole owner; held, although the sale was ratified by the heirs and devisees, the land was still liable to be taken by creditors.⁽²⁾

53. If the property purchased by the trustee is a lease, and he renews it in his own name, the renewal shall be for the benefit of the *cestui*.^(b) So, if a trustee buys in an incumbrance upon the estate,

(1) *Campbell v. Walker*, 5 Ves. 680.

(2) 1 Cruise, 358; *Wiggins*, 1 Hill's Ch. 354; *Campbell v. Pennsylvania, &c.*, 2 Whart. 53; *Whelpdale v. Cookson*, 1 Ves. 9; 5 Ves.

678; *Bruch v. Lantz*, 2 Rawle, 392. See *Pitt v. Petway*, 12 Ired. 69; *Haywood v. Eusley*, 8 Humph. 460.

B. A suffered a judgment to be rendered against him, and, in the levy of the execution upon the intestate's estate, acted both as defendant and agent of B. Held, the proceedings were illegal and collusive, and that the levy was void as against a subsequent execution in favor of C. *Goddard v. Divoll*, 1 Met. 413. And the principle applies to public, as well as private trusts; as where a member of the legislature sought to obtain a title from the land-office, after the claimant had petitioned for confirmation of his right. *O'Neill*, 2 Bland, 151. It has been enforced in a late case even against a high dignitary in the church. A statute authorized a rector, with consent of the bishop, to raise money by an annuity for the rectory-house. The bishop advanced the money, and obtained a grant of the annuity, charged on the living. Held, the proceeding was entirely void. *Greenlow v. King*, 3 Beav. 49.

The right to avoid a purchase of the trust property by a trustee is not personal to the beneficiary, but passes to his representatives; and creditors, or a receiver for their benefit, may avail themselves of it. *Iddings v. Bruen*, 4 Sandf. Ch. 223.

In Massachusetts, *partition* may be made between a trustee, attorney or guardian, and the party connected with him in that relation. St. 1853, 993.

It is said, a court of equity will, under no circumstances, permit a trustee to secure a debt of his own, not secured by the trust, by forming a combination with one claiming adversely to the *cestuis que trust*. *Irwin v. Harris*, 6 Ired. Eq. 215.

Where a trustee denies a trust, and claims the property as his own, and the trust is established by parol evidence, he cannot set up a bond to himself from the creator of the trust extending the times of payment. *Tritt v. Crotzer*, 1 Harris, 451.

(a) The reason of the rule is said to be, not that there *is*, but there *may be*, fraud. *Brothers v. Brothers*, 7 Ired. Equ. 150.

(b) A *joint lessee* will also be held responsible as a trustee, in case of renewal. *Burrell v. Bull*, 3 Sandf. Ch. 15.

So a partner will, in respect to a renewed lease, be a trustee for the firm, where he would not be so in respect to a purchase of the reversion. *Anderson v. Lemon*, 4 Sandf. 552.

A and B held a lease, fixtures, stock, &c., in common, and A carried on the business of a refectory. C and D held mortgages on A's interest, and, not feeling secure, agreed to pay the arrears of rent if immediate possession were given, which was done, and they also agreed to protect the interests of B. They did not pay the rent, but suffered a sale under a distress, purchased the fixtures, stock, &c., at the sale, and continued the business. It having been arranged that C should procure a renewal of the lease, for the common benefit of

he can hold it only as security for the sum paid by him, with interest.(1)

54. If, after purchasing the estate, the trustee resells it at an advance, more especially if in pursuance of a previous bargain, the *cestui* may affirm the sale, and claim the profits. But, in such case, the trustee shall be allowed money paid to his agent for making the purchase. So, where the holder of a mortgage assigned it in trust, for the benefit of children, and afterwards accepted a reassignment of it from the assignee in trust; held, he was accountable as a trustee to the *cestui que trusts*. So, where a trustee became the owner of land, on which was a mortgage belonging to the trust estate, cancelled the mortgage on the record, sold one-third of the same land, taking back a mortgage thereon for the same amount as that which he had cancelled, and executed a declaration of trust, acknowledging that he held it in trust, in lieu of the one cancelled, but the land covered by this substituted mortgage was greatly inadequate security; on a bill by the *cestui que trust*, setting forth that these acts of the trustee were done without his knowledge or consent, and that the original bond and mortgage had never been paid, a decree was made, establishing the original bond and mortgage, as valid existing securities, securing the rights of subsequent *bona fide* mortgagees, and directing a sale of the premises, and payment of any deficiency by the trustee. So, where a trustee has borrowed money, and with it purchased other property, and added it to the trust, and repaid the borrowed money out of the proceeds and profits of the trust property; the property thus purchased will belong to the beneficiaries in the trust.(2)

55. One to whom a legacy is given, coupled with a trust, is chargeable with the latter, and cannot legally deal with the *cestui*.(3)

56. An administrator purchases land, sold upon a judgment in favor of his intestate. Held, he took it in trust.(4)

57. So, if an executor purchase the land of his testator at sheriff's sale, recede from his purchase, and the land be resold, he is chargeable for the highest price.(5)(a)

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| <p>(1) Killick v. Flexney, 4 Bro. R. 161; Quackenbush v. Leonard, 9 Paige, 334; Webb v. Sugar, 2 Y. & Coll. 247; Tanner v. Elworthy, 4 Beav. 487; Waters v. Bailey, 2 Y. & Coll. Cha. 219.</p> <p>(2) Whichcote v. Lawrence, 3 Ves. jr. 740; Hayward v. Ellis, 13 Pick. 272; Wasson v. English, 13 Mis. 176; Gilchrist v. Stevenson,</p> | <p>9 Barb. 9; Stuart v. Kissam, 2, 498; Butler v. Hicks, 11 S. & M. 78.</p> <p>(3) McCants v. Bee, 1 McCord's Cha. 383.</p> <p>(4) Fellows v. Fellows, 4 Cow. 682. See Darcus v. Crump, 6 B. Mon. 363; Painter v. Henderson, 7 Barr, 48.</p> <p>(5) Guier v. Kelly, 2 Bin. 294.</p> |
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B, C and D, C procured the renewal in his own name, and then he and D separately sold their interests in the whole to E, who took possession of the whole concern, and kept B out of possession. Held, in a suit by B, that C and D were bound to account to him for his share of the profits previous to the sale to E, and for his share of the purchase-money, deducting his share of what they had paid. Burrell v. Bull, 3 Sandf. Ch. 15.

(a) In Illinois, it is provided by statute, that, if the interest of an estate require that land sold on execution be purchased by the executor, he may buy it, and hold it as assets. St. 1841, 168. Where an executor purchases land, and takes a conveyance to the estate, this is, *prima facie*, a declaration of trust, and the land will be subject to division among the heirs. Garrett v. Garrett, 1 Strobb. Eq. 96.

A purchase by an executor, at an orphans' court sale for payment of debts, is voidable by the devisee or heir, even though the purchaser did not interfere in procuring the order to be made, but the petition was presented, the bond given, and the sale made by another executor. Beeson v. Beeson, 9 Barr, 279.

58. An attorney, employed to collect or foreclose a mortgage, takes a conveyance to himself of the equity, instead of foreclosing. Held, the estate was subject to the trust in the hands of his heirs; and that they were bound to reconvey, on payment of the amount paid for the equity, and of the trustee's claim for his services, together with the value of improvements made by themselves before notice of the trust.(1) So, where a bank is bound to pay off and discharge a mortgage, so as to relieve the property of a third person from sale under a decree of foreclosure, and the cashier attends the sale as agent for the bank, and bids off the property on his own account; held, he must in equity be regarded as having purchased for the benefit of the bank, and that the purchase was improper, and should be set aside.(2) So, a purchase, by the general agent of heirs, of the land of their ancestor, from the vendee at a tax sale, instead of redeeming the land, inures to the benefit of the heirs.(3)

59. Executors, having authority to sell, sold, with the intent of repurchasing the estate from the purchaser. Held, the sale was voidable.(4)

60. Devise of land mortgaged, and a direction to the executors to redeem the mortgage. Though having assets, the executors took an assignment of the mortgage. Held, they should hold it in trust for the devisee, whose right, it seems, would be barred only by the lapse of twenty years.(5)

61. Land was sold upon execution. The plaintiff directed his attorney, A, to bid it off. A confessed that he had done so, and said that the deed would be made to the plaintiff, and that he had made a *temporary* sale, to save the expense of advertising, and would receipt the execution, when paid. The sale was made on a stormy day, and only A and the officer were present. A purchased the land, and afterwards conveyed to B, who had notice of the facts. The land was worth \$2,000, while only \$80 was due on the execution. Held, it was doubtful whether the plaintiff's attorney could, in any case, legally purchase land sold on execution, inasmuch as he has the whole control of the proceedings, and therefore great opportunity for unfairness; and that in this case the judgment debtor might redeem, on payment of the sum due upon the execution and interest, the amount paid to discharge incumbrances by A or B, and the cost of improvements made by the latter.(6)

62. A trustee agreed to purchase a farm for the *cestui* from the proceeds of trust property. He bought the farm, and gave a bond and mortgage for the purchase-money, but refused to pay them when due, and procured a foreclosure and sale by the mortgagee, at a loss of \$4,000. Held, he was liable for the loss.(7)

63. One of several remainder-men purchased the particular estate, avowedly for all. Held, a trust for the others.(8)(a)

(1) Giddings v. Eastman, 5 Paige, 561.
See Davinney v. Morris, 8 Watts, 314.

(2) Bank, &c. v. Torrey, 7 Hill, 260.

(3) Myers, 2 Barr, 463.

(4) Den v. McKnight, 6 Halst 385.

(5) Jenison v. Hapgood, 7 Pick. 1.

(6) Howell v. Baker, 4 John. Cha. 118.

(7) Green v. Winter, 1 John. Cha. 27.

(8) Anderson v. Bacon, 1 Mar. 51.

(a) A, a tenant in common, released his right to B. C was in possession, claiming under a sale for taxes. He was also a tenant in common, and agent for A and the other proprietors.

63 *a.* Where an agent, to sell a mortgage, represented to his principal that a certain price was the most he could obtain for it, when it was of greater value, and it was sold for that price to the agent; held, the redress of the principal was not an allegation of fraudulent representation, but a call to annul the assignment, or account to him for its true value.(1) So, if heirs elect to set aside purchases made by executors, administrators, or guardians, at their own sale, they must go into equity.(2)

64. The *cestui que trust* "must not lie by to speculate upon events," but disaffirm the sale in a reasonable time; and what is reasonable time, depends on the circumstances of each case. The sale is not void, but only voidable at his election; and, the rule being adopted solely for his benefit, neither remainder-men, strangers, nor parties to the deed, nor those claiming under them, can raise the objection, nor will the deed be set aside on application by or on behalf of the trustee himself.(3)

65. Upon the filing of a bill in Chancery, to obtain a resale of the premises, it will be referred to a master to settle whether such resale would be beneficial to the plaintiff. And, if such resale takes place, and no advance is made upon the sum paid by the trustee, he will be held to complete the purchase.(4)

66. Where there are joint trustees, a sale of the trust property by one to another is illegal; and the latter is liable for any neglect on the part of the former to pay over the purchase-money, or apply it to the purposes of the trust. The purchaser is also answerable for all profits arising from the property.(5)

67. But where an heir or devisee, being one of several, becomes constructively charged with a trust, but, having no notice of it, purchases the shares of the others, he shall hold the latter discharged of the trust, though his own share remains charged.(6)

68. Although a purchase by the trustee of the trust property is a transaction of great hazard and delicacy, to be watched with the utmost diligence, yet such purchase may be valid, provided it appears, after the most careful investigation, that there was a distinct and clear contract, understood by the *cestui*; and that on the part of the trustee there was neither fraud, concealment, nor any advantage taken of his situation, as such.

69. Thus, a trustee for payment of debts purchased the estate as agent for his father, both being creditors and partners, and the *cestui* had full knowledge, and took the sole management of the sale, making

(1) *Thompson v. Hallet*, 26 Maine, 141.

(2) *Worthy v. Johnson*, 8 Geo. 236.

(3) *Thorp v. McCullum*, 1 Gilm. 614; *Worthy v. Johnson*, 8 Geo. 236; *Pitt v. Petway*, 12 Ired. 69; *M'Kinley v. Irvine*, 13 Ala. 681; *Ward v. Smith*, 3 Sandf. Cha. 592; *Painter v. Henderson*, 7 Barr, 48; *Costeris, &c.*, 1 Har. 292; *Woelhers, &c.*, 2 Barr, 71.

(4) *Campbell v. Walker*, 5 Ves. 678; *Ball*

v. Carew, 13 Pick. 31; *Den v. McKnight*, 6 Halst. 385; *Davis v. Simpson*, 5 Har. and J. 147; *Lacey*, 6 Ves. 625; *Thorp v. M'Cullum*, 1 Gilm. 614.

(5) *Ringgold v. Same*, 1 Har. & Gill, 11; *Hulbert v. Grant*, 4 Mon. 582; *Case v. Abeel*, 1 Paige, 393.

(6) *Giddings v. Eastman*, 5 Paige, 561.

surveys, settling the particulars, prices, &c. Held, the purchase was good.(1)

70. So, a trustee may validly purchase directly from the *cestui*, provided he practice no unfairness. By such a contract, he in fact removes himself from the character of a trustee.(2) And, after the trust ceases, the trustee may always make a valid purchase.(a)

71. A mortgages land for security to B, his surety. A then transfers to C, a creditor, all his remaining interest in the land, without the knowledge and not for the account of B, and afterwards transfers such interest to B. Held, in the absence of all fraud, B's purchase was not invalid, as made by a trustee; for, by A's transfer to C, he had ceased to stand in that relation.(3)

72. The rule against a trustee's purchasing does not prevent him from *occupying*.(4)

72 a. A *cestui que trust*, knowing of a purchase of the trustee, and of his right to avoid it, may ratify it, by assenting to the application of the purchase-money to his use.(5)

72 b. Where a trustee becomes a purchaser at the sale of a co-trustee, it is necessary, in order to render the sale utterly void by reason of the fraudulent acts of the seller, to connect the purchaser with them.(6)

72 c. Where land is sold under a testamentary power by trustees, an executor, who is not one of the trustees, may purchase.(7)

72 d. A purchase of land by an administrator, at a sale of the estate of his intestate, if not actually fraudulent, cannot be avoided by the heirs, unless suit be brought within twenty-one years after the sale, or within ten years after the heirs attain their majority, if they were then minors.(8)

72 e. If the rule, that a trustee to sell cannot himself become the purchaser, is applicable to an administrator, licensed to sell real estate, and purchase through a third person, such purchase is voidable only by creditors, or other persons interested, while the estate remains in the hands of such administrator; and not as against a *bona fide* purchaser, for valuable consideration, without notice.(9)

72 f. Although good faith must be strictly enforced against a trustee, and he may not be allowed to deal with the property for his own benefit, yet, where the trustee had substituted a new security, by way of mortgage, in the place of a former mortgage, upon certain property, but not including the whole which was covered by the former mortgage; and there was no gain made, or intended to be made, by the trustee; and, so far as appeared, the new security would have been deemed suf-

(1) *Coles v. Trecothick*, 9 Ves. 234; *Morse v. Royal*, 12 Ves. 355; *Naylor v. Winch*, 1 Sim. & Stu. 555; *McCants v. Bee*, 1 M'Cord's Cha. 389. See *Murdock*, 2 Bland, 467; *Kennedy v. Kennedy*, 2 Alab. (N. S.) 572; *Allen v. Bryant*, 7 1red. Equ. 276; *Marshall v. Stephens*, 8 Humph. 159.

(2) *Sanderson v. Walker*, 13 Ves. 601.

(3) *Ball v. Carew*, 13 Pick. 28.

(4) *Root v. Yeomans*, 15 Pick. 495.

(5) *Beeson v. Beeson*, 9 Barr, 279.

(6) *Beeson v. Beeson*, 9 Barr, 279.

(7) *Cudburry v. Duval*, 10 Barr, 265.

(8) *Musselman v. Eshleman*, 10 Barr, 394.

(9) *Robbins v. Bates*, 4 Cush. 104.

(a) So a trustee may become purchaser, at a sale made by virtue of proceedings prior to his becoming such. Thus, the assignees of an insolvent may purchase land sold on execution under a mortgage prior to the assignment. *Fisk v. Larher*, 6 Watts & S. 18.

ficient at the time, and it was accepted by the *cestui que trust*, who was competent to judge of its value; the transaction was not deemed to be void.(1)

72 *g.* The purchase of trust property, by a trustee, through a secret agent, does not, of itself, render the sale utterly void, unless used as a means of deceiving or misleading the *cestui que trust*.(2)

72 *h.* Where one of two partners, in his own name, and with his own funds, purchased in fee the premises on which the firm, under a lease, was conducting its business, (after the term limited for the partnership had expired, but before an actual dissolution,) such purchase being made, not fraudulently, but without the consent or knowledge of his co-partner, and the purchase of the real estate not being any part of their ordinary business; held, the latter could not, at his election, claim that the premises were partnership property.(3)

72 *i.* Two partners had been conducting business, on leased premises. The term for their connection had expired, but the business was continuing, with a view to arrange a further term. One of them, with the other's knowledge, was treating with the owners of the reversion for its purchase, professedly intending the premises for the use of the firm, if it continued, and consulting his co-partner as to the price demanded. The latter, privately, without the knowledge of the former, bought the premises with his own means, and in his own name, and then refused to continue the firm permanently. Held, the purchase was not made fraudulently as against the purchaser's partner, and the premises were not partnership property.(4)

72 *j.* A *cestui que trust* can purchase at a sale of the trust estate as freely as a third person, but he does not become a trustee for parties interested, without a repayment to him of the purchase-money.(5)

72 *k.* A trustee may retain the amount of a loss, occasioned by the failure of a *cestui que trust* to comply with the terms upon which he purchased a portion of the trust estate out of the income of such trust estate, payable to said *cestui que trust*.(6)

73. Where one of several trustees refuses to accept the trust, it is usual for him to *disclaim* by deed, or release all his interest to the others. A *release* implies a prior acceptance, and therefore cannot affect such duties as are founded in personal confidence. Thus, notwithstanding such release, the trustee must still join in a receipt for purchase-money, if the will required that all should sign it.(7)(a)

(1) *Stuart v. Kissam*, 11 Barb. 271.

(2) *Beeson v. Beeson*, 9 Barr. 279.

(3) *Anderson v. Lemon*, 4 Sandf. 552.

(4) *Ib.*

(5) *Walker v. Brungard*, 13 S. & M. 723.

(6) *Waters v. Waters*, 1 Md. Ch. 196.

(7) *Crew v. Dicken*, 4 Ves. 97. See *Mass. Rev. St. ch. 69, sec. 8*; *Green v. Borland*, 4 Met. 330; *Field v. Arrowsmith*, 3 Humph. 442.

(a) With regard to the rights and duties of *joint trustees*; in general, they are not responsible for the acts of each other. 2 Story's Equ. 520; 4 Kent, 306, n. Thus, where a loss accrues to a trust fund, through the default of one of five trustees, his co-trustees will not be held responsible for such loss, if they have acted in good faith, and exercised that vigilance over the fund, which a man of ordinary prudence will exercise over his own property. The *State v. Guilford*, 18 Ohio, 500.

Otherwise, where money has been jointly received, or a joint receipt given for it, (unless this was a necessary or merely formal act, and proof is given of actual payment to one alone,) or where, though payment was made to one, it was done by the act, direction, or agreement of the other. 2 Story, 520; 4 Kent, 406, n. See *Griffin v. Macaulay*, 7 Gratt. 476; *Banks*

74. After accepting and entering upon the execution of a trust, or perhaps even after suffering himself to be appointed, the trustee cannot surrender it, without the assent of the *cestui*, or order of court.(1)(a)

(1) *Shepard v. McEvers*, 4 John. Cha. 136. See *Mass. St.* 1843, 273; *Chaplin v. Givens*, *Rice*, 132.

v. Wilkes, 3 Sandf. Ch. 99; *Johnson v. Corbett*, 11 Paige, 265; *Richardson v. The State*, 2 Gill, 439; *State v. Guilford*, 15 Ohio, 593.

Where there are several trustees, who unite in a breach of trust, the *cestui que trust*, in seeking relief, may proceed against all or either of the trustees. *Gilchrist v. Stevenson*, 9 Barb. 9.

With regard to the powers of joint trustees; in general, they must act together, in order to render their doings legal and effectual.

Thus in receipts and conveyances; their power over the subject matter of the trust being equal and undivided, they cannot act separately. *Ridgeley v. Johnson*, 11 Barb. 527.

A deed in the names of, and purporting to be executed by, three trustees of a trust in lands, appeared, upon its production, to have been in fact executed by only two of the trustees. The trustee who did not execute the deed had been appointed only a few months previously to the date of the deed. Held, that inasmuch as the deed, upon its face, assumed that he was still alive, and he was named as one of the grantors therein, the presumption was, that he was alive at the date of the deed; and that a party claiming under the deed, in order to avail herself thereof, by showing authority in two trustees only to execute it, was bound to prove that such third trustee was dead at the time the deed was executed by the others. *Ib.*

A sale by one of two trustees, of property held by them jointly under an assignment for the benefit of creditors, is void. *Wilbur v. Almy*, 12 How. (U. S.) 180. One of the trustees cannot release a mortgage. *Van Rensselaer v. Akin*, 22 Wend. 549. But it is held, that though, where a trust is appointed for private purposes, all the trustees must join in receipts for money; in cases of public trusts, a majority of the trustees will be sufficient. *Hill v. Josselyn*, 13 S. & M. 597. In Maryland, where one of two trustees appointed by a will relinquishes to trustees, the other may execute it. *Md. L.* 1828, ch. 174.

In North Carolina, it is provided, that, where several executors are appointed in trust to sell lands, if some of them refuse administration, the others may give a valid deed. A similar provision is made in Pennsylvania, where an executor has died, removed, or been discharged; and, in Illinois, where one of the executors empowered to sell dies. In Ohio, a surviving trustee under a will may execute it, unless an intention is expressed to the contrary.

In Kentucky it is held, that, where a mere discretionary power to sell lands is given to several executors, they have a power, without an interest, and one cannot sell alone, though the rest do not qualify. But a devise to executors to sell, for payment of debts, gives them an interest. In New York, upon the refusal of one trustee to accept the trust, the whole estate vests in the others, as if the former were dead, or had not been named. And, if one refuse to accept, and formally renounce the trust, the Court of Chancery has no authority to re-instate him, even with his consent, and on application of another trustee. 1 N. C. Rev. Sts. 281; *Purd.* 301-2, *Illin. Rev. L.* 641; *Woolridge v. Watkins*, 3 Bibb, 349; *Baird v. Reman*, 1 Mar. 215; *Swan*, 1001; *King v. Donnelly*, 5 Paige, 46; *Schoonhoven*, *Ib.* 559. See *Champlin*, 3 Edw. 571; *Niles v. Stevens*, 4 Denio, 399; *Taylor v. Morris*, 1 Comst. 341. In Missouri, where there are joint trustees, and one dies, the others take by survivorship. *Stewart v. Pettus*, 10 Miss. 755.

(a) All the trustees of a will declined to act, and did not act or take upon themselves the trusts of the will. A petition was presented for the appointment of certain persons as trustees, "in the place or stead of" the trustees so declining to act, who appeared by counsel and disclaimed. Held, that the disclaiming trustees were, nevertheless, "existing" trustees, so as to authorize an order appointing the new trustees in their "place or stead," within the meaning of the 32d section of the Trustee Act of 1850. *Tylers, &c.*, 8 Eng. Law and Eq. 96.

A marriage settlement contained a power for the two trustees and the survivor of them, and the executors or administrators of such survivor, to sell certain estates with the consent of the husband and wife. The settlement contained no power of appointing new trustees. One trustee died; the other trustee went to reside abroad; and, upon a bill filed for that purpose, two new trustees were appointed under an order of the court. Held, that the trustees appointed by the court had no right to execute the power of sale. *Newman v. Warner*, 7 Eng. Law and Eq. Rep. 182.

A and B contracted for the building of a house on a certain lot, which A erected, and for which B became indebted to him in the sum of \$6,000. Shortly afterwards, B conveyed the house and lot to A and C, in trust for the use of B's wife and children, and to be held by them free from B's debts. After B's death, A prosecuted his claim against B's estate, and

75. A trustee cannot delegate his power, as, for instance, a power to sell.(1)

76. If a trustee refuses to accept the trust, the Court of Chancery will either appoint a new one, assume the execution of the trust itself, or direct a release to other trustees, if there are such, who are willing to accept the office.(2)

77. A court of chancery may also, in some cases, remove a trustee from office, though he is willing to act. As where his co-trustees refuse to join with him.

78. So, where a female trustee marries a foreigner, though she expressly disclaim all intention of going abroad.

79. And it is said, there is great inconvenience in a married woman's being trustee.(3)

80. It is usual to provide expressly in trust deeds, that, if any of the trustees die, become incapable of acting, or wish to relinquish the trust, a new trustee shall be appointed, either by the others or by the *cestui*, and the property conveyed to him jointly with the rest.(a) Where there is no such clause, the Court of Chancery will appoint a new trustee, after a release from the former one. This may be done upon a bill filed against the remaining trustees, and by reference to a Master.(4) And Chancery will appoint a new trustee, notwithstanding

(1) *Hawley v. James*, 5 Paige, 318.

(2) 2 Brev. Dig. 305; *Barnet v. Barnet*, 4 Des. Cha. 454; *Cooper v. Henderson*, 6 Bin. 192; *Lining v. Peyton*, 2 Des. 375; *Travell v. Danvers*, Finch, 380; *Swan*, 1001; *Com. v. Barnitz*, 9 Watts, 252; *Ebert*, 9, 300; *Carlisle*, Ib. 332; *Snyder v. Snyder*, 1 Md. Ch. 295.

(3) *Uvedale v. Ettrick*, 2 Cha. Cas. 20; *Lake v. Delambert*, 4 Ves. 592-5. See *Wright v. Miller*, 3 Barb. Ch. 382; *Craig*, 1 Barb. 33; *Gibbes v. Smith*, 2 Rich. Equ. 131; *Sloo v. Law*, 1 Blatch. 512; *Berry v. Williamson*,

11 B. Mon. 245; *Jones, &c.*, 4 Sandf. Ch. 615; *Rigler v. Cloud*, 2 Harr (Pen.) 361; *Childe v. Willis*, 2 Eng. L. & Equ. 356; *Watts*, 4 Ib. 67; *Tunstall*, 5 Ib. 113; *Turner v. Maule*, Ib. 222; *Plyer, &c.*, Ib. 232; *Robert*, 2 Strobh. Equ. 86; *Bayles v. Staats*, 1 Halst. Ch. 513; *Davidson, &c.*, 7 Eng. L. & Equ. 161; *Davies, &c.*, Ib. 8; *Farrant*, Ib. 47.

(4) *Buchanan v. Hamilton*, 5 Ves. 722; *Stuyvesant*, 3 Edw. 299; *Cape Sable, &c.*, 3 Bland, 627; *Winder v. Diffenderfer*, 2, 167; *Berry*, Ib. 322; *Jones v. Stockett*, Ib. 434; *Clay*, Ala. 350.

sought by a bill in equity to have the trust estate sold under his execution. Held, that having accepted the office of trustee, A. could not renounce it; and, as he was to hold the property free from B's debts, he could not enforce his own claim against the trust estate, as it would be a violation of his duty as trustee. *Strong v. Willis*, 3 Florida, 124.

Where a testator provides that his executors shall sell, lease, or dispose of his real estate at their discretion, the trust is personal; and, if the executors renounce, it cannot be executed by an administrator under the will. *Armstrong v. Park*, 9 Humph. 195.

(a) A testator, by his will, appointed A and B to be his trustees. He then directed that, "if the trustees hereby appointed, or to be appointed, as hereinafter is mentioned, should die," &c., it should be lawful for other trustees to be appointed as therein mentioned. A died in the lifetime of the testator. Held, that, under the power, a new trustee could be appointed in the place of A. *Hadley's Trust*, 9 Eng. Law and Eq. Rep. 67.

A testator, by his will, appointed A and B to be his trustees, and directed that if they should die, or desired to be discharged from, or refused or declined to act, it should be lawful for the surviving or continuing trustee or trustees, or if there should be none such, then for the trustee so desiring to be discharged, or refusing or declining to act, to appoint new trustees. A died. Held, that B declining to act, except for the purpose of appointing new trustees, had the power of appointing new trustees in the place of A and B. Ib.

In South Carolina, in case of the substitution of one trustee for another, no deed is necessary from the one to the other, but the statute of 1796 executes the transfer by the order of the court making the substitution. *McNish v. Guerard*, 4 Strobh. Eq. 66.

When a trustee retires, and new trustees are appointed by the court, the retiring trustee is entitled to have the accounts taken. *Nott v. Foster*, 1 Eng. Law and Eq. 125.

A demise of lands was made to trustees for 1,000 years on certain trusts. On a petition for the appointment of new trustees, it was held, that the reversioner ought to be served with the petition. *Farrant's Trust, in re*, 7 Eng. Law and Eq. Rep. 47.

by the will creating the trust, such appointment seems to be confided to the original trustee. So, if one trustee declines, Chancery will appoint a receiver for an infant *cestui*.(1)

81. In Kentucky, where there is a devise to two in trust, without mentioning *the survivor*, upon the death of one, one-half of the trust estate passes to his heirs. So a trustee may devise his estate, and, if the devisee renounce, the trust will pass to the heirs.(2)

82. All persons are capable of being trustees. In England, the king, who cannot be seized to a use, may be a trustee, and the remedy against him is in the Exchequer. So, in this country, a State may be a trustee. So a corporation may hold in trust for its own members or others, and is subject to the jurisdiction of Chancery.(3)

83. A trust, once created, is said to fasten itself on the estate. Chancery never wants a trustee. Hence, when the trustee dies or becomes incapable of acting, the court will provide for the continuation of the trust, by compelling the legal owner of the estate to perform it. So, also, where no trustee is appointed, if the object of the grant or devise cannot be otherwise effected, the court will appoint or imply a trustee. Thus, where land is devised upon certain trusts, to a company which is incapable of taking it, the heir at law of the testator shall be held a trustee. So, where land is devised to a married woman, for her separate use, her husband shall be a trustee for her.(a) And the same has been held in Tennessee, in the gift of a slave to a woman and the heirs of her body. So, where no trustee of the wife is appointed by an ante-nuptial marriage settlement, by which the husband stipulates that the wife shall enjoy her own property, the husband will be treated as trustee in equity, and compelled to account to his wife, as such. So, where the only obstacle to the execution of a trust created by a will, is the refusal of trustees to accept the trust, the court will supply the defect by appointing new trustees. Generally it may be stated, that, where property has been bequeathed in trust, without the appointment of a trustee, if it is personal estate, the personal representative is deemed the trustee; and if real estate, the heir or devisee.(4)(b)

(1) *Dunscomb v. Dunscomb*, 2 H. & Mun. 11; *Tait v. Jenkins*, 1 Y. & Coll. Cha. 492. See *Goodwin v. Hubbard*, 15 Mass. 210.

(2) *Sanders v. Morrison*, 7 Mon. 56; *Waggener v. Waggener*, 3, 545. See *Waltons v. Coulson*, 1 McL. 132.

(3) *Penn v. Lord Baltimore*, 1 Ves. 453; 3 Comm. 438; *Mayor, &c. v. Att'y Gen.* 7 Bro. Parl. 235; *Att'y, &c. v. Governors, &c.*, 2 Ves. 46; *Green v. Rutherford*, 1, 468; 1 Cruise, 322.

(4) 2 Story on Equ. 396; *Blanchard v. Blood*, 2 Barb. 352; *Burrill v. Sheil*, 2 Barb. 457; *Harkins v. Coalter*, 2 Port. 463; *Souley v. Clockmakers, &c.*, 1 Bro. 81; *Rogers v. Ross*, 4 John. Cha. 383; *Bennet v. Davis*, 2 P. Wms. 316; *Hamilton v. Bishop*, 8 Yerg. 33; *Stagg v. Beekman*, 2 Edw. 89; *Ray v. Adams*, 3 My. & K. 237; *Hoxie v. Hoxie*, 7 Paige, 187; *Couch v. Couch*, 9 B Mon. 160; *Duffy v. Calvert*, 6 Gill, 487; *Suarez v. Punnelly*, 2 Sandf. Ch. 336; *Willis on Trustees*, 56.

(a) It has been held otherwise in South Carolina. *Hunter, Rice*, 293. See *Baskins v. Giles*, Ib. 315.

(b) By the Maryland act of 1831, c. 311, sec. 11, mere naked trusts, when the trustee has no beneficial interest or estate whatsoever in the lands, descend to the heir at common law. *Duffy v. Calvert*, 6 Gill, 487.

But, in a special case, the right of the trustee to reimburse himself out of the trust in his hands, the heavy expenses incurred in the attempt to sustain the will, and the ulterior limitations in his favor in the codicil, were held to create such beneficial interests as must exclude this trust from the operation of that act. Ib.

84. But if the terms of a devise show a manifest intent to charge with the trust only the party to whom the estate is expressly given; upon his refusing to accept the estate, it vests in the heirs, discharged of the trust; and they are not liable to reimburse any moneys expended for the benefit of the *cestui que trust*, who is a minor, by his guardian.

85. Though a trust will not be suffered to fail for want of a trustee; yet, it is said, that being an *incident* merely, it will be suspended or destroyed by the suspension or destruction of the legal estate, as by escheat, disseizin, &c. But it has been held, that where the estate of the trustee devolves upon the State by escheat, the State holds subject to the trust. A trust will escheat for want of heirs; but the trustee may maintain ejectment against one claiming under the State.(1)

86. On the other hand, if all the purposes of a trust, as to any share of the property, cease, or are illegal, the estate of the trustees ceases *pro tanto*.(2)

CHAPTER XXVI.

TRUST TERMS. TRUSTS IN NEW YORK.

1. Trust terms.

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9. Trusts in New York.

1. TERMS for years are either vested in trustees *for the use of particular persons*, or *for particular purposes*; or else upon trust, *to attend the inheritance*.

2. Those of the former class are called terms *in gross*. The *cestui que trust* of such a term is entitled to the rents and profits, and may also demand an assignment of the term to himself. His estate is transferable; passes to his executors and administrators; and is equitable, though not legal assets, not being within the statute of frauds. The husband of a female *cestui* has the same interest as in any other term.

3. Terms *attendant on the inheritance*, though constituting a title equally intricate and important in the English law, are practically almost unknown in the United States, and therefore demand only a very brief notice.

4. The attendancy of terms is *the creation of a court of equity*, invented partly to *protect* real property, and partly to *keep it in the right channel*.

5. If a term has been created for a particular purpose, which is satisfied, and the instrument does not provide for a *cesser* of the term, on the happening of that event, the beneficial interest in it becomes a creature of equity, to be disposed of and moulded according to the equitable interests of all persons having claims upon the inheritance. When the purposes of the trust are satisfied, the ownership of the term belongs, in equity, to the owner of the inheritance, whether declared by the

(1) Benzsein v. Lenoir, Dev. Eq. 225; Marshall v. Lovell, Cam. & Nor. 217; Ward v. Matthews, 10 Gill & J. 443; St. 4 & 5 Wm. 4, ch. 23. See Com. v. Blanton, 2 Monr. 393.

(2) Lorillard v. Coster, 5 Paige, 173; Parks v. Parks, 9 Paige, 167; McMullin v. McMullin, 8 Watts, 236.

original conveyance to attend it or not. The trustee will hold the term for equitable incumbrancers, according to priority; and it is a general rule, that in all cases where the term and the freehold would, if legal estates, merge, by being vested in the same person, the term will, in equity, be construed to be attendant on the inheritance, unless there be evidence of an intention to sever them.

6. If a *bona fide* purchaser happen to take a defective conveyance, he may remedy the defect, and perfect his equitable title, by taking an assignment of an outstanding term, which will give him priority over the intermediate legal estate.

7. As a conveyance of the legal estate in fee of a trustee may be often presumed, so in many cases the surrender of a trust term may be presumed.

8. The equitable interest in a term attendant devolves in the same channel, and is governed by the same rules, as the inheritance. The term becomes consolidated with the inheritance, and follows it in its descent or alienation. On the death of the ancestor, it vests technically in his personal representatives, but in equity it goes to the heir. It must be devised with all the formalities of real estate.(1)(a)

9. By the New York Revised Statutes, uses and trusts are abolished, except as therein authorized and modified; and every estate and interest in land converted into a legal right, with the same exception.(2)(b)

10. In relation to trusts, these statutes abolish passive trusts, where the trustee has only a naked and formal title, and vest the whole beneficial interest, or right in equity to the possession and profits, in the

(1) 4 Kent, 86, 94; 1 Cruise, 334, *et seq.*

(2) 4 Kent, 294. See Hone v. Van Schaick, 20 Wend. 564; Darling v. Rogers, 22, 483; Jackson v. Edwards, Ib. 498; Rogers v. De Forest, 7 Paige, 272; Gott v. Cook, Ib. 521; Hone v. Van Schaick, Ib. 221; De Peyster v. Clendening, 8 Paige, 295; Van Vechten v. Van Vechten, Ib. 104; Vail v. Vail, 7 Barb. 226; Leggett v. Perkins, 2 Comst. 297; Tucker v. Tucker, 5 Barb. 99; Selden v.

Vermilya, 3 Comst. 525; Yates v. Yates, 9 Barb. 324; Sterrick v. Dickinson, 9, 516; Craig v. Craig, 3 Barb. Ch. 76, 9; L'Amoureux v. Van Rensselaer, 1 Barb. Ch. 34; M'Cosker v. Brady, Ib. 329; Mason v. Jones, 2 Barb. 229; Haxton v. Corse, 2 Barb. Ch. 506; Mason v. Mason, 2 Sandf. Ch. 432; Arnold v. Gilbert, 3, 531; Bellinger v. Shafer, 2 Sandf. Ch. 293.

(a) I have been able to find no case in the American Reports, upon the subject of attendant terms. I am informed by one of the counsel in a case in Massachusetts, (Salisbury v. Bigelow, S. J. C. March, 1838.) that the subject was there much discussed—probably, by way of analogy and illustration merely.

(b) In Wisconsin, (Rev. Sts. chap. 57, p. 318,) uses and trusts are abolished except as expressly provided.

Section 2. Estates now held to use are confirmed.

Secs. 3 & 5. A ny one entitled to possession of land by virtue of an agreement, &c., shall be deemed to have the legal estate.

Section 4. The last section is not to apply to *active* trusts where the trustees have the management and responsibility.

Section 6. The above sections not to apply to resulting trusts.

Section 7. A trust shall not result to the party who pays the purchase-money, another taking the deed; but the deed shall be deemed fraudulent, and a trust shall result to the creditors of the former.

Section 10. A purchaser without notice of a resulting trust shall not be affected by it.

Section 11. Express trusts may be created to sell for creditors; to sell, mortgage or lease for legatees, or pay a charge on land; to receive income and apply to the use of any person, subject to chap. 56; and in some other cases.

Section 12. A devise to sell, without power to receive rents, &c., shall be construed a power merely.

Section 13. The surplus of rents of trust property, beyond what is necessary to the support of the *cestui que trust*, is subject to his debts.

Sec. 14. Trusts shall not be deemed powers, when they can be lawfully executed as such.

cestui que trust. The latter takes a legal, corresponding with his beneficial interest; and no estate or interest vests in the trustee.(1)

11. Trusts are confined to two classes. 1. Trusts arising or resulting by implication of law. But the payment of the purchase-money by one man, for land conveyed to another, creates no trust in favor of the former,(a) except in relation to his creditors existing at the time; and excepting also a conveyance made to the latter without the consent of the former, in violation of some trust. But no resulting trust is valid against a purchaser for valuable consideration, without notice. 2. Certain classes of *active* or *express* trusts, where the trustee is clothed with some actual power of disposition or management, which requires a legal estate and actual possession. Express trusts are allowed: 2. To sell lands for the benefit of creditors; 3. To sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon; 4. To receive rents and profits, and apply them to the support and education of any person, or to accumulate them for the purposes and within the limits mentioned. In these cases, the trustee takes the whole estate in law and equity, subject only to the execution of the trusts. If an express trust is created for any other purpose, no estate vests in the trustee: but if the act authorized is lawful *under a power*, the trust is valid as a *power in trust*. Every estate and interest, not embraced in an express trust, and not otherwise disposed of, remains in or reverts to the person who created the trust, and he may dispose of the lands, subject to the trust, or in the event of its failure or termination; and the grantee or devisee will have a legal estate, as against all persons but the trustee. The conveyance to the trustee must contain a declaration of the trust; otherwise it will be absolute against subsequent creditors of, or purchasers from, the trustee without notice. When thus declared, any act of the trustee in contravention of the trust is void. Upon the death of all the trustees, the trust vests in the Court of Chancery, and does not pass to the representatives of the surviving trustee.(2)

12. Where some of the trusts provided for are valid, and others invalid, the trustee will take a legal estate for the fulfilment of the former only, unless the whole are so blended together, that it is impracticable to execute one without the other, in which case all will be void. And any subsequent limitation, which is invalid as creating a perpetuity, shall be deemed wholly void, in determining the validity of the legal estate itself, or other preceding trusts.(3)

13. An *annuity* is a *legacy* of several annual sums in gross; and, if payable from the rents and profits of land, a *charge* upon such land. Hence, an express trust, to lease lands and receive the rents, &c., for payment of such annuity, is valid under section 55 of the statute.(4)

(1) 4 Kent. 303; *Cushney v. Henry*, 4 Paige, 345; *Yates v. Yates*, 9 Barb. 324. | *v. Thompson*, 4 Barb. 279; 8, 537; *De Kay v. Irving*, 5 Denio, 646; *Tucker v. Tucker*, 5 Barb. 99.

(2) 4 Kent, 303-4-5.

(3) *Hawley v. James*, 5 Paige, 318; *Dupre*

(4) *Ib.*

(a) But see *Ross v. Hegeman*, 2 Edw. Chan. 373, that, where there is a joint advance of money upon a purchase by two in the name of one, a trust results to the other, though he did not pay the money till after completion of the purchase. If A purchases with money of B, and the deed is made to A by consent of B, no trust results to B. *Norton v. Stone*, 8 Paige, 222.

14. In such case, there is a resulting trust in the surplus rents, &c., in favor of the person presumptively next entitled to the estate.(1)

15. Where certain property is to be invested in land, in trust to receive the rents and profits for the use of a *cestui que trust*, and the interest of the latter is inalienable, (under the Rev. Statute, sect. 63,) even the consent of the parties and of the Court of Chancery also will not authorize an act which is virtually an alienation. But, if the property is directed to be invested in lands in a certain place, the court may authorize an investment in other lands, with the consent of parties, and may itself consent on behalf of infants.(2)

16. A trust to receive rents and profits and *pay them over* was a familiar one at common law; but at first was held not to be valid under the Revised Statutes. The phrase used in describing the third class of express trusts, "apply them to the use," was decided to mean that the trustee should *provide means and pay debts*; that he is to judge of the propriety of the expenditures; and has the whole legal and equitable estate; that the *cestui* has no estate, but only a right to enforce the trust in equity. This class of express trusts was said to be intended for the cases of minors, *femes covert*, lunatics and spendthrifts. But in a later case it has been held, that one who creates a trust, to receive rents and profits or income for the use of another, may direct the manner of their application, and that they be periodically paid over to the *cestui*, to provide him with necessaries.(3)

17. In order to receive rents and profits for the use of another, the trustee must have a legal title to the land. If such title is vested in the *cestui* himself, no valid *power in trust* can be reserved to the trustee.

18. A testator directed that his property should be invested in lands, to be conveyed to his children, but in trust for their guardian to receive the rents and profits for their use, both during and after their minority, so long as he should think proper. Held, the trust was void under the Revised Statutes; that the guardian took no estate as trustee, but could hold the fund only as guardian.(4)

19. A trust for the accumulation of rents, &c., or income, is invalid, unless it is for the sole benefit of an infant, and he to be paid absolutely on coming of age.(5)

20. Trusts of real property for charitable uses are within the prohibition of the statute, unless authorized by the act of 1840, respecting grants and conveyances to colleges and other literary institutions, and made to such trustees as are therein authorized to hold.(6)

21. A religious society may purchase and hold land in trust for any use within the general objects of its incorporation. Where a grant was made to a religious society in trust for the support of the minister; held, this use was within the "other pious uses" for which religious societies were empowered to purchase and hold real property by the general act for their incorporation.(7)

22. An annuity, arising from the proceeds of real and personal estate in the hands of trustees, is beyond what is necessary for the support of the party and his family, subject to the claims of his creditors;

(1) *Ib.*; *Irving v. De Kay*, 9 Paige, 521.

(2) *Wood v. Wood*, 5 Paige, 596.

(3) *Coster v. Lorillard*, 1835, 4 Kent, 309,
n.; *Gott v. Cook*, 7 Paige, 521.

(4) *Wood v. Wood*, 5 Paige, 597.

(5) *Hawley v. James*, 5 Paige, 318.

(6) *Yates v. Yates*, 9 Barb. 324.

(7) *Tucker v. St. Clement's Church*, 3 Sandf.
242.

and the Court of Chancery will not, under the provision empowering them to exonerate from creditors' suits such funds created by third persons, insert in an injunction a qualification excepting trust funds so created.(1)

23. A trust created by will to executors, to sell and convey gores of land to straighten lines; to rent houses and collect rents; to repair; to pay taxes and assessments; to effect insurance, and pay over the surplus to the devisees thereof; such trust to continue until the death of the widow of the testator, and one year afterwards—is illegal under the statute, which prohibits the alienation of trust estates, and the creation of trusts to extend beyond two lives in being.(2)

24. It cannot be objected to the validity of a trust, that it unduly suspends the alienability or absolute ownership of the property, where the execution of the trust by selling is unlimited as to time, if the time is not made to depend on an event which might carry it beyond the duration of two lives.(3)

25. A general power in trust, the execution or non-execution of which does not depend on the mere volition of the trustees, is imperative in its nature, and imposes a duty, the performance of which may be compelled in equity.(4)

26. A husband, by post-nuptial settlement, conveyed all the property acquired by his marriage to trustees, "to hold and to keep the principal and interest thereof during the said marriage, exempt from his debts, contracts, or control; to be managed and disposed of on her separate orders or receipts, or by her deeds or will, so that she may enjoy and dispose of the same as it came from her parents and sister, or may hereafter in any manner accrue to her in all respects as if she were unmarried." Held, the deed passed to the trustees all the interest which the husband had acquired by the marriage, and created a good and valid trust, and not a mere nominal trust, nor did it contemplate a duration greater than was allowed by statute.(5)

27. Held, also, that such deed did not pass, as the husband had no power to convey the fee, or the right to dispose of the real estate of the wife, nor the rents and profits thereof beyond his lifetime.(6)

28. Held, also, that the power of appointment by the deed to the wife extended to the absolute disposal by her of the principal and income, or of any part thereof.(7)

29. The Revised Statutes do not apply to a will, creating a trust which was executed before they were passed.(8)

(1) *Rider v. Mason*, 4 Sandf. Ch. 351.

(2) *Tucker v. Tucker*, 5 Barb. 99.

(3) *Arnold v. Gilbert*, 5 Barb. 190.

(4) *Ib.*

(5) *Cruger v. Cruger*, 5 Barb. 225.

(6) *Ib.*

(7) *Ib.*

(8) *Stewart v. McMartin*, 5 Barb. 438.

CHAPTER XXVII.

ESTATE ON CONDITION. NATURE AND KINDS OF CONDITIONS.

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| <ol style="list-style-type: none"> 1. Definition. 2. <i>Implied</i> or <i>express</i>. 4. <i>Precedent</i> or <i>subsequent</i>. 11. May belong to any estate. 12. Things <i>executed</i> and <i>executory</i>. 13. Must determine the whole estate. 15. To whom reserved. 18. Impossible conditions. 19. Illegal conditions. | <ol style="list-style-type: none"> 20. Repugnant conditions. 23. Cannot be made void by a change of the law. 25. Repugnant obligations. 28. Condition against assignment of lease. 38. Confession of judgment, whether a transfer. 40. For re-entry in case of insolvency. 43. In restraint of marriage. |
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1. A *condition* is said to be a qualification or restriction annexed to a conveyance, by which, upon the happening or not happening of a particular event, or the performance or non-performance of some act by the grantor or grantee; an estate shall commence, be enlarged, or be defeated. (1) Lord Mansfield remarked, that at common law the only modification of estates was by condition. (2)

2. A condition is either *implied* or *express*. Implied conditions are those created by law, and not by any express words; that is, *the legal incidents* of estates. For instance, at common law, a tenant for life held his estate upon the implied condition, that any attempt by him to convey in fee would be a forfeiture of his interest; and also upon the implied condition, not to commit waste. (3)(a)

(1) 2 Cruise, 4.

(2) Doe v. Hutton, 3 B. & P. 654, n.

(3) Co. Lit. 233 b.

(a) Where a conveyance is made for certain purposes, expressed in the deed, the question sometimes arises, whether the application of the land to the specified uses constitutes an implied condition, the breach of which will forfeit the estate.

Grant, in 1640, by the assembly of the colony of New Haven, of certain land, "for the purpose of planting," to be located by the grantees in separate lots, and held in severalty. Held, these terms did not make a condition or qualification that the lots should be *planted*, in the modern sense of the word, but the grant was for the purpose of a *settlement*. East Haven v. Hemmingway, 7 Conn. 186.

Whether a deed of land, "for the purpose of a court-house and jail," involves an implied condition against using it for any other purpose, *qu.* If it does, the erection of a stable on the land is no breach of the condition, nor of a dwelling for the jailor, with proper out-houses and a garden. Jackson v. Pike, 9 Cow. 69. Grant of land, on condition that certain public buildings should be there erected. By an act passed afterwards, the seat of justice was removed. Held, the land reverted. Police, &c. v. Reeves, 18 Mart. 221. See Austin v. Cambridgeport, &c., 21 Pick. 215; Braithwaite v. Skinner, 5 Mees. & W. 313.

A granted, for a nominal consideration, a lot of land to certain persons, in trust for those who had subscribed, or might thereafter subscribe, towards the erection thereon of a school-house and house of public worship, and towards the support of a school, or of the gospel, in said building: providing, that if the premises should be converted to any other use than as aforesaid, and for a burying-ground, the lot should revert to the grantor and his assigns. One of the trustees permitted a female, in distress, to occupy the premises temporarily as tenant at will, without rent, though she and her family remained there seven years. Held, no forfeiture. McKissick v. Pickle, 16 Penn. 140.

In case of a conveyance, with warranty, to commissioners and their successors, for the use of a county forever, in consideration of one dollar, and that the county seat had been located on the land; the grantor cannot recover it back, though the legislature subsequently change the county seat. Harris v. Shaw, 13 Illin. 456. It might be otherwise, if the grant had been on condition of using the land for a particular purpose. *Ib.*

Deed, in the common form of a conveyance in fee, "for the purpose of erecting a school-

3. Express conditions are those created by express words, either in

house or school-houses, for school purposes, and for these purposes only." Held, a conveyance of the land, and not of some possibility or peculiar interest in reversion. *Sherwood v. Waller*, 20 Conn. 262.

Grant of land in fee, in trust for certain persons and their associates, "for the purpose of the public worship of God, and the erection on said premises granted of a church or meeting-house for said worship, as also a house for a clergyman and a school-house." The deed contained the following conditions: that "the grantees, or *cestuils que trust*, or some of them, shall build and finish, within two years from the 9th day of November, 1832, on the lot hereby conveyed, a church or meeting-house for the public worship of God, and shall build and finish, within three years from the said 9th day of November, a suitable dwelling-house for the clergyman, and a school-house, all on the lot hereby conveyed; and in case the said church or meeting-house, and parsonage-house and school-house, shall not be built on said lot, and finished within the respective times above mentioned, then the land hereby granted, with its appurtenances, is to revert to 'the grantors.' And this grant is upon the further condition, that the land, &c., shall be forever hereafter appropriated to the maintenance and support of the public worship of God, as hereinbefore specified, and to no other uses or purposes whatever; otherwise, the same to revert to said corporation of the Canal Bridge, as above mentioned." Afterwards, the grantors extended the time within which the school-house might be built. B and others conveyed said lot to S and others, in trust for a religious society that had been incorporated, to be held on the trusts and conditions expressed in the deed of the original grantors, made to B and others. The meeting-house, parsonage-house, and school-house, were built on said lot, and were finished, to the satisfaction of the original grantors, within the times mentioned in their deed, and afterwards extended by them. Afterwards another house, connected with the school-house, was built on said lot, for the use of the preceptor of the school; a vestry and two shops were made in the basement of the meeting-house, and the shops leased for secular business; the land, on which the parsonage-house was built, was mortgaged for a debt incurred in building on the whole lot; the land, on which the school-house and preceptor's house were built, was leased for a long term to an incorporated academy, and said academy mortgaged the same. The original grantors entered upon the land originally granted by them to B and others, for breaches of the conditions in their deed, and brought writs of entry to recover the whole land, as forfeited by such breaches. Held, the second condition in said original deed was repugnant to the previous parts of the deed, and was void; and that the actions could not be maintained. *Proprietors, &c. v. Methodist, &c.*, 13 Met. 335.

A person conveyed to trustees a piece of ground, for the purpose of having a public school-house erected thereon; and the house was accordingly built. Held, the grant was not forfeited, merely because the trustees had permitted religious, political, and temperance meetings to be held in the house, at times when such meetings did not materially interfere with any school taught therein. *Broodway v. The State*, 8 Blackf. 290.

Land was sold to the city of New York for the purposes of a public square, upon condition that they should forever be used and appropriated for such purposes exclusively, and that the corporation should immediately proceed to regulate the land granted, and enclose and improve it in the manner specified in the conveyance. The corporation joined in such deed, under the corporate seal, and covenanted to stand seized of the premises for the purposes of a public square exclusively, and that such corporation would abide by, observe and perform the conditions imposed upon it by the acceptance of such agreement and conveyance. Held, the corporation was bound to perform the conditions specified in the deed, and liable in damages to the grantor for the non-performance thereof. *Stuyvesant v. Mayor, &c.*, 11 Paige, 414.

Held, also, that the grantor might, at his election, re-enter for breach of the conditions, bring an action for damages sustained by the breach of the covenants of the corporation, or file a bill in equity for specific performance. *Ib.*

Where land was conveyed to trustees, to erect a Roman Catholic church, and lay out a place of burial, with a condition that, if the church was not erected, and the remainder of the lot appropriated for burial purposes, the deed should be void, &c., and no church was ever erected on the lot, but a church was erected, by the same society of Christians, upon a lot in the neighborhood, and the lot in question was used exclusively as a place of sepulture; and, the corporation of Baltimore being about to sell the lot for non-payment of a paving tax, the pastor of the church and one of the congregation filed a bill for an injunction; held, neither of the complainants had any interest, legal or equitable, for the protection of which they could claim the interposition of a court of equity. *Dolan v. The Mayor, &c.*, 4 Gill, 394.

Under the New York Statute, (1 Rev. Sts. 346,) providing that a diversion of salt works to other purposes than the manufacture of salt shall work a forfeiture of the leasehold estate, the partial diversion of a lot, as for the erection of a dwelling-house, &c., will not work a forfeiture. *Hasbrook v. Paddock*, 1 Barb. 635.

the deed itself or some other instrument to which it refers; as, for

And, if it did, a subsequent holder of the leasehold estate, under an agreement for an exchange of it for other lands, cannot take advantage of it for the purpose of avoiding such agreement, after he had quietly occupied for several years, and the other party had made large improvements on the land received by him in exchange; such partial diversion being known to him at the time of making the agreement, and the statute, making a diversion a forfeiture, being a public law, of which he was bound to take notice; and where such forfeiture, if any, had been waived by the people and a renewal of the lease granted. 1b.

Contributors to a fund, on condition that a literary and theological seminary shall be located permanently in a specified place, and in consideration thereof, which is accordingly done; have a right to apply for an injunction, to prevent an illegal and unauthorized removal of the seminary to another place. *Hascall v. The Madison, &c.*, 8 Barb. 174.

Where A and B made a parol agreement with the inhabitants of a town and its neighborhood, that they would give the ground for a church and graveyard for the use of two congregations, if the members of the congregations and the neighbors would erect the house of worship and open a graveyard on the premises; and the church or meeting-house was erected in consequence, and the graveyard opened at the expense of said congregations and other charitable neighbors; held, that the agreement was not within the statute of frauds; that A and B stood seized of the premises as trustees for the use of the two congregations; and, upon a sale by the sheriff under a judgment against A, the sheriff's vendee acquired the title of A, subject to the trust, and became himself a trustee for the original uses. *Beaver v. Filson*, 8 Barr, 327.

The question sometimes arises, whether certain terms of limitation create merely a charge upon land given to one person, for the benefit of another, or a condition, by breach of which the estate is forfeited. Thus, a testator devised all his real estate to his sons, by *their paying* to each of his daughters so much "out of the estate." This payment not being made, one of the daughters brings a writ of entry for a part of the land, as forfeited by breach of condition. Held, the sons took an absolute estate in fee, charged with the legacies, not an estate on condition; that this charge would follow the property into the hands of any purchaser, with notice; but that the present action could not be sustained. *Taft v. Morse*, 4 Met. 523; acc. *Morancy v. Buford*, 1 M'Lean, 195. See *Fox v. Phelps*, 17 Wend. 393. *Crawford v. Severson*, 5 Gill 443; *Hackadorn, &c.*, 11 Penn. 86; *Wright, &c.*, 2 Jones, 256. Devise to a son of the testator, *he paying* his younger brother £100. Held, a charge. *Luckett v. White*, 10 Gill & J. 480. The following are some other cases of conditional devises. "I will—that I do to offend by the word *pay*, &c., to H and his wife I wish their acceptances of twenty five acres of land," &c. The testatrix lived in H's family, who afterwards sued the executor for her board, but without success. Held, a conditional devise, which H elected to relinquish by bringing the suit. *Hapgood v. Houghton*, 22 Pick. 480. Devise to A and B, sons of the testator, of all his real estate, on condition, if either made any claim on the estate, he should have no right under the will. A made such claim, and received payment from the executor. Held, a forfeiture of his moiety, which passed to the heirs. *Sackett v. Mallory*, 1 Met. 355. Devise of a fractional part of certain land, "to be taken by the devisee where he shall choose or select," &c. Held, not a condition precedent to the vesting of the estate, but the devisee became a tenant in common, with a right of selection. *Brown v. Bailey*, 1 Met. 254. Devise—"I will that A shall be supported out of my estate—and shall have the use of the north room in my house," while single. If she marries, "I give her \$150, to be paid her by my son B in full of all demands." B, being devisee of the whole estate, gave bond for payment of debts and legacies, and afterwards conveyed the land to C, who had notice of the above devise. Held, a charge upon the real estate (A having never married.) if the personal was insufficient, to be enforced either by a suit on the bond or against C. *Sheldon v. Purple*, 15 Pick. 528.

Devise to A, a son of the testator, of three lots of land, "by his paying the other children towards their share of my estate, \$300;" and of the residue of his estate, to his children. Held, a charge on the land of A. *Ward v. Ward*, 15 Pick. 511. See *Button v. Button*, 2 Beav. 256; *Veazey v. Whitehouse*, 10 N. H. 409.

A will contained legacies and a devise to A, with a condition annexed; proceeded to give legacies to B; and, by a subsequent clause, ordered that A should pay all debts. Held, this was not a mere personal charge upon A, but, with the legacies to B, a charge upon the real estate. *Sands v. Champlin*, 1 Story, 376. A devise, *in respect thereof* charging the devisee with debts and legacies, is *in rem*, and a charge upon the property. 1b.

Devise on condition of maintaining the testator's widow for life. If the devisee refuse to accept and perform the condition, the devise is void, and the heirs may enter. *Stone v. Huxford*, 8 Blackf. 452.

A testator, in one clause of his will, directed that his wife should "have a decent and comfortable support to be derived from all his lands and tenements" In a subsequent clause, he devised to his son A, in fee-simple, a part of his lands, "subject nevertheless to a charge of five hundred dollars, to be paid by him, his heirs, &c., to his brother B, as soon as he, the

instance, a condition in a lease, that, if the rent shall not be paid at the day, the lessor may re-enter.(1)(a)

4. Conditions are either *precedent* or *subsequent*; the former must be performed before the estate will vest, the latter enlarge or defeat an estate already created.

5. Whether a condition shall be regarded as precedent or subsequent, depends not on any form or location of words, but on the fair construction of the contract, and plain intention of the parties.(2)

6. If, in case of a will, the particular clause in question, or the whole will, indicates that the condition must be performed before the estate can vest, the condition is precedent. If the act prescribed does not necessarily precede the vesting of the estate, but may accompany or follow it, the condition is subsequent.(3)

7. Where covenants go to *the whole* of the consideration on both sides, they are conditions precedent; where only to a part, otherwise; and each party must resort to his separate remedy, because the damages might be unequal.(4)

8. Conveyance in fee, reserving a life estate in a part of the land. "This deed is made and to have effect on the following conditions;" viz., payment of money at divers times to several persons. The fee passes, upon condition subsequent.(5)

9. A testator gave a large amount of lands to his wife for life, and all his real estate *at her death* to A, on condition of his marrying a daughter of B and C, who at the making of the will had no child. Held, the words of gift being *in presenti*, "I give," &c., imported an immediate interest; that, in regard to the portion devised to the wife, inasmuch as B and C were childless at the making of the will, the testator evidently did not contemplate that A would marry, according to the condition, during the life of the wife, and therefore intended that

(1) Lit. 328.

(2) Thorp v. Thorp, 12 Mod. 464; Newkirk v. Same, 2 Caines, 352; Barruso v. Madan, 2 John. 148; Brockenbrough v. Ward, 4 Rand. 352; Green v. Thomas, 2 Fairf. 318; Finlay v. King, 3 Pet. 374; Tompkins v. Elliot, 5 Wend. 496; 7 Gill & J. 240; Gardiner v. Corson, 15 Mass. 500; Barry v. Alsbury, 6 Lit. 151; Passmore v. Moore, 1 J. J. Mar. 591; Dullman v. King, 4 Bing. N. 105; Turuer v. Tebbult, 2 Y. & Coll. Cha. 225; Thompson v. Bright, 1 Cush. 420; McCul-

lough v. Cox, 6 Barb. 386; Houston v. Spruance, 4 Harring. 117; Shinn v. Roberts, 1 Spencer, 435.

(3) 3 Pet. 374.

(4) Boon v. Eyre, 1 H. Blackf. 273, n. See Barry v. Alsbury, 6 Lit. 151; Minister, &c. v. Bradford, 8 Cow. 457; 20 John. 12; Johnson v. Reed, 9 Mass. 78; Brockenbrough v. Ward, 4 Rand. 352; Clopton v. Bolton, 23 Miss. 78.

(5) Howard v. Turner, 6 Greenl. 106.

said B, shall have completed his studies, &c.; a good and sufficient voucher for the payment of the said sum of five hundred dollars, &c., shall vest in him, his heirs or assigns forever, a good, pure and absolute estate of inheritance in the said lands and tenements." Held, notwithstanding this charge in favor of B, the land so devised was also subject to its proportionate share of the charge in favor of the wife. Baird v. Baird, 7 Ired. Eq. 265.

Where an estate is devised on condition of, or subject to, the payment of a sum of money, or where an intention to make an estate, specifically devised, the fund for the payment of a legacy, is clearly exhibited; such legacy is a charge upon the estate; and equity may decree, that the person in whom the estate is vested shall execute the trust, although he be an heir of the testator, who has taken the estate upon the devisee's declining to accept it. Bugbee v. Sargent, 27 Maine, 338.

(a) Conveyance, "subject to the conditions and obligations contained in an agreement between the parties." Held, a valid legal condition was thereby created, upon breach of which the grantor could recover the land even from an execution purchaser of the grantee's estate. Bear v. Whisler, 7 Watts, 144.

he should take at her death, whether he had thus married or not; that there was no ground for any distinction, with respect to the condition, between this and the other part of the estate; and, therefore, that the devise of the whole was on condition subsequent, and took effect immediately, subject, as to a part of the land, to the wife's possession for life.(1) It would have been otherwise, it seems, if the devise had been, "I devise my lands to A *on his marrying B.*"(2)(a)

10. There is one case, where the distinction between conditions precedent and subsequent becomes very important, the same event producing, in the two cases, directly opposite effects. It will be seen that, if a precedent condition becomes *impossible*, by act of God, no estate can vest; whereas, if the condition is a subsequent one, the estate becomes absolute. So, if the condition be *illegal*.(3)

11. A condition may be annexed to any estate whatsoever.

12. It is said that, as to things *executed*, a condition must be created and annexed to the estate, at the time of making it. Hence, when a condition is made by a separate deed, this must be sealed and delivered at the same time as the principal deed. This point arose in the reign of Edward III, who, having conveyed lands to certain noblemen, attempted, subsequently, to annex a condition to such conveyance. But the condition was held void by all the judges and sergeants.(4) But

(1) *Finley v. King*, 3 Pet. 374. See *Taylor v. Mason*, 9 Wheat, 325. *son*, 9 Wheat. 325; *Myers v. Daviess*, 10 B. Mon. 394.

(2) *Ib.* 375.

(3) *Infra.* ch. 23, sec. 15. See *Taylor v. Ma-*

(4) *Co. Lit.* 236 b; *Touch.* 126; 2 *Cruise*, 5.

(a) A deed from the trustees of a town contained the stipulation, that the grantee should "allow all people to pass and repass, to fish, fowl and hunt," &c., on the granted premises. Held, this was not a *reservation* or *exception*, but a condition subsequent, upon breach of which the title might, by proper proceedings, be divested. *Parsons v. Miller*, 15 Wend. 564.

Devise of land to a town, to use and improve forever, and not be sold, but rented out, and the rents applied to support the ministry in the town. Held, a condition subsequent. *Brigham v. Shattuck*, 10 Pick. 309. Devise to a son in fee, "on condition that, after my decease, he becomes a perfectly sober man;" if not, the property to *descend* to his wife and children in fee. Held, a condition precedent. *Lewisburg v. Augusta*, 2 W. & Serg. 65.

A, having an absolute appointment by deed or will over an estate, devised it to her husband B, with power to sell and dispose of the same, or to raise any sum of money thereon by mortgage, as he should think proper, "provided that such part of all and every sum and sums of money, so as aforesaid raised by the said B, either by sale or mortgage, as shall be unexpended at my (his) decease, shall be charged upon the houses belonging to B, situate, &c., to be disposed of immediately after the decease of the said B, that sum to be paid to my four nieces." She also devised the reversion of the estate to her four nieces, in case it should be in mortgage; and, if the estate should not be sold or mortgaged by B. then she devised the same to her said four nieces, as tenants in common in fee. B mortgaged the estate, and died, never having charged his houses with any part of the mortgage-money. Held, the condition was not a condition precedent, and the mortgage was valid. *Watkins v. Williams*, 10 Eng. Law and Eq. 23.

A, and B his wife, conveyed real estate to C and D, on condition that the grantors should be permitted to continue to occupy the house on the premises, and that the grantees, their heirs, executors and administrators, should furnish the grantors a decent and comfortable support during their (the grantors') lives. Held, the condition was a condition subsequent; and, if the possession of said house and a suitable support were furnished to B, after the death of A, she might claim her dower in the premises. *Hefner v. Yount*, 8 Blackf. 455.

Where land is devised to A, on condition that he shall pay debts and a legacy, the estate vests in A immediately on the testator's death, and such payment is a condition subsequent. *Horsely v. Horsely*, 4 Harring. 517.

things *executory*, such as rents, annuities, &c., may be restrained by conditions annexed to them after their creation.(1)(a)

13. A condition must *determine the whole estate* to which it is annexed. Thus, if a feoffment is made on condition that, upon the happening of a certain event, the feoffor may re-enter and hold *for a time*, or the estate shall be void *for a part of the time*; or, if a lease be made for ten years on condition that in a certain event it shall be void *for five*; these conditions are void. But a condition may legally be confined to a *portion of the land* which is conveyed. Thus, there may be a conveyance of six acres, with a condition that, upon a certain event, it shall be void as to three. So, also, in case of a lease, it has been seen (ch. 16,) that there may be a condition for the lessor to re-enter for non-payment of rent, and *hold till he is satisfied*.(2)

14. Conveyance of an estate tail, conditioned to be void in a certain event, as if the tenant in tail were dead. Held, inasmuch as the death of the tenant would not terminate the estate, but only his death without issue, this condition was void.(3)

15. A condition can be reserved only to the grantor or lessor, or his heirs, not to a third person. This rule is founded upon the general principle of law, which forbids *maintenance* or the purchase of disputed titles. (See *Maintenance*.) But heirs shall have the benefit of a condition, though not specially named.(4)(b)

16. It is a legal maxim, that nothing which *lies in action, entry, or re-entry*, can be granted over. Upon this principle, at common law, a condition, in a lease, for re-entry upon non-payment of rent, did not pass to an assignee of the reversion, even though the tenant attorned to him. This rule, however, is changed by statute.(5)

17. There are many circumstances which may render a condition *void*.

18. *Impossible* conditions(c) are void. So those which become impossible by the act of the grantor. Thus, where the King of Great Britain granted a charter of a town in Vermont, (then New Hampshire,) in part to the defendants, an incorporated society, reserving a rent of one

(1) Co. Lit. 237 a.

(2) Corbet's case, 1 Rep. 86 b.

(3) *Jernin v. Arscott*, 1 Rep. 85; 6 Ib. 40.

(4) *Jackson v. Topping*, 1 Wend. 388; Co.

Lit. 214 a; *Winn v. Cole*, Walk. 419; *King's, &c. v. Pelham*, 9 Mass. 501. See *Parker v. Nichols*, 7 Pick. 111; 7 Conn. 201.

(5) Lit. sec. 347.

(a) This distinction seems to be now of no practical importance, however well founded in the technical rules of the ancient common law. *Things executed* may undoubtedly be modified, subsequently to their creation, by the consent of *both parties*; and *things executory* cannot be, without such consent.

(b) For, as they are the persons prejudiced by the grant or lease, they ought to have the same means as their ancestors, of recovering the estate. See ch. 28, secs 6, 44. Devise to a son of the testator of a farm in fee-simple; on condition that his daughters should have the use and occupation of a room in his house, food, &c., while they remained unmarried. Held, upon breach of condition, the daughters might recover their shares of the estate, as heirs to their father. *Hogboom v. Hall*, 24 Wend. 146.

So a residuary devisee may avail himself of a condition annexed to a specific devise. *Hayden v. Stoughton*, 5 Pick. 528; *Brigham v. Shattuck*, 10, 306; *Clapp v. Stoughton*, Ib. 463. In Pennsylvania, a right of entry may be reserved to the grantor's *assigns*; under which a purchaser on execution may claim for a forfeiture, though subsequent to the purchase. *McKissick v. Pickle*, 16 Penn. 140.

(c) "Impossible conditions mean a *physical impossibility*, and not the want of power in the party." 1 Swift, 93.

shilling for every hundred acres, after the first ten years, *to be paid annually to the grantor, in his council chamber in Portsmouth*, or to such officer as should be appointed to receive it; held, the separation of the two countries, an act of the grantor, rendered impossible a payment at the place named; and, no other place having been appointed, nor any officer to receive it, the people of Vermont, as successors to the king, could not claim a forfeiture.(1)

19. *Illegal conditions are void.* These are: 1. To do something that is *malum in se* or *malum prohibitum*. 2. To omit some duty. 3. To encourage such act or omission.(2)(a)

20. It is said, that a condition is a *divided clause* from the grant, and therefore cannot either expressly or by implication frustrate the grant, in regard to any of its inseparable incidents. Hence, conditions *repugnant* to the nature of the estate are void. As, for instance, a condition in a conveyance of the fee, or even a devise of an estate for life, that the grantee shall not take the profits, or alienate; or a condition in a lease to three persons, that one of them shall not demand the profits, or enter upon the land during the lives of the others. So a condition, annexed to an estate tail, that the donee shall not marry; because, without marriage, he could not have an heir of his body; or that he shall not suffer a recovery.(3)(b)

(1) *People, &c. v. Soc'y, &c.* 1 Paine, 652; *U. S. v. Arredondo*, 6 Pet. 691; *Hughes v. Edwards*, 9 Wheat. 489; *Whitney v. Spencer*, 4 Cow. 39.

(2) *Mitchel v. Reynolds*, 1 P. Wms. 189.

(3) Lit. 360-1; *Hob.* 170; *Doe v. Carter*,

8 T. R. 61; *Co. Lit.* 206 b, 223 a; *Moore v. Savil*, 2 Leon. 132; *Jenk.* 243; *Dyer*, 343 b; *Co. Lit.* 223 b; *Newton v. Reid*, 4 Sim. 141; *Hodges v. Hodges*, 2 Cush. 455; *McCullough v. Gilmore*, 11 Penn. 370; *Blacket v. Lamb*, 10 Eng. L. & Equ. 5.

(a) "There are three sorts of conditions to be rejected: 1. Such as are repugnant; 2. Those impossible in their creation; 3. Those *mala in se*." *Harvey v. Aston*, 1 Atk. 361; *Com. R.* 726; *Willes*, 83.

(b) *Rochford v. Hackman*, 10 Eng. L. & Equ. 64. Devise of real estate to a wife for life, and "the remainder of the testator's estate, in possession or reversion, to his five children, to be equally divided to and among them or their heirs respectively, always intending that none of his children shall dispose of their part of the real estate in reversion, before it is legally assigned to them." Held, the children took a vested remainder in the real estate given to the wife for life, and the above restriction upon alienation was void. *Hall v. Tufts*, 18 Pick. 455.

Lease in perpetuity, with a condition and covenant that, upon every sale of the land, the tenant or his assigns should obtain the written consent of the reversioner, and offer him the right of pre-emption, and, if sold after such offer, that one-tenth of the purchase-money should be paid to the lessor. Held, this provision was a restraint and a fine upon alienation, against the policy of the law, upon which the remedy, if any, was at law, but which equity would not aid in enforcing. *Livingston v. Stickles*, 8 Paige. 398. A condition in a lease, that the tenant shall not sell any wood or timber without permission, is valid. *Verplanck v. Wright*, 23 Wend. 506.

But, in a lease for two years, a proviso that the lessee occupy but one, is void. *Scovell v. Cabell*, Cro. Eliz. 107. So, in the grant of a house, a condition not to meddle with the shops, which are part of the house. *Hob.* 170. See, as to insensible and absurd conditions, *Doe v. Carew*, 2 Ad. & Ell. (N. S.) 317.

The owner of lots of land on the East River, opposite New York, improved one of them at a great expense for a cottage residence and garden, and sold a part of the other, with the agreement that the grantee should only use it for a place of residence; and the conditions in the deed were, that the grantee should not use the lot in any way, or for any business, which might be offensive to the occupant of the adjoining lot, or that would tend to deteriorate or lessen its value, and the grantee was not to use the lot as a stone quarry. The grantee leased a part of the lot, for a railroad to carry stone from a neighboring quarry to a wharf, which he gave the lessees leave to build opposite the lot. Held, on a bill by the grantor for an injunction, that such a use of the lot would be a breach of the conditions of the deed, and that the grantee and his lessees could be restrained by an injunction. The

21. So a condition annexed to a devise to children, in these words: "in case they continued to inhabit the town of H., otherwise not." In this case, only one of the devisees lived at H., at the date of the will, or the death of the testator. The word *continue* was therefore held unmeaning. Another ground was, that the devisees being themselves heirs at law, there was no one to take advantage of a breach of condition; inasmuch as the residuary devise to two sons of the testator, expressly excepted this portion of the estate. The devise was declared repugnant, unreasonable, uncertain and nugatory. But Thompson, J., dissented, on the ground that the condition was a precedent one.(1)

22. But conditions, prohibiting only what is contrary to law, are valid. Thus, a condition against alienation in *mortmain*, or against alienation in any mode which is invalid in law. And a condition against the exercise of a power, which is not *incident* to the estate granted, but only *collateral*, and conferred by a special statute, is valid; as, for instance, a condition in a gift in tail, that the donee shall not lease for three lives or twenty-one years, as authorized by Statute 32 Henry VIII.(2)

23. A condition, valid at the time of creating it, cannot be affected by any change in the law pertaining to its subject matter.

24. Conveyance, on condition the grantee shall not aliene, till he reaches the age of twenty-five years. Before this time he alienes, and makes a second conveyance after reaching the age prescribed. The first deed is void, and the last valid. When this condition was imposed, twenty-five was the age of majority in this State (Missouri.) A subsequent act changed it to twenty-one. Held, the condition was still binding.(3)

25. It was formerly held, that a bond, against exercising the powers incident to an estate, was valid. (See *supra*, ch. 2, sec. 56.) Thus, where a son, receiving lands from his father in tail, gave bond that he would not dock the entail, and afterwards applied to Chancery for relief against the bond; held, it was a valid instrument.(4)

26. But this doctrine is said to be extremely questionable, and has been denied in subsequent cases.(5)

27. Thus, where successive tenants in tail, according to the direction of the donor, entered into mutual obligations not to aliene; held, in

(1) Newkerk v. Newkerk, 2 Caines, 345.

(2) 2 Cruise, 7; Gray v. Blanchard, 8 Pick.

289. (3) Dougall v. Fryer, 3 Misso. 40.

(4) Co. Lit. 206 b; Freeman v. Freeman, 2 Vern. 233; acc. Turner v. Johnson, 7 Dana, 438.

(5) 2 Cruise, 7.

erection of a wharf was held to be especially a breach, as it would be a temptation to nocturnal debauchees to frequent the neighborhood. Seymour v. McDonald, 4 Sandf. Ch. 502.

A conveyed land to B and C, his wife, with the conditions that each should take an undivided moiety, and that C should not incur her part or sell it, without B's consent, and that she should have the power to devise the same. Held, these conditions were not void, and the appointment made by C in her will was a valid one, and could not be set aside by her or B's heirs. Hicks v. Cochran, 4 Edw. Ch. 107.

A condition annexed to a devise, that the person who may have the right is to procure an act of the legislature for change of name. "together with his taking an oath before he has possession, that he will not make any change during his life" in the will, relative to the real estate; is repugnant and void. Taylor v. Mason, 9 Wheat. 325.

A condition in a conveyance, that the grantee shall keep a saw and grist mill on the land doing business, is valid; and a breach thereof forfeits the estate. Sperry v. Pond, 5 Ohio, 389.

Chancery, and by the advice of Lord Coke, that, as these agreements tended to a perpetuity, they should be delivered up to be cancelled. The same decree was made, in case of a bond from a tenant in tail not to commit waste.(1)

28. In regard to estates for life and for years, it has been held, that, if a lease is made to one *and his assigns*, a condition against assignment is repugnant and void. But where assigns are not named, such condition is valid, though not favored, but looked nearly into by the courts.(2) As a general principle, the landlord, having the *jus disponendi*, may annex whatever condition he pleases to his grant, provided it is not illegal, unreasonable, or against public policy. It is reasonable that a landlord should exercise his judgment, with respect to the person to whom he trusts the management of his estate. It is a matter of personal confidence, founded on a knowledge of the tenant's honesty, or skill and diligence in farming.(3)(a)

29. Lease for years, on condition the lessee, his executors or assigns should not aliene, without the lessor's consent. After the lessee's death, his administrator assigned, without leave of the lessor. Held, as the administrator was an assignee in law, this was a breach of the condition.(4)

30. So a condition, that if the lessee for years, his executors or assigns demised the land for more than from year to year, the lease should cease; was held valid, and to be broken by a devise of the term.(5)

31. But it was subsequently decided, that, where a lessee covenanted not to assign his term without consent, a devise was no breach.(6)

32. A condition against assignment, either by the lessee or his assigns, without the lessor's consent, is waived and put an end to by an assignment with his consent; so that a subsequent assignment by the first assignee is valid, and not within the condition. So if a license is obtained, it remains in force, and an alienation is valid, after the landlord's death.(7)

33. An *under-lease* is not within a condition against assigning over the lessee's estate.(b) So held, where a lessee for twenty-one years covenanted "not to assign, transfer or set over, or otherwise do or put away the said indenture of demise, or the premises thereby demised or any part thereof, to any person or persons whomsoever, without the license and consent of the lessor;" and afterwards leased for fourteen years.

34. So, where the condition was, that the lessee would not assign

(1) Poole's case, Moo. 810; *Jervis v. Bruton*, 2 Vern. 251.

(2) *Stukeley v. Butler*, Hob. 170; Co. Lit. 204 a, 223 b; *Crusoe v. Bugby*, 3 Wils. 237; *Hargrave v. King*, 5 Ired. Equ. 430.

(3) *Roe v. Galliers*, 2 T. R. 138-40.

(4) *More's case*, Cro. Eliz. 26; (*Pennant's case*, 3 Rep. 64.)

(5) *Berry v. Taunton*, Cro. Eliz. 231.

(6) *Fox v. Swann*, Styles, 483.

(7) *Dumpor's case*, 4 Rep. 119; *Whitchcot v. Fox*, Cro. Jac. 398; Co. Litt. 52 b.

(a) A *condition* is to be distinguished from a *covenant* against assigning, &c. The latter is merely a ground for damages, not for forfeiture; more especially where the lease expressly provides a forfeiture for waste, non-payment of rent, &c. *Spear v. Fuller*, 2 N. H. 174. Whether a lessee, with such a covenant in the lease, can pass any title to the assignee, *qu.* As between him and such assignee, the transfer is valid, and sufficient consideration for a note. *Ib.*

(b) So it is held, that the lessee may associate others with himself in the enjoyment of the term. *Hargrave v. King*, 5 Ired. Equ. 430.

over or otherwise part with the indenture or the premises thereby leased, or any part thereof, to any person, &c.

35. But in case of a lease to one, his executors, &c., a proviso that the lessee, his executors, &c., shall not set, let or assign over the premises or any part thereof, embraces an under-lease by the lessee's administrator. The term, for the purposes of assignment, is not legal assets. If the proviso applied in its terms only to the lessee himself, it might be held not to embrace a transfer by the administrator.

36. Where the condition requires consent in writing, a parol consent will not be sufficient.

37. Whether a consent by the lessor to a transfer of a part of the premises, is a waiver of the condition as to the whole, *qu.*(1)

38. Where there is a condition against any transfer of the lessee's estate, if he confess judgment, through a warrant of attorney, upon which execution is taken out and levied upon the term; this is no breach of condition, but the term will pass to an execution purchaser, even with notice of the proviso. A judgment is held to be "*in invitum*;" and the case is merely that of a fair creditor, using due diligence to enforce payment of a just debt.(2)

39. But, in a new action between the same parties, the verdict found, that "the warrant of attorney was executed for the express purpose of getting possession of the lease," in which purpose the tenant concurred; and it was held that the lease was forfeited. Lord Kenyon remarked, "it would be ridiculous to suppose, that a court of justice could not see through such a flimsy pretext as this. Here the maxim applies, that which cannot be done *per directum* shall not be done *per obliquum*. The tenant could not by any assignment, under-lease or mortgage, have conveyed his interest to a creditor. Consequently, he cannot convey it by an attempt of this kind."(3)

39 *a.* A lease gave the lessee power to sell his interest, on obtaining the lessor's written consent, and paying him one-tenth of the purchase-money. The lessee contracted to sell his interest, and received the principal part of the purchase-money; and the purchaser went into possession under the contract, but received no actual transfer of title. Held, the condition must be construed strictly against the lessor; and as the legal estate of the lessee was not divested, the right of the lessor to the tenth of the purchase money was incomplete, and he was not entitled to relief in equity. *Aliter*, however, if it appear that the legal estate is continued in the lessee, for the mere purpose of evading the covenant or condition, the equitable title having been transferred.(4)

40. A condition, that the lessor may re-enter in case of bankruptcy on the part of the lessee, has been held valid.(*a*) It was objected, that such a principle would enable the lessee to hold out false colors to the world, and that the condition was equivalent to a proviso, that the lease, though absolutely granted, should not be seized under a commission of bankruptcy. But the court held, that there was the same reason for making this provision, as for providing against voluntary as-

(1) *Crusoe v. Bugby*, 3 Wils. 234; 2 Bl. R. 766; *Jackson v. Harrison*, 17 John. 66; *Roe v. Harrison*, 2 T. R. 425.

(2) *Doe v. Carter*, 8 T. R. 57.

(3) 8 T. R. 300-1.

(4) *Livingston v. Stickles*, 7 Hill, 253.

(*a*) It is waived by the receipt of subsequent rent. *Doe v. Rees*, 4 Bing. N. 384.

signments; that there was even more danger of the estate falling into bad hands in the former case than in the latter; that public policy favored the security of landlords; that the mere possession of land was no proof of ownership, but a creditor was bound to look into the lease if he would ascertain the title; and that, although if the lease were granted absolutely, such proviso would be void for repugnancy, yet here there was an express limitation to terminate the estate upon the lessee's becoming bankrupt, a stipulation against his own act. The case was compared to that of a lease for twenty-one years, on condition that the tenant should continue to occupy personally, which would be a valid proviso. It was also suggested, that such a condition, in a very long lease, would be liable to the objection of creating a perpetuity.(1)

41. Some cases have occurred, in which leases have contained a condition against the lessee's allowing other persons to occupy, except under certain restrictions. Thus, where there was a stipulation in the lease, that "if the lessee suffer more than one person to every 100 acres to reside on, use or occupy any part of the premises, the lease shall be void;" held, a breach of condition, for the lessee to let parts of the premises to persons for a year, to cultivate for shares, in the proportion of more than one for each 100 acres.(2)

42. But, where 135 acres were leased, and the lessee covenanted not to permit more than one tenant to each 100 acres to reside on or occupy the premises; held, it was no breach to allow one tenant besides himself to occupy.(3)

43. It is the doctrine of the ecclesiastical court and court of chancery in England, derived from the civil law, that conditions *in restraint of marriage*, annexed to bequests of personal property, are void, as against public policy, except where there is a devise over upon breach of condition.(a) But such conditions, annexed to devises of real estate, have generally been held valid, whether they were precedent or subsequent. It is said, there can be but one true legal construction of these conditions; and therefore it must be the same in the Court of Chancery, and all the other courts in Westminster Hall. The meaning of the testator, or the control which the law puts upon his meaning, cannot vary, in what court soever the question chances to be determined.(4)

44. Devise to the testator's wife for life; then to his granddaughter, A, in tail, provided, and upon condition, that she married with consent of the wife of B and C; and, if she married without consent, devise to D. A married without consent. The master of the rolls held the con-

(1) *Roe v. Galliers*, 2 T. R. 133. See *Butterfield v. Baker*, 5 Pick. 522; *Doe v. Carew*, 2 Ad. & El. N. S. 317; — *v. Rees*, 6 Scott, 161.

(2) *Jackson v. Brownell*, 1 John. 267.

(3) *Jackson v. Agan*, 1 John. 273.

(4) Per Ld. Mansfield, *Long v. Dennis*, 4 Burr. 2056. See *Craig v. Watt*, 8 Watts, 498; *Hoopes v. Dundas*, 10 Barr, 75.

(a) This rule, however, seems applicable only to a *general* restraint of marriage; not to such conditions as merely prescribe provident regulations and sanctions; as, for instance, in regard to time, place, age, or person, the consent of other parties, due ceremonies, &c.— unless they are used evasively for the purpose of general restraint. It has been held that a *devise over* is not essential, to render a condition annexed to land, and in restraint of marriage, void. *McCullough's Appeal*, 2 Jones, 197.

dition as "*in terrorem*"(a) and void ; but the decree was reversed on appeal.(1)

45. Devise to trustees and their heirs, in trust for A for life, if, within three years from the testator's death, she should marry B ; if not, devise to C. Upon the death of the testator, the friends of A made proposals for her to B, which he declined, and A then married D. Held, in the Court of Chancery, that this was a good condition precedent, without performance of which A could gain no title ; and one which, in its nature, admitted of no pecuniary compensation. (But this decree was reversed in the House of Lords.)(2)

45 *a*. A testator devised the whole of his real estate to A and B, "during their natural lives, that is, if they remain single ; but if either of them shall marry, then his claim and benefit of the aforesaid land to be void ; or if they both shall marry, then the land to be sold as hereinafter described." Held, that on the death of A, unmarried, B took the whole of the land, to hold so long as she continued unmarried.(3)

46. Such a condition has also been held valid, when annexed to a devise of money, charged upon and to be raised from land ; and in the case of a trust term, created for the purpose of raising portions for daughters, which arise out of land, are not subject to the ecclesiastical jurisdiction, but are governed wholly by the common law.(4)

47. A settled his estate to the use of himself for life, remainder to trustees for a term of years, upon trust, to raise £2,000 for each of his daughters, if they married with their mother's consent ; and if either of them died before marrying with consent, her portion to cease, and the premises to be discharged ; or if raised, to be paid to the owner of the premises. A gave to his daughters, by will, an additional £2,000 each, on the same condition. Having married without the consent of their mother, but both they and their husbands knowing of the condition, the daughters filed a bill in equity against the trustees and executors, to have their portions raised. Sir Joseph Jekyll decreed, that the conditions were void. Upon appeal, Lord Hardwicke, aided by Lord Chief Justices Willes and Lee, and Lord Baron Comyns, reversed the former judgment. The chief grounds of decision were ; that the restraint was a condition precedent, till the performance of which no estate could vest ; or else a limitation of the time of payment, which, in this case, never arrived ; that the condition was neither repugnant, impossible, nor *malum in se*, the only conditions to be rejected ; that although, where a compensation was possible, there was no material distinction between conditions precedent and subsequent, yet in this case, which did not allow compensation, a much clearer intent, expressed by a devise over, would be required to divest an estate once created, than to prevent the vesting of the estate ; and that the direction to have the estate exonerated was equivalent to a devise over.(5)

48. But, where lands are charged only as auxiliary to personal estate,

(1) *Fry v. Porter*, 1 Cha. Ca. 138 ; 1 Mod. 300.

(2) *Bartie v. Falkland*, 3 Cha. Ca. 129 ; 16 Jour. 230-36-38-40-1.

(3) *Fawver v. Fawver*, 6 Gratt. 236.

(4) *Reves v. Herne*, 5 Vin. Abr. 343.

(5) *Harvey v. Aston*, 1 Atk. 361 ; Com. R. 726 ; Willes, 83.

(a) Lord Mansfield shrewdly remarked upon this phrase, that a clause can carry very little *terror*, which is adjudged to be of no effect. 4 Burr. 2055.

such condition is invalid. Thus, a testatrix gave to her daughter a sum of money, provided she should marry with the written consent of trustees given before marriage, and not otherwise, and charged all her real estate with debts and legacies. The daughter married without consent, but this was obtained after marriage. Held, the devise took effect.(1)

49. A condition, restraining a female from marrying a Scotchman, has been held good.(2)

50. Conditions of this kind, however, being in the nature of *penalties* or *forfeitures*, are construed strictly in favor of the devisee. If the substantial part and intent be performed, equity will supply small defects and circumstances. They are said to be odious, and contrary to sound policy.(3)

51. Devise to trustees in trust for the testator's daughter, A, till her marriage or death; if she should marry with their consent, then to her and her heirs; if without their consent, to the sisters of A. There were also other devises to A and her sisters. A married during her father's life, with his consent and approval, and he settled upon the marriage a part of the property devised to her. Held, such marriage was a waiver of the condition, and made the devise absolute; and that to treat the estate as forfeited would defeat the manifest intention, because it would pass, not to the other sisters, but to the heirs at law.(4)

52. So, where the condition was that the devisee should marry the testator's granddaughter; held, an offer of marriage and a refusal on her part were a waiver of the condition.(5)

53. Devise to trustees, to the use of the testator's son, A, for life, remainder to his wife for life, remainder to A's first and other sons in tail; provided, if A should marry any woman not having a competent marriage portion, or without the trustees' consent, &c., in writing, under hand and seal, the trustees should hold, after A's death, to the use of the testator's daughters. The testator further declared, that the proviso was not meant to be construed *in terrorem*, but a condition, for want of performance of which, in every respect, the estate should not vest in his son's wife, or the heirs of that marriage. A married a woman having a portion, but without the consent of the trustees, one of whom became one of the devisees in remainder. Lord Mansfield, in rendering judgment, remarked that the forfeiture was so cruel as to begin with the innocent issue of the offender, who was to have the estate for his own life at all events; and that the testator considered money as the only qualification of a wife, but still meant to leave it to the judgment of trustees, whether there might not be some equivalent for money. It was accordingly held, that, although the condition was undoubtedly a precedent one, yet it was to be taken in the alternative, there being a mere error in the penning; *or* was to be construed *and*; either a portion, or the consent of the trustees, fulfilled the condition; and such consent was probably withheld by one of them from self-interest.(6)

54. Devise, on condition the devisee should marry with the consent of trustees; if not, devise over. The trustees, being applied to, offered

(1) *Reynish v. Martin*, 3 Atk. 330.

(2) *Perrin v. Lyon*, 9 E. 170.

(3) 4 Burr. 2052.

(4) *Clark v. Lucy*, 5 Vin. Abr. 87.

(5) *Robinson v. Comyns*, For. 164; *Daley v. Desbouverie*, 2 Atk. 261.

(6) *Long v. Dennis*, 4 Burr. 2052.

to agree if a proper settlement were made. The devisee married without their knowledge, and a proper settlement was afterwards made. Held, a good compliance with the condition.(1)

55. Devise to A, on condition she married with the consent of B, in writing; if not, devise over. A married without B's knowledge, but B consented as soon as he heard of it. Held, a fulfilment.(2)

56. A condition restraining a widow from marrying again is valid; especially if there is a devise over.(3)(a)

57. A testator devised his real and personal estate to his wife, provided she remained his widow for life; but, in case she married again, she was to leave the premises; and, if she remained a widow for life, the testator devised all his property, after her death, to his father and mother, if living, if not, to others. The land was sold for the payment of debts, and the widow married. The testator's father died before the marriage of the widow, leaving the mother surviving. Held, the testator's mother was entitled to the surplus proceeds of the real estate.(4)

58. Property was devised to a wife, during life or widowhood, charged with the maintenance of her children, and, in the event of her marriage, to be equally divided amongst the children, except that one slave was given absolutely to the widow. Held, this devise was not void, as in restraint of marriage; that it was not a devise for life, to be void on condition that the widow married, but a devise during widowhood, charged with the education and maintenance of the children; and that it was valid.(5)

59. Devise to "my wife of one-third of the profits arising off of my real estate, only so long as she remains my widow;" followed by legacies to her and children, payable from the land. "Each of the foregoing legacies, that is to come out of my real estate, shall be liens thereon, until paid." Held, a devise of one-third of the land; a devise upon condition; that no entry was necessary to take advantage of it; and that equity would not relieve.(6)

(1) *Daley v. Desbouverie*, 2 Atk. 261.

(2) *Bolton v. Humphries*, 2 Cruise, 24.

(3) *Fitchet v. Adams*, 2 Stra. 1128.

(4) *Commonwealth v. Stauffer*, 10 Barr, 350.

(5) *Hawkins v. Skeggs*, 10 Humph. 31.

(6) *Bennett v. Robinson*, 10 Watts, 348.

(a) It is held in Massachusetts, that a devise to the testator's wife of an annuity, during her life and widowhood, is a devise on condition subsequent, subject by its terms to be defeated by the second marriage of the wife; but that the condition is void as being merely *in terrorem*, there being no devise over except to the residuary legatee, who was the heir at law. *Parsons v. Winslow*, 6 Mass. 169. In a late case in England, it is held, that a general condition in restraint of marriage is good, with respect to the testator's widow, but not any other woman. *Lloyd v. Lloyd*, 10 Eng. L. & Eq. 139. The same general doctrine has been adopted in Missouri.

Devise to a son and daughter of the testator, with a provision that if his said daughter should marry or die, the land should belong exclusively to the son. Held, the condition was void, being in restraint of marriage. *Williams v. Cowden*, 13 Mis. 211.

CHAPTER XXVIII.

ESTATES ON CONDITION—PERFORMANCE, BREACH, DISCHARGE, ETC., OF CONDITIONS.

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|---|---|
| <ol style="list-style-type: none"> 1. Performance—conditions precedent and subsequent. 2. Performance as far as possible. 3. Copulative condition. 5. Who may perform. 9. When performed. 13. Place. 14. Who bound by. 15. Impossible conditions. 20. Refusal to accept performance, &c. | <ol style="list-style-type: none"> 23. Breach and forfeiture at law; <i>condition and covenant</i>, &c. 28. Relief in equity. 36. Breach, how taken advantage of. 42. Breach, who may take advantage of. 49. Effect of entry. 51. Waiver of condition. 53. Release of condition. 54. Accord and satisfaction. 55. <i>Condition and Limitation</i>—distinction. |
|---|---|

1. WITH regard to *the performance* of conditions, a distinction is made between conditions precedent and subsequent; the former, which create an estate, are construed liberally, according to the intent; the latter, which destroy an estate, are construed strictly. Thus, where a forfeiture of land is claimed by the grantor for breach of a condition subsequent, in the performance of which he has no interest, having parted with the estate for the accommodation of which it was created; the terms of the condition are to be construed with great strictness.(1)

2. But where literal performance of a condition subsequent becomes impossible, it should be performed as nearly according to the limitation as practicable. Thus, if A convey to B, on condition that B re-convey to A and his wife in tail, remainder to A's heirs, and before such re-conveyance A die; B shall convey to the wife for life without impeachment of waste, remainder to A's heirs on her begotten, remainder to A's right heirs.(2)

3. When a condition copulative, consisting of several branches, is made precedent to an estate, the entire condition must be performed, else the estate can never arise or take place.(3)(a)

4. Thus, where a settlement provided, that trustees should be seized of land to the use of A and his issue, if he should be married to B after the age of sixteen and they should have issue; and they were married before she was sixteen, and she lived to that age, but died without issue; it having been decided that A took the estate, this decree was reversed in the House of Lords, a part of the condition not being fulfilled.(4)

(1) Co. Lit. 219 b; *Hogboom v. Hall*, 24 Wend. 146; *Merrifield v. Cobleigh*, 4 Cush. 178.

(2) Lit. 352. See ch. 27, sec. 18.

(3) *Harvy v. Dame*, &c., Com. R. 732;

Van Horne v. Dorrance, 2 Dall. 317; *Clark v. Trinity*, &c., 5 Watts & S. 266.

(4) *Wood v. Southampton*, 2 Freem. 186; *Show. Parl. Ca.* 83.

(a) A similar principle has been applied to a condition subsequent. Under the New York statute, (1 Rev. Sts. 346,) providing that a diversion of salt works to other purposes than the manufacture of salt shall work a forfeiture of the leasehold estate, the partial diversion of a lot, as for the erection of a dwelling-house, &c., will not work a forfeiture, but only a diversion of the whole. *Hasbrook v. Paddock*, 1 Barb. 635.

5. The general rule is, that any person interested in the condition or the estate may perform the former. Thus, if a conveyance is made on condition the grantee shall pay a certain sum at a certain time; a grantee of such grantee may perform it.(1)

6. So, also, the heirs of a grantee may perform the condition, though not named, if a time is fixed for the performance. The possibility of performing the condition is an interest, right, or *scintilla juris*, which descends to the heir. (See ch. 27, s. 15.)

7. Devise to A for life, remainder to B in fee; provided, that if within three months from A's death, C should pay B, his executors, administrators, &c., a certain sum, the land should go to C and his heirs. C died during the life of A. Held, after A's death, the heir of C might perform the condition.(2)

8. But if no time is appointed for performance of the condition, the performance of it is a right personal to the party himself. Thus, it is said, in case of a feoffment from A to B, upon condition that if A pay B a certain sum, A and his heirs may enter; the heir cannot perform the condition. This principle, however, seems inconsistent with the modern law of mortgages, as will be seen hereafter.(3)

9. Where no time is fixed for performance, a condition shall be performed either during the life of the party who is to fulfil it, or in reasonable time, according to the circumstances of the case. Thus, where the condition is that the grantee shall pay a certain sum, he is bound to pay it in reasonable time, because he has the use of the land. But if the grantor is to regain the estate on payment of a certain sum, he has during his life to pay it; because until payment he cannot take possession.(4) So, if one devise land to A, "on condition he shall marry B," the devise takes effect immediately, and the devisee has his lifetime to perform the condition.(5)

10. The former of these rules is applicable, where an immediate performance by the grantee is necessary, to effect the evident purpose of the grantor in making the conveyance.(6)

11. Devise of lands to a town for a school-house, "provided it be built within one hundred rods of the place where the meeting-house stands." Held, this was a valid condition subsequent, and the vested estate was forfeited, and passed to the residuary devisee as a contingent interest, upon non-compliance with the condition in reasonable time.(7)(a)

12. The time of performing a condition precedent in a deed cannot be enlarged by parol, so that an action will lie upon the deed.(8)

13. Where a certain place is appointed for performance of a condition, the party who is to perform must be at the place at the time ap-

(1) Co. Lit. 207 b; *Simonds v. Simonds*, 3 Met. 558.

(2) *Marks v. Marks*, 1 Ab. Eq. 106.

(3) Lit. 337.

(4) *Crummel v. Andros*, 2 And. 73; 14 Mass. 428.

(5) *Finlay v. King*, 3 Pet. 376.

(6) *Hamilton v. Elliott*, 5 Ser. & R. 375.

(7) *Hayden v. Stoughton*, 5 Pick. 528. See *Brigham v. Shattuck*, 10 Pick. 309.

(8) *Porter v. Stuart*, 2 Aik. 417.

(a) Conveyance, on condition the grantee shall discharge a mortgage on the land, made by the grantor, but not fixing any time for such discharge. Held, it must be done in reasonable time. *Ross v. Tremain*, 2 Met. 495. See *Austin v. Cambridgeport, &c.*, 21 Pick. 215.

pointed, and the other party is not bound to accept performance elsewhere. But, if he does accept, the performance will be good. Where no place is appointed for performance, a grantee, who is to perform the condition, by payment of money, must seek for the other party, if he is in the realm, (country,) but not if he is abroad. If the condition is to deliver specific and cumbrous articles, such as wheat or timber, the grantee is not bound to seek the grantor, but the latter must go to the former and appoint a place of delivery.(1)

14. One who accepts an estate upon condition is absolutely bound to perform it, even though the performance be attended with a loss, and though the party be incapable of incurring a mere personal obligation. Thus, it seems, the acceptance of an estate charged with a charity binds the party receiving it to fulfil the charity, though the rents prove insufficient.(2) So an infant heir or married woman is bound to perform a condition; which charges not the person, but the land. So, an infant mortgagee is bound by the condition. "The deed must be good in the whole, or void in the whole."(3) So, where an infant agreed that a judgment with condition should be rendered in his favor; held, after coming of age, he could not avail himself of the former, without the latter. Upon the same principle, a condition binds the estate to which it is annexed, into whose hands soever it may come.(4)(a)

(1) Lit. 340; Co. Lit. 210 b; 3 Leon. 260; 1 Rolle's Abr. 444.

(2) Att'y. Gen. v. Christ's Hos., 3 Bro. Cha. 165.

(3) Parker v. Lincoln, 12 Mass. 18; Badger

v. Phinney, 15, 359. See Robertson v. Stevens, 1 Ired. Equ. 247; Garrett v. Scouten, 3 Denio, 334; Cross v. Carson, 8 Blackf. 138.

(4) Lowry v. Drake, 1 Dana, 47; Hogeboom v. Hall, 24 Wend. 146.

(a) The following recent case illustrates this, with some other principles, relating to conditions:

A provision in a will. "that if either of my said daughters shall be distressed, and come to want, and be unable to support themselves, then my will is, that she or they be maintained, in a decent and comfortable manner, out of the income and profits of the whole of my real estate," constitutes a legacy or bequest, charged upon the income of the real estate, and through that upon the whole of the land itself; and, on the happening of the contingency, the maintenance is chargeable upon such income, in the hands of any one to whom the land may come. *Pickering v. Pickering*, 15 N. H. 281.

The land being devised to several persons jointly, an implied promise arises on the part of the devisees, accepting the devise, to appropriate the income to the support of the daughters, or any of them, on the happening of the contingency, while the devisees hold the land. *Ib.*

Should the income not be sufficient for the support of all the daughters who may need, it must be apportioned. *Ib.*

The devisees taking jointly, the implied promise is joint. *Ib.*

Where there is an implied promise by a devisee, to pay a legacy charged upon the land, an action will lie against his executor or administrator, for any breach in the time of the devisee, and perhaps for a subsequent breach, if the legacy is given in such a manner that it constitutes *debitum in presenti*. *Ib.*

* If the charge upon the land be of a gross sum, payable presently, or at a future day, a conveyance of the land, would neither discharge the land, nor the devisee from his implied promise to pay the debt. No personal promise of the grantee would be implied, but he would take the land charged with the duty. *Ib.*

Where the charge depends upon a contingency, as, for instance, where the legacy is charged upon the income of the land, in case the legatee shall be in need, the implied promise of the devisee, on the acceptance of the devise, extends only to an appropriation of the income, if the contingency happens while he holds the estate. The law raises no implication of a promise, beyond the time that he will have the ability to perform it; and the estate he takes is assignable. *Ib.*

It seems that in such case, upon every transfer of the whole estate, the grantee who takes

15. Where performance of a condition becomes *impossible*, by act of God; if precedent, no estate vests; if subsequent, the estate becomes absolute.

16. Devise to A, on condition of her marrying B when, or before A should be 21. B died, before A refused or was requested to marry him. Held, the condition was excused.(1)

17. Devise of land to A, "on condition of his marrying a daughter of B and C." B dies, without having had a daughter. The condition being *subsequent*, and having become impossible, A's estate is absolute.(2)

18. Where performance of a condition becomes impossible by the act of the party who imposes it, the estate is rendered absolute. Thus, a testator devised to A for life his estate at B, and also the income of certain other property, while A should live and reside at B. He afterwards revoked the former devise. Held, A should hold the latter devise absolutely.(3)

19. Where a condition is double, and one part of it is possible at the time, and the other not, performance of the former is sufficient. And, if the condition is disjunctive, giving an election to the party, and one part becomes impossible by act of God, the whole is excused. It seems, however, that this rule is subject to exceptions.(4)

20. Where the party, who is to have the benefit of a condition, prevents or refuses to accept performance; or absents himself when he ought to be present; or neglects or disables himself to do the first act on his own part, as he was bound to do; the condition is discharged.(5)

21. Thus, tender and refusal of a mortgage debt(a) discharges *the land*, though *the debt* remain. So, where the agency of a landlord is in any way involved in the act, which is to work or prevent a forfeiture

(1) Co Lit. 206 a. 218 a; Thomas v. Howell, 1 Salk. 170; Merrill v. Emery, 10 Pick. 507; Van Horne v. Dorrance, 2 Dall. 317. See 19 John. 69; Taylor v. Bullen, 6 Cow. 627; M'Lacklan v. M'Lacklan, 9 Paige, 534.

(2) Finlay v. King, 3 Pet. 374.

(3) Darley v. Langworthy, 3 Bro. Parl. Cas. 359.

(4) Wigley v. Blackwal, Cro. Eliz. 780; Laughter's case, 5 Rep. 21; Studholme v. Mandell, 1 Lord Ray. 279; Da Costa v. Davis, 1 B. & P. 242.

(5) 2 Cruise, 33. See Camp v. Barker, 21 Verm. 469.

the estate, charged with a duty which is to be performed upon a contingency, or a continuing duty which does not constitute a debt, or a duty which occurs from time to time, might be held, by implication, to promise performance of the duty, or payment of the charge which accrues in his time, and that his personal representatives might be chargeable for his default. *Ib.*

But, where the devisee or devisees sell the estate in parcels at different times, (although any one of the grantees might perform the duty, or make the payment, and have his remedy for contribution,) upon ordinary principles of law, neither could exonerate his land by performing or paying a *pro rata* proportion, nor could a several promise of performance of the whole duty be implied. *Ib.*

If a joint promise, upon which an action at law may be sustained, can be implied, it must be of such a shifting character, upon the happening of subsequent sales, as to show that it can only be raised from the necessity of the case, for the sake of a remedy. No such implication can be raised, if the legatee can have any other relief; and the appropriate remedy is in equity, where equitable jurisdiction over the subject matter exists. *Ib.*

The duty devolving upon the holders of the land, in this case, would be performed by an appropriation of the income, or so much of it as is necessary, at a reasonable place, by either of them. But an offer of support by a devisee who had parted with his title, and was not liable, would not bar the remedy. *Ib.*

(a) In New York, even after condition broken. *Farmers, &c. v. Edwards*, 26 Wend. 541

of a lease, he ought so to act, as to make it appear that he means to insist on the forfeiture.(1)

22. A and B mutually agreed, that B would purchase a farm of A, and, as a part of the consideration, convey to A another farm of less value; and that all timber, trees, &c., upon each estate, should be valued and paid for by them respectively; and, unless A should be able to make a good title before a certain day, the agreement to be void. A cut down divers trees. In a suit for the penalty annexed to the agreement, held, A had disabled himself to perform his part of the agreement by this act; that such performance was a condition precedent, and therefore A could not maintain the present action.(2)

23. A court of law cannot relieve against a breach of condition, or restore the consideration paid by the party, upon whom such breach operates as a forfeiture.

24. Thus, where one conveys land upon condition subsequent, which the grantee fails to perform, and the grantor enters for the breach; the grantee cannot recover back money paid by him as part of the consideration.(3)

25. But, on the other hand, after such entry, the grantor cannot recover the balance of the price.(4)

25 a. A condition, in a deed of land subject to mortgage, that the grantee shall indemnify the grantor from the principal and interest secured by the mortgage, is broken by a failure to pay interest when due; and the grantor, on paying the interest, may immediately, without a demand on the grantee for reimbursement, enter on the land for breach of condition; and a subsequent tender of the principal and interest, accompanied by an offer to indemnify the grantor for any trouble and expense to which he has been subjected, is no bar to a suit to enforce the forfeiture.(5)

25 b. But the court will order a stay of proceedings, on payment of the mortgage debt, interest and costs, provided the default was not wilful.(6)

25 c. Conveyance in fee, upon condition that the deed should be void, if the grantor and others paid certain notes at the times specified, (the sum of said notes being the whole purchase-money, and the consideration of the deed.) The grantee entered, and held without hindrance, but the grantor did not pay the notes at the times specified. Held, by non-performance of the condition, a forfeiture was saved, and the subsequent payment of the notes could not destroy the conveyance.(7)

26. A court of law, however, will sometimes construe that which is in form a *condition*, a breach of which forfeits the whole estate, into a *covenant*, on which only the actual damage sustained can be recovered. Conditions and limitations are not readily to be raised by mere inference and argument. The words usually employed to create a condition, are *on condition*. But the phrases *so that*, *provided*, *if it shall happen*, are of the same import. *Provided always* may constitute a condition, limitation or covenant, according to the circumstances.

(1) *Jackson v. Crafts*, 18 John. 110; *Merritt v. Lambert*, 7 Paige, 344; *Tate v. Crowson*, 6 Ired. 65.

(2) *St. Albans v. Shore*, 1 H. Bl. 270; *Hard v. Wadham*, 1 E. 619.

(3) *Frost v. Frost*, 2 Fairf. 235.

(4) *Ibid.*

(5) *Sanborn v. Woodman*, 5 Cush. 36.

(6) *Ibid.*

(7) *Hodsdon v. Smith*, 14 N. H. 41.

And if words, both of condition and covenant, are used, both may take effect.(1)

27. But, where the explicit words which denote a condition are used, they will not be construed into a covenant. Thus, where one conveyed a house, "*on condition* that no windows should be placed in the north wall within thirty years," and windows were made within that time; held, this could not be construed as a covenant, and the estate was wholly forfeited. And even where, for breach of *covenant*, a forfeiture is incurred, a court of law has no power to stay proceedings.(2)

28. Where a forfeiture has been incurred at law by breach of condition, a court of Chancery will sometimes afford relief. It was formerly held, that this could be done only where the condition is a subsequent one; but it seems to be now settled, that in all cases a forfeiture shall not bind, where the thing may be done after the time, or a compensation made for it, and where the breach resulted from inevitable accident. And Chancery will relieve, even in favor of the heir of the party who was to have performed the condition, and after a recovery of the land, at law, by the heir from whom it was devised away, on condition.(3)(a)

29. A married woman, having a power to dispose of lands, devised them to her executors to pay £500 out of them to her son; provided, that if the father did not release certain goods to the executors, the devise of the money should be void, and it should go to the executors. After the death of the testatrix, a release was tendered to the father, which he refused to sign. The son brings a bill in equity against the executors and the father, and the father answered that he was then ready to release. It was decreed that the £500 should be paid.(4)

30. So, where one devises lands on condition to pay certain sums at specified times to his heir, and for non-payment of one of them the heir enters, Chancery will restore the land, on payment of the sum with interest.(5)

31. Even where land is devised on condition of paying a sum of money at a certain time, and upon non-payment devised over on the same condition, Chancery will relieve.(6)

32. Devise to the two sons of the testator, "they jointly and severally paying to my two daughters \$300 each, within one year from

(1) 4 Kent, 131-2 and n.; Doe v. Phillips, 9 Moore, 46; Doe v. Watt, 8 Barn. & Cress. 308.

(2) Gray v. Blanchard, 8 Pick. 284; Doe v. Asby, 10 Ad. & El. 71.

(3) 4 Kent, 120, 125; Popham v. Bampf. field, 1 Vern. 83; Cage v. Russel, 2 Vern. 352; Barnardistone v. Fane, 2 Vern. 366;

Wells v. Smith, 2 Edw. 75; City, &c. v. Smith, 3 Gill & J. 265; Baxter v. Lansing, 7 Paige, 350; Bacon v. Huntington, 14 Conn. 92; Luckett v. White, 10 Gill & J. 480; Washburn v. Washburn, 23 Verm. 516.

(4) Ibid.

(5) Grimston v. Bruce, 1 Salk. 156.

(6) Woodman v. Blake, 2 Vern. 222.

(a) Chancery relieves in case of failure to pay rent, though the lease was thereby to become void. In equity, it seems, an equitable agreement, though in form of a charge, does not forfeit, without change of possession. But no relief is afforded to a lessee, who commits a breach of covenant. Bowser v. Colby, 1 Hare, 109.

It is said, *time* fixed for performance of a condition precedent is of the essence of the contract, whether it be an *hour* or a *day*. Shinn v. Roberts, 1 Spencer, 435.

Whether the Supreme Court in Maine can afford equitable relief for breach of condition; see Mavwick v. Andrews, 25 Maine, 525.

my death." Held, this was not a *legacy*, but a *condition*—the breach of which forfeited the estate at law; but also that Chancery would relieve, notwithstanding the effect of the disposition was to make an unequal distribution of the estate.(1) Hosmer, J., seems to place the decision upon the ground that the condition was a *subsequent* one.(2)

33. But Chancery will not relieve against a breach of condition, in those cases where there is no rule for the measure of damages, and where the breach consists in a positive act directly in the face of the condition; as, for instance, where a lease contains a condition against assignment, which the lessee violates. Nor will it relieve where, by performing a condition precedent, the party would have the right to sue at law; though he has offered so to perform.(3) It is said, equity cannot control the lawful contracts of parties, or the law of the land. And, in one case, Lord Eldon held, that relief could be granted only where the condition was *to pay money*.(4)(a)

34. So, Chancery will not relieve against forfeiture of an estate, declared at law, where the condition consists in the performance of services and attentions, for the personal comfort and convenience of the party claiming the forfeiture. In such case, the time for the performance of the service is of the essence of the contract; it can never be performed afterwards; and it is impossible to put the party in the precise situation in which he would have been if the condition had been performed.(5)

34 a. And, even if the forfeiture were declared, for breach of a condition admitting of compensation, the court will not relieve, when the party has been guilty of other breaches, for which a forfeiture might be enforced at law, and when the court cannot feel confident that the party would thereafter faithfully perform his covenant.(6)

34 b. So, the insolvency of the party asking the relief affords a strong reason why the relief should not be granted, where such insolvency might, and probably would, prevent the due performance of the covenants.(7)

34 c. And, when the covenants are for the performance of personal services, and the delivery, from time to time, of specific articles of produce and provisions, for the comfort and support of the covenantees, and a forfeiture has been declared at law for a breach of conditions; the Court of Chancery have no power, upon a bill brought for relief, to change the contract of the parties, and direct a certain sum to be paid periodically, in lieu of the performance of the covenants stipulated.(8)

34 d. And, where the forfeiture, in such case, was taken for breach of covenant to keep a suitable horse for the use of the covenantees, and there had been no subsequent performance, or acceptance of performance; held, a subsequent acceptance, by the covenantees, of the per-

(1) *Wheeler v. Walker*, 2 Conn. 196-299.

(2) *Ib.* 301.

(3) *Wafer v. Mocato*, 9 Mod. 112; *Rolfe v. Harris*, 2 Price, 207 n.; *Bracebridge v. Buckley*, *Ib.* 200; *City, &c. v. Smith*, 3 Gil. & J. 265; *Gouverneur v. Bibby*, 3 Edw. 348.

(4) *Hill v. Barclay*, 18 Ves. 63. See *Blake v. Shrieve*, 5 Dana, 373.

(5) *Dunklee v. Adams*, 20 Verm. 415. See *Austin v. Raymond*, 9 Verm. 420.

(6) *Ib.*

(7) *Ib.*

(8) *Ib.*

(a) Where an order was passed upon a mortgagor to pay the debt between the hours of 11 and 12, and the mortgagee came to the place at 20 minutes past 11 and waited an hour, the mortgage was held foreclosed. 1 Coll. Cha. 273.

formance of other covenants, essential to their support, would not operate as a waiver of the forfeiture, it appearing that a litigation was pending at the time between the parties, in which the covenantees were constantly insisting upon the forfeiture.(1)

35. A covenanted, in 1799, to convey to B certain land, being government land, "on B being at one-half the expense, in land or otherwise, for procuring a title," &c. This condition was the sole consideration. A incurred the expenses in 1800, and gave notice to B in 1802, but B paid no regard to it till 1806. In the meantime, the value of the land increased tenfold. B brings a bill in equity against A for specific performance. Held, the condition was a condition precedent, and, upon various considerations, equity would not relieve. 1. B was not bound by any contract; and, therefore, if A had performed his part of the agreement, he would have had no remedy against B. 2. As the title to the land was in the government, and a survey necessary, the expenses must necessarily be incurred; and they must also be paid in *procuring* the title—merely *reimbursing* might defeat the whole object. 3. Hence this condition was not intended as a *mere security*, and the breach was not a mere default *in time*, but it destroyed the *substance of the contract*. 4. The act provided for was to be done for the benefit of a third party, the owner of the land, and therefore the damage was not susceptible of compensation. 5. The word "expenses" included *time and labor*, which, from their very nature, could not be paid at any subsequent period.(2)

36. Breach of a condition, annexed to a freehold, can be taken advantage of by the grantor or his heir, only by means of an *entry* upon the land, for this express purpose, or, in some cases, a *claim*, which is equivalent to entry; and it matters not, whether there is any express provision for re-entry or not. In case of incorporeal or reversionary rights, a claim is the only practicable mode. Where there is a forfeiture to the government, an *office*, or writ of *scire facias* or *quo warranto*, is equivalent to entry.(3) But the bringing of an action of *disseizin* has no effect as a *claim*.(4)(a) In some instances of condition subse-

(1) Dunkle v. Adams, 20 Verm. 415. See Austin v. Raymond, 9 Verm. 420.

(2) Hutcheson v. Heirs, &c., Ohio Cond. R. 10. See Longstreet v. Ketcham, Cox, 170.

(3) Co. Lit. 218 a; Fitchet v. Adams, 2 Stra. 1128; Wigg v. Wigg, 1 Atk. 383; Gray v. Blanchard, 8 Pick. 284; Finch v. Riseley, Popn. 53; Doe v. Watt, 1 Mann. & Ry. 694;

Canal, &c. v. Railroad, &c., 4 Gill & J. 121; Willard v. Henry, 2 N. H. 120; People v. Brown, 1 Caines, 426; Spear v. Fuller, 8 N. H. 174; Thompson v. Bright, 1 Cush. 420; Cross v. Carson, 8 Blackf. 138; Bowen v. Bowen, 18 Conn. 435.

(4) Chalker v. Chalker, 1 Conn. 79; Lincoln, &c. v. Drummond, 5 Mass. 321.

(a) It has been seen, that, in many of the States, the bringing of a suit is made equivalent to re-entry, in case of *non-payment of rent*. In Ohio, the same provision applies to all breaches of condition. (Walk. Intro. 297; Sperry v. Pond, 5 Ohio, 387.) In Massachusetts, (Rev. St. 610,) in all cases, a title may be enforced by action alone, without entry. In Vermont, where A conveyed to B for the life of B and his wife, reserving to himself the right to possess and cultivate the premises, for the purpose of enabling him to perform certain covenants upon his part, for the support of B and his wife; and B subsequently recovered judgment in ejectment against A, for breach of those covenants, upon which no writ of possession was taken out; held, the judgment terminated A's right to possession, and, if he still undertook to manage the farm, directly or indirectly, without some new license, he did so as a wrong-doer, and acquired no right to the crops, as against B, or the holders of B's title. Adams v. Dunklee, 19 Verm. 382. Where a right of re-entry was reserved for breach of covenant, upon giving notice of avoiding the conveyance; held, a notice that there would be a re-entry, *unless* the other party should do certain acts, was insufficient, being prospective and conditional. Muskett v. Hill, 5 Bing. N. 694.

quent, Chancery will decree a reconveyance of the land. Thus, where a marriage settlement was made, on condition that if the wife, on coming of age, should not charge her own estate with a certain sum, the settlement should be void, and she refused so to do; a reconveyance was decreed, with an account of the rents and profits from the time of refusal.(1)

37. Even where the condition provides that the estate shall be *void* on non-performance, the estate is not defeated without some act or declaration of the grantor.(a) (But see sec. 41.) Thus, A granted to B a license to enter upon his lands, and search for and dig ores for twenty-one years, provided, that if he should cease to work the mine for six months, or break any of his covenants, the said indenture and the liberties, powers, &c., thereby granted, should cease, determine and be utterly void and of no effect. Held, the word *void* should be construed to mean *voidable*; that, although no *entry* was necessary to avoid the license, because it did not pass the land, yet, by analogy to the rule in case of a freehold lease, the grantor should give notice of his intention to avoid it; and that, until such notice, the right of possession, certainly as against any one not claiming under the grantor, remained in the occupant.(2)

38. So where a patent is granted, with the provision that on failure to clear or pay rent, it shall *ipso facto* cease; still the condition is subsequent, and an adverse claimant is bound to prove a forfeiture. And notwithstanding this form of expressing a condition, to save a forfeiture, it will be fairly and liberally construed; and a distinction made between slight or accidental breaches, and those which are important and wilful.(3)(b)

39. There are some cases, where an entry for breach of condition is impracticable, or inconsistent with other rights, and therefore the law does not require it. Thus, where A grants land to B, with livery of seizin, for five years, on condition that, if he pay a certain sum within two years, he shall have the fee, and B fails to make payment at the time; inasmuch as A has no right of entry till the five years expire, the fee reverts in him without entry or claim. So, where one grants a rent-charge from his own land on condition, the rent becomes void upon breach of condition, without entry or claim, because the grantor

(1) Hunt v. Hunt, Gilb. Rep. 43; Prec. in Chancery, 12 Ired. 194; Western, &c. v. Kyle, 6 Gill, 343.

(2) Roberts v. Davey, 4 Barn. & Ad. 664; Sneed v. Ward, 5 Dana, 187; Cross v. Bowser v. Colby, 1 Hare, 109; Phelps v. Coleman, 6, 446.

(a) But a deed of land upon condition that, unless the grantee should make certain payments, the deed should be "void, so far as to make good any non-fulfilment of said conditions," will entitle the grantor, on breach of condition, to recover possession of the land, to hold as security for the performance of the conditions. Fisk v. Chandler, 30 Maine, 79.

(b) Conveyance by father to son, of one-third of his farm, upon which both resided, conditioned to be void, if the grantee should refuse to pay the grantor \$30, each year, if the grantor should call for it. Held, the annual payments could not be consolidated and demanded together, after several years, but each must be demanded separately, at or about the close of each year, and, if not, was waived, or relinquished, and no forfeiture incurred by non-payment. Buckmaster v. Needham, 22 Verm. 117.

The son, having been in possession with the father several years, removed, and left the latter in sole possession, and afterwards mortgaged one-third of the farm. Held, the father's possession should not be presumed to be adverse, even though so intended, as against the validity of the mortgage, unless the mortgagee had notice of the adverse possession. Ib.

is already in possession. For the same reason, if a grantee on condition, before a breach, lease the land to the grantor, no entry is required to revest the title in the latter. So a party, for whose benefit a condition subsequent is attached to a devise of real estate, being in possession at the time of the breach, is presumed to hold for the purpose of enforcing the forfeiture. Such party may waive the forfeiture; and acts inconsistent with the claim of forfeiture are sufficient evidence of a waiver.(1)

40. But where the party who is to perform a condition, and the party for whom it is to be performed, are jointly in possession, it is said the latter must make *claim* for a breach, by acts and words, or either of them, such as will distinctly admonish the grantee that possession will be retained for the breach, and not waived. *Complaints* are mere *statements of a breach*, not expressions of an intent to claim a forfeiture.(2)(a)

41. Where the estate to which a condition is annexed is for years only, and is to cease on the lessor's doing a certain act, no entry is required to determine it. Thus, if A lease to B for years, on condition that if he pay B £10 the estate shall cease, upon such payment the term *ipso facto*, comes to an end.(3)(b)

42. As the benefit of a condition can be reserved only to the grantor or lessor and his heirs, so no person could enter for breach of an express condition, at common law, except parties and privies in right and representation—that is, the heirs, executors, &c., of individuals, or the successors of corporations. Neither privies nor assignees in law, as the lord by escheat, nor privies in estate, as reversioners and remaindermen had a right of entry.(c) This rule, however, did not apply to implied conditions—as, for instance, that against a tenant's attempting to convey a greater interest than he himself had; of the breach of which an assignee might take advantage.(4)

42 a. The charter of Trinity Church was confirmed in 1704, by an act which limited its clear income from lands to £500 a year. In 1705, a tract of land was granted to it by the queen, which was leased for £30 a year, for five years from that time. The land rapidly increased in value, and the income and value became enormous. Held, on a bill in which the church's title in fee was denied, that such an increase of the income of the land would not divest the church of its title under the grant, and, if it did, it could only be taken advantage of by the

(1) Lit. 350; Co. Lit. 218 a; Lincoln, &c. v. Drummond, 5 Mass. 321; Hamilton v. Elliot, 5 S. & R. 375. See Watenby v. Moran, 3 Call, 491; Andrews v. Senter, 32 Maine, 394.

(2) Willard v. Henry, 2 N. H. 122.

(3) Plow. 142; Bro. Abr. *Condition*, 83.

(4) Lit. 347; Co. Lit. 215.a. See *infra*, sec. 46; 2 Cruise, 31.

(a) Upon the same principle, a breach of condition must, in general, consist in some *act*, not in a mere declaration. Thus, where the condition is that certain persons shall have the use and occupation of a room: mere denial of the right is no breach—there must be a shutting up of the room, or some similar act. Hogeboom v. Hall, 24 Wend. 146.

(b) But where a lease is made, upon the condition that the lessee, at the end of each year, should give bond, with surety, for the rent of the succeeding year, a failure to comply with the condition will not work a forfeiture, unless the landlord make a demand of performance at the end of the year. Tate v. Crowson, 6 Ired. 65.

(c) Nor has a *creditor* of one of the heirs of the grantor, any remedy against the land, unless it be by an execution at law, against that portion of it which may belong to such heir, after the right of entry shall have been exercised. Cross v. Carson, 8 Blackf. 138.

sovereign, and not by one claiming a title hostile to the corporation, and to the sovereign.(1)

42 *b*. A statute provided, that a diversion of salt-works, to other purposes than the manufacture of salt, should work a forfeiture of leasehold estate. Held, a partial diversion of a lot could not be taken advantage of by a subsequent holder of the leasehold estate, under an agreement for an exchange of it for other lands, for the purpose of avoiding such agreement, after he had quietly occupied the premises for several years, and the other party had made large improvements on the land received by him in exchange; such partial diversion being known to him at the time of making the agreement, and the statute making a diversion a forfeiture being a public law, of which he was bound to take notice, and where such forfeiture, if any, had been waived by the people, and a renewal of the lease granted.(2)

43. A condition may be of such a nature that, although relating only to the grantor himself, and not broken during his life, there may be a breach after his death, of which the heir may take advantage.

44. A man granted land to A, his child, on condition that A should support him, pay his debts, and save him from any trouble or cost on account of them, with a clause of re-entry. After the father's death, B, another child, presented a debt of the father to A for payment, which was refused. Whereupon B brings ejectment for a share of the land as an heir at law. Held, the action would lie, though this debt had subjected the father to no cost, &c.—that clause in the condition being operative only during his life.(3)

45. A condition, by means of a descent, may be disannexed from the estate with which it was originally connected. Thus, although the land itself may descend to such special heirs, as claim through the ancestor, from whom it came to the deceased; the condition, being reserved to heirs generally, will pass to the heirs at common law. But, after the latter have entered for condition broken, the former may re-enter upon them. Where the condition descends to one heir only, as heir at common law, but the estate descends to several—as in the English *gavelkind*—after entry by the former, the rest shall enjoy the estate with him.(4)

46. At common law, as has been stated, (sec. 42,) where a reversioner assigned his reversion, the assignee could not avail himself of any conditions annexed to the particular estate. The conditions were regarded as *rights in action*, which, by the policy of the law, were not assignable. But, by St. 32 Hen. VIII, c. 34, the assignees of reversions are placed on the same footing, in regard to conditions and taking advantage thereof, as the original lessors.(a)

47. An assignee of *part of the land* is not within the statute; but an assignee of *part of the reversion* is.(b) The statute does not apply to one

(1) *Bogardus v. Trinity &c*, 4 Sandf. Ch. 633.

(2) *Hashbrook v. Paddock*, 1 Barb. 635.

(3) *Jackson v. Topping*, 1 Wend. 388.

(4) *Paine v. Samms*, 1 And. 184; *Clerc v. Pecock*, 2, 22; *Rob. Gav.* 119; *Godb.* 3.

(a) Lease from a company, with condition of re-entry. The company being afterwards incorporated, with a provision that all contracts, &c., with the company should be valid; held, the corporation might avail itself of the condition. *Doe v. Knebell*, 2 Carr. & K. 66.

(b) Thus, if a lease be made of three acres, and the reversion of two of them granted away, although the rent will be apportioned, the condition is destroyed, being entire and against common right. 2 Cruise, 22. But if the reversion is granted for years, the grantee may avail himself of a condition. Co. Lit. 215, a.

who comes to the estate *by law*, as, for instance, by escheat; because the language of it implies, that the assignee must be either an assignee *to*, or *by*, the reversioner, claiming either in the *per* or the *post*—that is, one who comes in by act and limitation of the party. It seems, however, that a tenant by the curtesy, or in dower, although claiming by law, is within the statute; being in *by* the wife or the husband. Although the words of the statute are “for non-payment of rent, or for doing waste, or other forfeiture,” yet an assignee can take advantage of such conditions only as are incident to the reversion—like those pertaining to rent; or such as are for the benefit of the estate—like those relating to waste and repairs; and not those merely personal—as for the payment of a sum in gross.(1)

48. It seems, that, in some cases, the party upon whom a condition is imposed may himself take advantage of it, to avoid his own act. Thus, it has been held, that where there is a lawful condition against alienation, under a certain age, if a deed be made before reaching this age, and a second after, the first is void, and the last valid.(2)

49. Entry for condition broken has the effect of entirely defeating the estate of the grantee, and restoring the grantor to the same title, which he had before the conveyance was made. It constitutes a paramount claim, and operates *by relation*, so as to avoid all intermediate rights and incumbrances. Thus, although the widow of a conditional grantee has dower, yet an entry for breach of condition will destroy this right. And, whether made before or after the husband's death, it seems, will make no difference.(3)(a)

50. There are, however, some exceptions to this principle.(4)

51. A condition may be *waived* by the acts of the party for whose benefit it was created, and, after being once dispensed with, can never afterwards be enforced. Thus, where land was conveyed on condition of paying a certain annuity, and, after a failure to pay, the annuitant accepted the annuity; held, a perpetual waiver of the condition. So, a receipt by the lessor of rent, accruing after acts of forfeiture by the lessee, which are known to the lessor, is a waiver of the forfeiture.(5)(b)

52. A father conveyed an estate to his son, on condition, that unless the son maintained his parents and brother in a specified manner, and properly cultivated the land, the conveyance should be void for the whole land during the lives of the parents, and as to one-half of the land forever. The father having died, his widow claimed her dower

(1) Co. Lit. 215 a; Hill v. Grange, Plow. 167.

(2) Dougal v. Fryer, 2 Misso. 40.

(3) Lit. 325; Co. Lit. 202 a; Ann May-
owe's case, 1 Rep. 147 b; 1 Rolle's Abr. 474.

(4) Co. Lit. 202 a. See Litchfield v. Ready,
1 Eng. L. & Equ. 460.

(5) Clarke v. Cummings, 5 Barb. 339;
Chalker v. Chalker, 1 Conn. 79. See Enfield
&c. v. Connecticut, &c., 7 Conn. 45; Dickey
v. McCullough, 2 Watts & S. 100; Bayley v.
Homan, 5 Mann. & G. 94; Thompson v.
Bright, 1 Cush. 420; Western, &c. v. Kyle, 6
Gill, 343; Conkling v. King, 10 Barb. 372.

(a) So, where lands bought from the government are forfeited for breach of condition, the widow has no dower. Rodgers v. Rawlings, 8 Por. 326. One holding a life estate leased to the remainder-man for the life of the lessor, on condition to be avoided for non-payment of rent; and afterwards entered for breach of condition. Held, this defeated any claim for dower by the lessee's widow. Beardslee v. Beardslee, 5 Barb. 224.

(b) One tenant in common devised to another, on condition he would convey to his daughter a part of the land. No conveyance was made, but the daughter for a long time occupied the land. Held, there was no forfeiture. Plummer v. Neile, 6 Watts & S. 91.

instead of the support thus provided for her, and the son transferred the land to another person. After the father's death, the mother was well supported, but neither she nor the father was supported in the manner pointed out by the deed, nor was the land well cultivated. The son, however, had always remained in possession, with his parents, and they had accepted the support which he gave them, often complaining that the condition was not fulfilled, but never making formal entry or claim for a breach. Held, these facts showed a waiver of the condition.(1)(a)

52 *a*. The owner of land made a deed of a small parcel thereof, with a house thereon, reserving to himself the privilege of a bridle road in front of the house, and not to be at any expense in supporting a fence around the land conveyed; and whenever the grantee, his heirs or assigns, should neglect or refuse to support the fence, then the deed to be void; and subsequently conveyed the residue to one who removed the fence without replacing it, and reconveyed such residue to the grantor, who afterwards entered upon the small parcel, claiming a forfeiture thereof for breach of the condition. Held, the condition, if not merely personal, being designed to benefit the grantor, as owner of the residue of the lot, attached to such residue, and passed to the grantee thereof, whose removal of the fence was an extinguishment or waiver of the condition; which, being thus determined, could not be revived by the reconveyance. And, the reconveyance having been in mortgage, held, further, it was immaterial in this respect, whether the removal of the fence took place before or after the execution of the mortgage. Held, also, until reasonable notice given, or request made, and neglect or refusal of the grantee, to replace the fence, there was no neglect or refusal to support the fence, within the terms of the condition.(2)

53. A condition may be destroyed by a *release* or discharge, which may be made either to the grantee or his assignee, if there be one. And where the grantee has limited the estate to one for life, remainder in fee, a release to the tenant for life will enure to the benefit of the remainder-man. It is held, that if the conditions of a deed have not been performed, the whole estate, legal and equitable, will revert to the grantor or his heirs, unless there is proof of such an agreement, or specific acts amounting to evidence of such an agreement, on the part of the grantor, or his heirs, as would entitle the grantees to a discharge of the condition.(3)

54. *Accord and satisfaction* is a legal equivalent for performance of a condition precedent. So, where an act is to be done at a certain time,

(1) Willard *v.* Henry, 2 N. H. 120.

(2) Merrifield *v.* Cobleigh, 4 Cush. 178.

(3) Co. Lit. 291 b, 297 b; Dolan *v.* Mayor

&c., 4 Gill, 394.

(a) It has been held, that forfeiture of a condition is not waived by parol assent or silent acquiescence, nor by an offer to accept immediate payment. Jackson *v.* Crysler, 1 John. Cas. 125; Gray *v.* Blanchard 8 Pick. 292; Hutcheson *v.* M'Nutt, 1 Ham. 21. It is only where rent is paid which accrued after a forfeiture, that the acceptance of such payment is considered an affirmation of the lease, and a waiver of the forfeiture. Hunter *v.* Osterhoudt, 11 Barb. 33. A condition cannot be waived by the reversioner, after he has parted with his reversion. Commyns *v.* Latimer, 2 Flori. 71. Performance of a condition may be *presumed* from lapse of time. Fox *v.* Phelps, 17 Wend. 393; 20, 437.

or on demand, an acceptance of the act after the time, or on a second demand, as and for a performance, will save the forfeiture.(1)

55. A condition is to be distinguished from a *limitation*. The latter requires no entry to terminate the estate, but terminates it *ipso facto*, by the mere happening of the event referred to. Thus, if A grant an estate to B till the death of C, B's estate immediately comes to an end upon the death of C.(2)

56. So, if a man makes a lease for a hundred years, if the lessee lives so long, upon the lessee's death the estate reverts in the grantor without entry. And a grantee of the reversion might always take advantage of a *limitation*, though not of a condition.

57. Where a condition subsequent is followed by a limitation to a third person, upon non-fulfilment or breach, this is a *conditional limitation*. Words of limitation mark the period which is to determine the estate, but words of condition render it liable to be defeated in the intermediate time. The one specifies the utmost time of continuance; the other marks some event, which, if it takes place during that time, will defeat the estate. A life estate given in the prior part of a will may well be determined, by an apt limitation over, contained in a subsequent part.

58. A conditional limitation is of a mixed nature. Thus, if an estate be limited to A for life, provided, that when C returns from Rome, it shall thenceforth remain to the use of B in fee; this is a condition, because it defeats the estate previously limited, while it is also a limitation, because no entry is required to take advantage of it. Such a disposition can be made, in general, only by will or a conveyance to uses. But in New York it may be made by common law conveyance.(3)

(1) Richards v. Carl, 1 Ind. 313; Hogins v. Arnold, 15 Pick. 259; 5 Mann. & G. 94. Cogan v. Cogan, Cro. Eliz. 360; Stearns v. Godfrey, 16 Maine, 158; Doe v. Crisp, 8 Ad.

(2) Co. Lit. 214 b; Coppage v. Alexander, 2 B. Monr. 316. & Ell 779; Rochford v. Hackman, 10 Eng. L. & Equ. 64.

(3) 4 Kent, 121-3; 1 N. Y. Rev. St 725;

CHAPTER XXIX.

MORTGAGE—NATURE, FORM AND EFFECT OF A MORTGAGE.

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| <ol style="list-style-type: none"> 1. Definition and history of mortgages. 2. Right of redemption. 5. In fee or for years. 6. Deed and defeasance. 20. What constitutes a mortgage in Chancery. Parol evidence. 23. Personal liability of mortgagor; whether | <p>implied in a mortgagee, or necessary to constitute one.</p> <ol style="list-style-type: none"> 28. Right of redemption cannot be restrained; mortgage and <i>conditional sale</i>, distinction between. 46. <i>Power to sell</i>, given to a mortgagee. |
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1. A MORTGAGE is a *conditional conveyance* of land, designed as security for the payment of money or performance of some other act, and to be void upon such payment or performance.(a) The name is de-

(a) By the English law, there are two kinds of estates, held as security for the repayment of money; the one acquired by some legal and compulsory process; the other voluntarily conveyed by the debtor to the creditor. Those of the first kind are called estates by *statute merchant*, *statute staple* and *elegit*. By the feudal law, the lands of a debtor were not liable to be taken by legal process, except in the hands of his heir; upon the ground that he would thereby, as by a voluntary alienation, be disabled from performing his feudal services. But in the reign of Edw. I., in consequence of great complaints from foreign merchants as to the difficulty of recovering their debts; a statute was passed, providing that the debtor of any merchant might be summoned before a certain prescribed tribunal, to acknowledge the debt, under his own and the king's seal, and have a day fixed for payment; and if payment were not then made, that by an immediate execution all his lands should be delivered to the merchant, to hold until the debt was wholly levied. This species of security was called a *statute merchant*. *Statute staple* is a security of a similar nature to the one above described, and is defined as a bond of record, acknowledged before the mayor of some trading town, (sometimes called *estaple* or *staple*,) and attested by a public seal. Under this sealed obligation, execution might be obtained against the lands of the debtor, in the same manner as under a *statute merchant*. Although these securities were originally intended for the benefit of merchants only, yet, on account of their cheapness and convenience, they became generally adopted, until in the reign of Hen. VIII., an act was passed, restricting statutes staple to merchants. The same statute, however, created a new kind of security, called a *recognizance in the nature of a statute staple*, being a bond acknowledged before certain judges or magistrates, and enrolled; upon which the same advantages may be had as upon a *statute staple*.

Another compulsory security for payment of debts was provided by St. Westmin. 2, 13 Edw. I., ch. 18, which authorized a judgment creditor to elect, either to have a writ of *fiery facias*, to be levied upon personal property, or else that the debtor should deliver him all his chattels, with certain exceptions, and one-half his lands, until the debt was levied, upon a reasonable price or extent. From this right of *election*, the new execution provided as above derived the name of *elegit*. The effect of the statute was, that a judgment became a lien upon the debtor's lands. So, also, a debtor, upon executing a bond for the debt, may also give a *warrant of attorney*, authorizing some attorney of the court to acknowledge a judgment for the money, upon which acknowledgment an *elegit* may issue, as in case of an adversary suit. Various statutes have been passed, requiring judgments to be docketed, registered or recorded, in order to give them priority of lien over subsequent transfers or incumbrances. When a writ of *elegit* is sued out, the sheriff empannels a jury, upon whose appraisal he sets out and delivers a moiety of the debtor's lands to the plaintiff, by metes and bounds. All estates in fee-simple may be thus taken; so, a reversion, an estate tail, a rent-charge, a term for years. This last may also be sold as personal property. Although the estate acquired by the creditor is uncertain as to duration, being determinable only on payment of the debt, yet it is but a chattel interest, which passes to executors. The security follows the claim secured.

These are the general rules of the English law, relating to estates held by compulsory process for payment of debts. They are practically of little consequence in the United States, because each State has for itself, by minute statutory provisions, regulated the subject of levying or extending executions upon real property, a summary view of which will be given in a subsequent portion of this work.

The subject of estates, voluntarily conveyed to a creditor as security, is considered in the text.

rived from the fact, that by the old law, where land was thus conveyed, unless the condition was performed at the day, the estate became *dead* or extinct.(a) A mortgage was in fact a feoffment upon condition, or the creation of a base or determinable fee, with a right of *reverter* attached to it. The debt was required to be tendered at the time and place prescribed; and, in general, the strict rules of law pertaining to *conditions* were rigidly enforced in relation to mortgages.(1)(b)

2. At an early period,(c) however, the Court of Chancery interfered to relieve against the hardship of an absolute forfeiture, upon payment of the debt, with interest and costs, if made in a reasonable time after the day appointed. Chancellor Kent remarks, "the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law."(2)

3. It was at first held, that the mortgagor had not the right of re-acquiring his estate, as against those holding the estate of the mortgagee *in the post*, as, for instance, the widow having a right of dower, or the lord the right of escheat. But this distinction in favor of parties thus holding the land has long been wholly done away.(3)

4. The mortgagor's right to regain his estate by application to the Court of Chancery, after breach of condition, is called an *equity of redemption*; and the same phrase is generally, though it would seem somewhat inaccurately, used, to express the interest remaining in the mortgagor, even before breach of condition. But in the Statutes of North Carolina and Florida, the distinction between these two kinds of estate seems to be carefully observed; the former being entitled an equity of redemption, and the latter a *legal right of redemption*.(4)

5. A mortgage may be made by a conveyance either in fee or for years. The latter form is rarely adopted in the United States. In

(1) Wade's case, 5 Co. 114; Goodall's case, 5 Co. 95; Lit. sec. 332; Co. Lit. 210 b; 4 Kent, 139; Parsons v Welles, 17 Mass. 421; Pride v Boyce, Rice, 275; Loyd v Currin, 3 Humph. 462. See Chapman v. Turner, 1 Call, 252; Coote, 139; Hebron v. Centre, &c., 11 N. H. 571; Montgomery v. Bruere, 1 South. 268; Lull v. Matthews, 19 Vern. 322.
(2) 4 Kent, 158. See Clapp v. Titus, 9 Verm. 211.
(3) 2 Cruise, 79-80.
(4) 1 N. C. Rev. St. 266; Thomp. Dig. 355; State v. Laval, 4 McCord, 340.

(a) This is the chief point of distinction between the *mortuum vadium* or mortgage, and the *vivum vadium*, or living pledge, which was used in the early periods of the English law, but is now for the most part obsolete. It was a conveyance of lands by debtor to creditor, to hold till the rents and profits should amount to the sum borrowed, and then revert to the borrower. See Poindexter v. M'Cannon, 1 Bad. & Dev. Equ. 377; Thayer v. Mann, 19 Pick. 538; Coote, 41, 43, 207, 222, 223; Teulon v. Curtis, Younge, 619. As to the form of the condition of a mortgage, see Skinner v. Cox, 4 Dev. 59; Stewart v. Hutchins, 6 Hill, 143; Palmer v. Gurnsey, 7 Wend. 248; Cooper v. Whitney, 3 Hill, 95; Baldwin v. Jenkins, 23 Miss. 206; Cotterell v. Long, 20 Ohio, 464.

(b) The ancient law, however, which may be considered as still in force, was as rigid in protecting the rights of the mortgagor, where he was guilty of no neglect, as in decreeing an absolute forfeiture for the slightest non-compliance with the condition of the mortgage. Thus, if a legal tender of the mortgage debt is made at the day and refused; the land is forever discharged of the incumbrance, though the debt remains. Swett v. Horn, 1 N. H. 332. 333. See Merritt v. Lambert, 7 Paige, 344; Edwards v. Ins. Co., 21 Wend. 476; 26 Ib. 541; Arnot v. Post, 6 Hill, 65; Smith v. Kelley, 27 Maine, 237.

(c) When this was; see Roscarriek v. Barton, 1 Cha. Cas. 219; Hale's History of Common Law, ch. 3; Rot. Parl. vol. 3, p. 258; Emanuel, &c. v. Evans, 1 Cha. Rep. 10; 2 Cruise, 62.

Missouri, mortgages of leaseholds for more than twenty years are treated like mortgages of estates in fee.(1)(a)

6. A mortgage may be made by an absolute deed, and a *defeasance*(b) back, instead of a single conditional deed. In England, this form of mortgage has been regarded unfavorably by the courts, as indicating fraud, and injurious to the mortgagor; because the defeasance might be lost, and an absolute title set up.(2)

7. The statute law, in many of the United States, expressly recognizes this form of mortgage; and, as deeds are universally registered, the inconveniences above suggested are less serious here than in England. In Delaware, the statute speaks of "a defeasance, or a written contract in the nature of a defeasance, or for reconveyance of the premises, or any part thereof." In Rhode Island, of a bond of defeasance, or other instrument which creates a mortgage or redeemable estate. Similar terms are used in New Jersey and Illinois; in the former of which States, any *writing* may be a defeasance; but, ordinarily, the word *defeasance* only is used. In New Hampshire, the condition of the mortgage must be contained in the deed itself.(c) By the Revised Statutes, a mortgage is defined, as a conveyance to secure payment of money, or performance of any other thing stated in the conditions thereof. In Florida, all writings of conveyance to secure payment of money are mortgages.(3)

8. It is the general rule, that the defeasance shall be a part of the same transaction with the conveyance. A conveyance must be a mortgage *at the time of its inception*; it never can become such by any subsequent act of the parties. If there ever was a moment when it could be considered only as an absolute estate, it must ever remain so. But provided both instruments are parts of one transaction, the defeasance

(1) Misso. St. 410. See *Wheeler v. Montefiore*, 2 Ad. & Ell. N. 133; *Edwards v. Jones*, 1 Coll. Cha. 247; *Coote*, 156, 157; *Phipps v. Budd*, 2 Eng. L. & Equ. 137; *Kearney v. Post*, 1 Sandf. 105; *Budeley v. Massey*, 6 Eng. L. & Equ. 356.

(2) *Cotterell v. Purchase*, Forr. 63; *Sel. Cas. in Cha.* 9; *Wright v. Bates*, 13 Verm. 341; *Harrison v. Lemon*, 3 Blackf. 52; *Kelly v. Thompson*, 7 Watts, 401; *Holmes v. Grant*, 8 Paige, 243; *Miller v. Hamblet*, 11 Verm.

499; *Jaques v. Weeks*, 7 Watts, 261; *Chambers v. Hise*, 2 Dev. & B. 305; *Waters v. Randall*, 6 Met. 479; *Manufurs. &c. v. Bank, &c.*, 7 W. & S. 335; *Scott v. McFarland*, 13 Mass. 309.

(3) *Lund v. Lund*, 1 N. H. 39; *Erskine v. Townsend*, 2 Mass. 493; *Wright*, 44; *Dela. St.* 1829, 91; *R. I. L.* 204; 1 N. J. L. 464; *Illin. Rev. L.* 131; *N. H. Rev. St.* 245; *Thomp. Dig.* 376; *N. J. Rev. Sts.* 658.

(a) A lease for years by indenture, in which the lessor acknowledges the receipt in advance of a certain sum, in full for rent during the term, and the lessee covenants to reconvey on repayment thereof with interest, is a mortgage, and subject to the same privileges with a mortgage of the freehold. *Nugent v. Riley*, 1 Met. 117. So, also, though executed only by the lessor, if the lessee accepts and takes possession under it. *Ib.*

In such case, though there is technically no covenant by the lessee, upon which an action will lie, yet, if he underlets and receives rent during the term, to the full amount of his payment, with interest, his estate for years thereby ceases, and the lessor is restored to his old title. If he receives more than that amount, the surplus is received by him, not as mortgagee, but for the lessor, who may recover it in an action for money had and received. *Ib.*

(b) See *Defeasance*, vol. 2. To defeat a deed, it must, in general, be itself a deed, or an instrument under seal. Whether a defeasance is necessarily under seal, see 22 Pick. 526; *Parsons v. Mumford*, 3 Barb. Cha. 152; *Moore v. Madden*, 2 Eng. 530.

(c) Reference to a bond, made with the deed, and containing the condition, is a substantial compliance with the statute. *Bassett v. Bassett*, 10 N. H. 64. See *Lift v. Walker*, *Ib.* 150.

may be dated after the deed. In Maine, they must bear the same date.(1)

9. So, a condition may constitute a mortgage, if written on the back of an absolute deed, though without signature or seal.(2)

10. Where one conveys land for a certain consideration, and the grantee covenants to reconvey, on payment of that sum, within one year, this is a mortgage, notwithstanding parol evidence that the parties intended otherwise.(3)

11. But a covenant by the grantee, to reconvey at an agreed price, unless certain improvements shall be commenced within a given time, is not a condition.(4)

12. A conveys land to B, who, two years afterwards, gives A a bond to convey the land to the wife of A, upon payment of certain notes. Held, no mortgage; and parol proof is inadmissible, that B agreed to A's keeping possession, that the deed was given as security, and the bond not made at the time, merely because the amount due upon the notes was not then ascertained.(5)

* 13. A gave to B the following receipt or acknowledgment: "this day received of B a deed of, &c., for and in consideration of — dollars, paid by my recognizance, and other demands against him; if on final settlement a balance shall be due him, I agree to pay it or reconvey to him, on being repaid for my advances and trouble; and I will return all that the land brings, besides repaying me." A afterwards sold the land. Held, this did not constitute a mortgage; that B had no interest, liable to his creditors, or which a court of equity would recognize, inasmuch as A had his election, either to reconvey the land or pay the surplus balance, and had elected the latter by conveying the land.(6)(a)

(1) *Lund v. Lund*, 1 N. H. 41; *Harrison v. Trustees, &c.*, 12 Mass. 456; *Bodwell v. Webster*, 13 Pick. 413; *Kelly v. Thompson*, 7 Watts, 401; *Me. Rev. St.* 553; 2 Greenl. Cruise, 81 n. See *Freeman v. Baldwin*, 13 Ala. 246; *Kerr v. Gilmore*, 6 Watts, 405; *Brown v. Wright*, 5 Yerg. 57.

(2) *Stocking v. Fairchild*, 5 Pick. 181; *Perkins v. Dibble*, 10 Ohio, 433; *Baldwin v. Jenkins*, 23 Miss. 206.

(3) *Colwell v. Woods*, 3 Watts, 188; *Hammond v. Hopkins*, 3 Yerg. 525; *Cooper v. Whitney*, 3 Hill, 395.

(4) *Cunningham v. Harper*, Wright, 366. See *Humphreys v. Snyder*, 1 Morr. (Iowa) 263; *Davenport v. Bartlett*, 9 Ala. 179.

(5) *Bennock v. Whipple*, 3 Fairf. 346; *Lund v. Lund*, 1 N. H. 39.

(6) *Fuller v. Pratt*, 1 Fairf. 197; *Holmes v. Grant*, 8 Paige, 243.

(a) If such a deed recites, as its consideration, an indebtedness of the grantor, which is not discharged; and is given by one trustee to another for the benefit of the *cestui*, to whom the debt is due; and contains a limitation over upon his death; and is subject to being disclaimed by the *cestui* upon coming of age; still it is not a mortgage. *Eckford v. De Kay*, 26 Wend. 29.

Where an absolute deed is given, but intended as a mortgage, it is void as against creditors, &c., although afterwards the parties agree that the grantee have the whole title, and the full value of the land is paid to creditors, according to contract. So, although a second delivery is made of the deed; because, the title having once passed, it cannot thus be divested. *Halcombe v. Ray*, 1 Ired. 340. A conveyance signed by both grantor and grantee, and providing that the grantee shall sell the property, pay debts due him from the proceeds, and the surplus to the grantor; constitutes a trust, in the nature of a mortgage. *Cross v. Colman*, 6 Dana, 446.

An absolute deed was made to a creditor, with the understanding that he should pay his own debt, indemnify himself against his liabilities, and satisfy other creditors, and pay the balance to the debtor's wife and children. Held, the transaction was a mortgage as to the debt of the grantee, and a trust for the balance. *McLanahan v. McLanahan*, 6 Humph. 99.

A conveyance to a trustee, with power to sell, pay a debt from the proceeds, and deliver

14. A bond delivered to a third person as an *escrow*, will not constitute a defeasance, unless the condition on which it is to be delivered to the obligee is performed.

15. A, having borrowed money from B, conveys land to him. B signs a bond of defeasance, which, by mutual agreement, is left with C, to be delivered by him to A, if A repay the money borrowed within a certain time. The time having elapsed, without repayment, C delivers the bond to B. Held, although, if A had repaid the money within the time, the bond would have operated as a defeasance *by relation to the first delivery*, yet, as B held no security for the money, the transaction did not constitute a mortgage.(1)

16. In general, a defeasance must be *recorded* or *registered*. Omission to *register* the defeasance makes the conveyance absolute as to all persons but the parties and their representatives, and those having actual notice. And, it seems, possession by the grantor will be no equivalent for that registration.(2)(a)

17. Where a deed is given, accompanied by a defeasance, which is not recorded; a subsequent surrender and cancelling of such defeasance, by agreement, for the purpose of giving the grantee an absolute title, without unfairness between the parties or as to strangers, and before any rights of creditors have intervened, will vest the absolute title in the grantee.(3)(b)

18. Where the obligee in a bond of defeasance has treated it by his acts as constituting a mortgage, he cannot maintain an action upon it as a contract.

(1) *Bodwell v. Webster*, 13 Pick. 411. See *Carey v. Rawson*, 8 Mass. 159.

(2) *Grimstone v. Carter*, 3 Paige, 421; *Whittick v. Kane*, 1 Paige, 202; *Dey v. Dun-*

ham, 2 John. Cha. 182; *Fuller v. Pratt*, 1 Fairf. 197; Mass. Rev. Sts. 407. See *Friedley v. Hamilton*, 17 S. & R. 70; 3 Paige, 421. (3) *Trull v. Skinner*, 17 Pick. 213.

the balance to the grantor, upon his failure to pay the debt; is a mortgage. *Woodruff v. Robb*, 19 Ohio, 212.

But a conveyance, with an agreement that the grantor may have back the land upon payment of the purchase-money and interest in two years, or before that time, if it should be sold for a larger sum, but both parties speaking of *a sale*, and the price being the full value of the land; is not a mortgage. *King v. Kinney*, 1 Ired. Equ. 187.

An instrument of defeasance may create a mortgage, though the parties have acquiesced for a long time after the period of payment stipulated therein, in the conveyance of the property; more especially if it is a reversionary interest. *Waters v. Mynn*, 14 Jur. 341.

(a) In Delaware and New Jersey, the grantee of the land is required to record a note or abstract of the defeasance, with his deed, in order to give validity to the registry of the latter. But, in Delaware, unless the grantor also record the defeasance within a certain time, it will be void against *bona fide* purchasers. By a statute of Illinois, a party "shall not have the benefit" of a defeasance, unless recorded within 30 days. This would seem to render registration necessary even as between the parties. In Pennsylvania, the defeasance must be recorded as against creditors, &c. So, in Michigan, notice to a *purchaser* is a good substitute for registration. But not to a judgment creditor, or vendee, on *exécution*. *Illin. Rev. L. 131*; *Jacques v. Weeks*, 7 Watts, 261; *Mich. Rev. St. 261*. *Actual notice* dispenses with registration in Massachusetts. The principle applies to the assignee of the grantor under the insolvent law. *Stetson v. Gulliver*, 2 Cush. 494.

In Maine, *implied notice*, existing prior to the Revised Statutes, was binding upon an attaching creditor. *McLaughlin v. Shepherd*, 32 Maine, 143. The rule as to the recording of a defeasance applies only to a bond *from the grantee to the grantor*; not to a bond from the grantor to the grantee, secured by the conveyance. *Noyes v. Sturdivant*, 6 Shepl. 104.

(b) After such cancellation, the grantee agreed by another deed to convey on certain terms to the grantor. Held, as this deed was subsequent to the original one, not part of the same transaction, nor intended nor understood as a defeasance, it did not either continue the original right of redemption, or constitute with the first deed a new mortgage. 17 Pick. 213.

19. A conveys land to B. B gives back a bond, reciting that the consideration of the deed was to indemnify him from his liability for A upon a certain note, and providing that, if A pays the note at a certain time, and B does not reconvey the land upon demand, the obligation shall be binding. A paid the note within the time and demanded a reconveyance, and then transferred all his interest in the land to C. It seems, this bond made the transaction a mortgage. Held, A could not maintain an action upon the bond.(1)

20. In addition to the class of strictly legal defeasances, being *written and sealed instruments*, and to *written instruments not under seal*, which are often allowed the same effect; even *parol evidence* is frequently admitted, for the purpose of converting an absolute deed into a mortgage. This apparent departure from the well-established rule, which excludes parol evidence to control written instruments, has been sometimes restricted to courts of equity, and sometimes to cases of *mistake, accident, surprise, fraud and trust*, which constitute peculiar grounds of Chancery jurisdiction, and may always be shown by parol evidence. But the prevailing current of decisions now tends to do away these limitations, and to establish the general proposition, that an absolute deed may be proved to be a mortgage by parol evidence. The principle has been earnestly resisted, more especially in courts of law, acting as such, or invested with merely limited equity jurisdiction. Thus, in Massachusetts and New Hampshire, it is held, that, before the court can exercise Chancery powers, it must decide, *as a court of law, whether there is a mortgage*; and this point cannot be proved by parol evidence. So, in New York, Maryland, North Carolina, Kentucky, Tennessee, Mississippi and Missouri, there have been decisions against the admissibility of parol evidence, to prove an absolute deed a mortgage, except under special circumstances; but the prevailing American doctrine is as above stated.(a)

(1) *Hogins v. Arnold*, 15 Pick. 259.

(a) The following may be cited as the leading English cases upon this subject. *Jason v. Eyres*, 2 Cha. Cas. 35; *Joynes v. Statham*, 3 Atk. 387; *Maxwell v. Montacute*, Prec. Ch. 526; *Walker v. Walker*, 2 Atk. 99; *Young v. Peachy*, Ib. 257; *Cottington v. Fletcher*, Ib. 155; *Hampton v. Spencer*, 2 Vern. 288; *Benbow v. Townsend*, 1 My. & K. 506; *Baker v. Wind*, 1 Vez. 160.

In Massachusetts, *Kelleran v. Brown*, 4 Mass. 443; *Lovering v. Fogg*, 18 Pick. 540; *Fowler v. Rice*, 17, 100, 22, 526; *Boyd v. Stone*, 11 Mass. 342.

In New Hampshire, 1 N. H. 41; *Bickford v. Daniels*, 271; *Runlet v. Otis*, Ib. 167; *Wendell v. N. H., &c.*, 9, 404; *Clark v. Hobbs*, 11, 122.

In Vermont, *Campbell v. Worthington*, 6 Verm. 448; *Baxter v. Willey*, 9, 280; *Wright v. Bates*, 13, 348; *Washburn v. Titus*, 9, 211.

In Connecticut, *Bacon v. Brown*, 19 Conn. 29.

In New York, the decisions have been somewhat conflicting; but the prevailing doctrine favors the admission of parol evidence, both at law and in equity. See *Moses v. Murgatroyd*, 1 John. Cha. 119; *Marks v. Pell*, Ib. 599; *Stevens v. Cooper*, Ib. 425; *Strong v. Stewart*, 4, 167; *Jackson v. Jackson*, 5 Cow. 173; *Whittick v. Kane*, 1 Paige, 202; *Martin v. Rapelye*, 3 Edw. 229; *Walton v. Cronly*, 14 Wend. 63; *Patchin v. Pierce*, 12, 61; *Van Buren v. Olmstead*, 5 Paige, 9; *Swart v. Service*, 21 Wend. 36; *M'Intyre v. Humphreys*, 1 Hoffm. 31; *Holmes v. Grant*, 8 Paige, 243; *Roach v. Cosine*, 9 Wend. 227; *Walton v. Cronly*, 14, 63; *Eckford v. DeKay*, 26, 39; *Webb v. Rice*, 1 Hill, 606; *Brown v. Dewey*, 2 Barb. 28; *Taylor v. Baldwin*, 10 Barb. 582; (the latest case, and adverse to the admission of parol evidence.)

As to the practice in Pennsylvania, see *Peterson v. Willing*, 3 Dall. 506; *Wharf v. Howell*, 5 Binn. 499; *Jaques v. Weeks*, 7 Watts, 268.

In North Carolina, *Blackwell v. Overby*, 6 Ired. Equ. 38; *Kelly v. Bryan*, 6 Ired. 283;

21. A mortgage sometimes contains a *covenant* to repay the money borrowed, or to pay the debt secured; which creates a *personal liability* in the mortgagor. In this country, the more common practice is, that the proviso of the deed refers to a bond, note or other *personal security*, made at the same time, upon the payment of which, both the mortgage and the personal security are to become void. In this case, also, the mortgagor is, of course, personally liable for the debt. Whether in the absence of such covenant, bond or note, the mortgage itself creates a personal liability, has been a matter of somewhat varying decision. The prevailing doctrine is, that it does not, unless the deed contains an express or implied admission of a debt due, without any accompanying agreement to rely wholly upon the property for its security or payment. But such an agreement might perhaps be inferred, from the mere fact of the absence of a direct promise, contrary to prevailing usage. In case of *borrowed money*, a mortgage is considered, in England, as a simple contract credit; and assumpsit lies to recover it. So it has been held, that, upon a recital of indebtedness in the mortgage, an action of debt may be maintained, as upon a covenant. So, where one person pays money for the benefit of another, and takes a mortgage to secure its repayment; the former is said to have a remedy either *in rem* or *in personam*.(1)(a)

22. Another point, upon which there has been much discussion and variety of opinion, is whether a conveyance of land given as security can be considered as technically a mortgage, without an accompanying personal obligation of the grantor. Upon this subject, it is now the prevailing and well established doctrine, that although the absence of such personal obligation may raise a presumption that the transaction is a *conditional sale* and not a mortgage; still it is by no means conclusive, and the grantor may have all the rights of a mortgagor as to redemption and otherwise. If the land is put in pledge, on condition, for

(1) *Ancaster v. Mayer*, 1 Bro. 464; *Floyer v. Lavington*, 1 P. Wms. 263; *Yates v. Ashton*, 4 Qu. B. 182; 8 Mass. 564; *Penniman v. Hollis*, 13 Mass. 430; *Conger v. Lancaster*, 6 Yerg. 477; *King v. King*, 3 P. Wms. 358; *Courtney v. Taylor*, 6 M. & G. 851; *Goodman v. Grierson*, 2 Ball & B. 274; *Flagg v. Mann*, 2 Sumn. 534; *Wharf v. Howell*, 5 Bin. 499; *Scott v. Fields*, 7 Watts, 360; *Elder v. Rouse*, 15 Wend. 218; *Hone v. Fisher*, 2 Barb. Cha. 559; *Hall v. Byrne*, 1 Scam. 140; 2 Greenl. Cruise, 83 n.; *New Orleans, &c. v. Hogan*, 1 La. Ann. R. 62; *Yates v. Astor*, 4 Ad. & Ell. N. 182; *Grinnell v. Baxter*, 17 Pick. 386; *Bacon v. Brown*, 19 Conn. 29; *Lawrance v. Boston*, 8 Eng. L. & Equ. 494.

Sellers v. Stalcup, 7 Ired. Equ. 13; *Allen v. McRae*, 4 Ired. Equ. 325; *Elliott v. Maxwell*, 7, 246; *Kemp v. Earp*, Ib. 167.

In Maryland, *Watkins v. Stockett*, 6 Har. & J. 435; *Bend v. Susquehannah, &c.*, Ib. 128; *Bank, &c. v. Whyte*, 1 Md. Cha. 536.

In Tennessee, *Brown v. Wright*, 4 Yerg. 57; *Perry v. Pearson*, 1 Humph. 431.

In Arkansas, *Blakemore v. Byrnside*, 2 Eng. 505.

In Illinois, *Hovey v. Holcomb*, 11 Illin. 660; *Coates v. Woodworth*, 13, 654.

In Missouri, *Hogel v. Lindell*, 10 Mis. 483.

In Alabama, *May v. Eastin*, 2 Port. 414.

In Mississippi, *Watson v. Dickens*, 12 Sm. & M. 608; *Prewett v. Dobbs*, 13, 431.

In Texas, *Stamper v. Johnson*, 3 Tex. 1.

In Indiana, *Conwell v. Evill*, 4 Blackf. 67.

In Kentucky, *Thomas v. McCormack*, 9 Dana, 108.

In Ohio, *Miami, &c. v. Bank, &c. Wright*, 249.

In the courts of the United States, *Morris v. Nixon*, 1 How. 127; *Bentley v. Phelps*, 2 Woodb. & Min. 426; *Bank, &c. v. Sprigg*, 1 McL. 183; *Chickering v. Hatch*, 3 Sumn. 474.

(a) In Maryland, a mortgage made by a citizen to a foreigner for the loan of money is valid, and binds him to pay it without any express covenant or agreement.

the payment of money or some other act; the transaction is a mortgage, whether the land is the only security or not.(1)

23. A mortgage being intended simply for *security*, and the nature of the transaction affording opportunity and temptation to the lender to take advantage of the necessities of the borrower; the right of redemption is held, in equity, to be an inseparable incident to a mortgage, and all restrictions or qualifications of this right are deemed utterly void. The maxim is, "once a mortgage, always a mortgage." Hence, a proviso, limiting the right of redemption to the mortgagor himself, is of no effect, and his heir after his death may redeem. So, although limited by an express covenant to the heirs male of his body, a jointress or assignee claiming under him may redeem. The right of redemption has been said to be as inseparable from a mortgage, as that of replevying from a distress.(2)(a).

24. A condition, that if the mortgagee, on failure of the mortgagor to pay the money at the time, pay him a further sum, the former shall become absolute owner, is void; though an agreement to give the mortgagee the right of pre-emption, in case of a sale, has been assumed to be valid. Chancellor Kent, however, suggests that this agreement, like the former, would be void. The mortgagor will not be allowed to use the incumbrance, in obtaining the equity of redemption for less than its value.(3)

25. Mortgage for £200, with a bond, conditioned that if not paid at the day, and if the mortgagee should then pay the mortgagor the further sum of £78 in full for the purchase of the land, the bond should

(1) Coote, 50, 61; Mellor v. Lees, 2 Atk. 494; Exton v. Greanes, 1 Vern. 138; Conway v. Alexander, 7 Cranch, 237; Morris v. Nixon, 1 How. 119; Wilcox v. Morris, 1 Mur. 117; Porter v. Nelson, 4 N. H. 130; Smith v. People's, &c., 11 Shepl 185; Kelly v. Beers, 12 Mass. 388, 389; Lanfair v. Lanfair, 18 Pick. 299; Hiester v. Maderia, 3 W. & S. 384.

(2) Jason v. Eyres, 2 Cha. Cas. 33; Howard v. Harris, 1 Vern. 33, 190; Henry v. Davis, 7 John. Cha. 40; Clark v. Henry, 2 Cow. 324; Holridge v. Gillespie, 2 John. Cha. 30; Conway v. Alexander, 7 Cranch, 218; Bowen v. Edwards, 1 Rep. in Cha. 221; 2 Sumn. 487; Kunkle v. Wolfersberger, 6 Watts, 126; Jaques v. Weeks, 7 Watts, 261; Wright v.

Bates, 13 Verm. 341; Perkins v. Drye, 3 Dana, 176; Rankin v. Mortimere, 7 Watts, 372; Waters v. Randall, 6 Met. 483; Hiester v. Maderia, 3 W. & S. 387; May v. Easton, 2 Port. 414; Spurgeon v. Collier, 1 Ed. 59. Trea. of Equ. lib V., l. c. 1, sec. 4; Vernon v. Bethell, 2 Ed. 113; Clench v. Witherby, Cas. Temp. Finch, 376; Sevier v. Greenway, 19 Ves. 412; Cauffman v. Sayre, 2 B. Mon. 205.

(3) 4 Kent, 142; Holridge v. Gillespie, 2 John. Cha. 34; Hammonds v. Hopkins, 3 Yerg. 525; McKinsty v. Cronly, 12 Ala. 678; Hicks v. Hicks, 5 Gill & J. 85; St. John v. Turner, 2 Vern. 418; Vernon v. Bethell, 2 Ed. 110.

(a) But the rule above stated does not apply to an agreement contained in the mortgage, that, if the interest shall not be paid when due, the mortgagee may treat the mortgage as due, and sue upon it, and also have a claim for his damages. Such agreement will be enforced. Huling v. Drexell, 7 Watts, 126. The unrestricted right of redemption extends to transactions between the parties in the nature of security for the debt, *subsequent to the original mortgage*. So, a third person may sometimes have an unlimited right to redeem, though there is no direct mortgage from him to the party of whom redemption is claimed. Thus, where an equitable owner sold his title and received part of the price, and then, with the consent of the purchaser, sold to another, on condition that he would advance the balance, and give the first purchaser a certain time to pay it; upon which payment, the first purchaser was to have the land, otherwise the second purchaser should have it. The first purchaser promised to pay the money to the second, and soon removed from the land, and the second purchaser took possession. Held, after the six months, not having paid the money, the first purchaser might still redeem the land. Bloodgood v. Zeily, 2 Caines' Cas. in Er. 124; Pennington v. Hanbey, 4 Munnf. 140.

be void. The £200 not being paid, and the mortgagee having paid the £78; held, the infant heir of the mortgagor might redeem.(1)

26. A mortgagee may contract, subsequently to the mortgage, for a purchase or release of the equity of redemption; but no agreement for a beneficial interest from the estate during the mortgage is valid, if disaffirmed in a reasonable time.(2)

27. On the same principle, if the mortgagor agree, by a distinct contract, to pay the mortgagee a sum over and above the debt, interest and cost, such contract will be set aside as unconscionable; for a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any bye agreement.

28. A loaned to B a sum of money on mortgage, and at the same time took from him a separate covenant, to convey to A, if he thought fit, certain ground-rents of the same value. On a bill for redemption by B, held he might redeem by paying merely the sum loaned, with interest and cost.(3)

29. Equity does not sanction an agreement to turn interest into principal, at the end of a specified period; because it is a stipulation for a *collateral advantage*, and tends to usury, though not actually usurious.(4)

30. But an agreement, that the mortgagee shall have the use of the property, instead of interest, is not usurious, unless such use amounts to more than legal interest.(5)

31. An agreement, subsequent to the making of the mortgage, between any party interested as mortgagee, and the mortgagor or his assignee, to limit the right of redemption to any particular time, will not be enforced.

32. A mortgagee filed a bill in equity, for foreclosure, against the mortgagor and his creditors, having an interest in the equity of redemption, and obtained a decree. The defendant, one of the creditors, paid and took an assignment of the mortgage, and agreed with the other creditors that they might redeem within a certain time. The defendant having had possession twenty years, the other creditors file a bill for redemption. Held, the other creditors stood in the conditional relation of mortgagor, to the defendant; and as the decree for foreclosure was not assigned to him, the agreement limiting the time of redemption was void, and they might redeem.(6)(a)

33. A mortgage is to be distinguished from a *sale with an agreement to repurchase*. The latter transaction, though narrowly watched, is construed like an independent agreement between strangers; and the seller will not have a mortgagor's right to redeem after the appointed

(1) Willett v. Winnell, 1 Vern. 488.

(2) 4 Kent. 143.

(3) Jennings v. Ward, 2 Vern. 520.

(4) Chambers v. Goldwin, 9 Vez. 271; Coote, 501, 502.

(5) Joyner v. Vincent, 4 Dev. & B. 512.

See Coote, 511, 512; Marquis, &c. v. Higgins, 2 Vern. 134; Burton v. Slattery, 5 B. P. C. 233; Brown v. Barkham, 1 P. Wms. 652; Stanhope v. Manners, 2 Ed. 199.

(6) Exton v. Greaves, 1 Vern. 138.

(a) A, tenant in tail of a reversion, mortgaged it B, his father, joining. A agreed that unless he paid by the day, or if B paid the debt, B should have the property, and give A one-seventh. B having died, and devised the land; held, A still had the right of redemption. Playford v. Playford, Holt, Equ. 310.

day. But equity will always construe the transaction to be a mortgage, if possible.(1)(a)

34. Where there is an agreement for repurchase within a certain time, by the mortgagor, of the estate mortgaged, and such agreement is made, not at the giving of the mortgage, but afterwards; the right of redemption or repurchase may be restricted to the time stipulated.

35. A, being a joint tenant with B, made a conveyance to C for £104, absolute in form, but admitted to be in reality a mortgage. This deed was cancelled, and another similar one made for a larger consideration, including the £104, and covenanting that A would not make partition without C's consent. The receipts for the money spoke of it as purchase-money. Two years after the last deed, it was agreed that A should regain the land, on payment of principal, interest and costs. B being in possession, C recovered the land in ejectment, and occupied sixteen years. A brings a bill to redeem. Held, though the covenant against partition showed that A was still supposed to retain an interest in the land, and though the first deed was allowed to be a mortgage, yet the case, on the whole, was one of a subsequent agreement for repurchase, and, after the lapse of so long a time, a redemption should not be allowed.(2)

36. So, where a mortgagee, having recovered the land for breach of condition, for an additional advance of money obtains a release of the equity from the mortgagor, at the same time giving him a promise to sell and convey, on payment of the whole money advanced within a certain time; after this time has elapsed, the estate becomes absolute in the mortgagee; the last transaction being regarded as an original contract to convey the estate upon certain terms. In this case, however, sixteen years had elapsed.(3)

37. Where a mortgage is made to or for a relation or a wife; in conformity with the presumed intention of the mortgagor, to make the conveyance beneficial to the mortgagee, the right of redemption will be limited strictly to the time specified. In case of a marriage settlement, an omission to perform the condition will be construed as an election to let the settlement stand, and no redemption will be allowed, especially after the mortgagor's death, and against a purchaser without notice from the wife.(4)

38. Thus, where A conveyed to B, to whom he was related by marriage, by an absolute deed, and took back another deed, making the land redeemable during A's life; held, in reversal of Lord Nottingham's decree, that the heir of A could not redeem.(5)

(1) 4 Kent, 143-4; *Davis v. Thomas*, 1 Russ. & M. 506; *Poindexter v. McCannon*, 1 Dev. Eq. 373.

(2) *Cotterell v. Purchase*, Ca. Temp. Tal. 61; *Wrixon v. Cotter*, 1 Ridge, 295; *Austin v. Bradley*, 2 Day, 466; 2 N. Y. Rev. Sts. 546; *Waters v. Randall*, 6 Met. 484; *Perkins v. Drye*, 3 Dana, 177; *Russell v. Southard*, 12 How. 139; *Cameron v. Irwin*, 5 Hill,

280; *Trull v. Skinner*, 17 Pick. 213; *Harri-son v. Phillips, &c.*, 12 Mass. 465; *Marshall v. Stewart*, 17 Ohio, 351.

(3) *Endsworth v. Griffith*, 2 Abr. Eq. 595; 5 Bro. Parl. 184.

(4) *King v. Bromley*, 2 Abr. Eq. 595.

(5) *Bonham v. Newcomb*, 2 Vent. 364; 1 Abr. Eq. 312. See *Trull v. Owen*, 4 Y. & Coll. 492.

(a) Conveyance in consideration of a certain sum, with a written but unsealed agreement by the grantee to reconvey, upon repayment of the sum within a certain time. Held, an equitable mortgage, not a sale with conditional right to repurchase. *Eaton v. Green*, 22 Pick. 526.

39. A granted a rent-charge of £48 per annum to B in fee, on condition, that if A should at any time, after notice, pay in the purchase-money by certain instalments, with interest, during his life, the grant should be void. The rent-charge fell short of the interest, and there was no covenant to pay the money. After A's death, B conveyed to C with warranty, and C to D. Sixty years having elapsed; upon a bill for redemption, held, the circumstances of the case showed that the mortgagee had parted with a fair equivalent for purchasing the right of redemption after A's death, and the lapse of time made the case still stronger against the bill, which was accordingly dismissed.(1)

40. A mortgages an estate to B, and B to C, for £200, A and his son D joining in the latter mortgage. To secure payment of the interest, C leases to the son of A for 5,000 years, at the rent of £12 per annum, for the first three years, and the rest of the term £10; and, if the £200 and interest were not paid in three years, the land to be re-conveyed. Receipts were given, sometimes as for interest, and sometimes for a rent-charge. The last receipt was about forty years subsequent to the lease. Ten years after this receipt, a bill was brought for redemption by the grandson of A, the estate having nearly doubled in value since the mortgage. Held, it would not lie.(2)

41. A having received a patent from the crown for land for a term of years, at a certain rent, a subsequent patent, not noticing the former, was made to B. The former term having nearly fifty years to run, and being worth £200 per annum, B, in consideration of £200, by lease and release, conveys to A, with the condition, that upon repayment, within five years, he might re-enter; but, on failure of payment at the time, the estate of A should be absolute and indefeasible, both in equity and law, and B forever debarred from all right and relief in equity. And B hereby released forever his right to redeem, on failure as aforesaid. There was no covenant for payment of the £200. The five years having expired, A brings a bill in equity for foreclosure, to which B never put in any answer or defence, and a decree was made that B should be foreclosed, unless the money were paid upon a certain day. More than thirty years afterwards, the lands having risen in value, the heirs of B bring a bill in equity against the heirs of A, alleging surprise and imposition in obtaining the decree, and praying redemption. The plaintiffs prevailed, but the decree was reversed in the House of Lords. The grounds of argument for the defendants were, the terms of the conveyance from B to A, waiving all right of redemption; the reversionary character of B's estate, yielding no present profit, and worth at the time not more than £200; and the want of any covenant to pay the money, and consequently of any mutuality in the transaction, which is essential to constitute a mortgage.(3)

42. The distinction between a mortgage and a conditional sale is said to be, that if a *debt* remains, the transaction is a mortgage, but if the debt is extinguished by mutual agreement, or the money advanced is not *loaned*, but the grantor has a right to refund in a given time, and have a reconveyance; this is a conditional sale. The true inquiry is, whether the purpose of the parties was to treat of a *purchase*, the value of the commodity contemplated, and the price fixed. And the point

(1) *Floyer v. Lavington*, 1 P. Wms. 268.(2) *Mellor v. Lees*, 2 Atk. 494.(3) *Tasburgh v. Eehlin*, 2 Bro. Parl. Cas.

265.

is to be settled by *the whole transaction*, not merely the written evidence. Parol evidence is received, not to explain or construe the writings, but to show the true character of the contract. Various and minute circumstances are to be taken into view. If a fair price is advanced, the property liable to injury, such as requires frequent repairs, and of fluctuating fashion and profits; or if the purchaser, though not put into actual possession, leases to the grantor, and receives the rents, &c., without accounting, and the grantor's wife releases her dower; and if the estate consists of a large building, which is subject to fire, and at the grantee's risk, and he has no power to enforce his claim against the grantor, there being no covenant or promise by the latter, while he at the same time has the right of re-purchasing within a given time: all these facts go to show a conditional sale.(1) The want of any *personal obligation* against the grantor, though not conclusive, is very strong evidence of a conditional sale; for a *mortgagee* must have a remedy, express or implied, against *the person* of the debtor. But Chancery will always lean in favor of a mortgage.(2)(a)

43. The same general principle, of not restricting the right of redemption, has been applied to the case of a *lease* from mortgagor to mortgagee, which is in the nature of a partial surrender of the equity of redemption. So, also, to a lease from mortgagee to mortgagor, accompanied by a covenant to reconvey the premises to the mortgagor, upon payment of a certain sum by a specified time; in which case, a redemption will be decreed, even against a purchaser from the mortgagee, with notice.(3)

44. The rule above stated, as to the right of redemption, and the distinction between a mortgage and a conditional sale, has been applied to the conditional assignment of a mortgage itself.

45. A assigns a mortgage to B, upon condition, that if certain expected receipts shall amount to \$300, B shall re-assign, and account for the surplus over that sum; if they shall not amount to that sum, and

(1) *Slee v. Manhattan*, &c., 1 Paige, 56; *Goodman v. Grierson*, 2 Ball & B. 274; *Robinson v. Cropsey*, 2 Edw. 138; *Robertson v. Campbell*, 2 Call, 354; *Chapman v. Turner*, 1, 244; *Sevier v. Greenway*, 19 Ves. 413; *Hicks v. Hicks*, 5 Gill & J. 82; *Bennet v. Holt*, 2 Yerg. 6; *Hickman v. Quinn*, 6, 96; *Hannah, &c., Bland*, 225-6; *Davis v. Thomas*, 1 Russ. & M. 506; 2 Sumn. 487.

(2) *Conway v. Alexander*, 7 Cranch, 237; *Menude v. Delaire*, 2 Des. 564; *Baxter v. Willey*, 9 Verm. 276; *Holmes v. Grant*, 8 Paige, 243; *Chambers v. Hise*, 2 Dev. & B. Equ. 375; *Glover v. Payn*, 19 Wend. 518;

Bacon v. Brown, 19 Conn. 29; *Dougherty v. McColgan*, 6 G. & John. 275; *Russell v. Southard*, 12 How. 139; *Galt v. Jackson*, 9 Geo. 151; *Gaither v. Teague*, 7 Ired. 460; *Page v. Foster*, 7 N. H. 392; *Verner v. Winstanley*, 2 Sch. & L. 393; *Perry v. Meddowcroft*, 4 Beav. 197; *Williams v. Owen*, 10 Sim. 386; *Baker v. Thrasher*, 4 Denio, 493.

(3) *Gubbins v. Creed*, 2 Sch. & Lef. 214; *Wright v. Bates*, 13 Verm. 341. See *Slee v. Manhattan, &c.*, 1 Paige, 48; *Fuller v. Hodgdon*, 25 Maine, 243; *Holridge v. Gillespie*, 2 John. Cha. 30; *Miami, &c. v. Bank, &c.*, *Wright*, 249.

(a) It has been held, that parol evidence, though admissible to prove an absolute deed a mortgage, is not admissible to prove a formal mortgage to be a conditional sale; that, in the one case, the proof raises an equity consistent with the writing, and in the other would contradict it. *Kunkle v. Wolfsherger*, 6 Watts, 130.

So, on the other hand, it has been said, that in examining transactions between borrowers and lenders, courts of equity, aware of the unequal relation of the parties, are particularly attentive to any circumstances tending to show an inconsistency between the form of an act and the intent of the parties, and will take great pains, when their suspicion is thus excited, to get at the substance of what was done or intended. But it is a conclusion of reason, and therefore must be the presumption of every court, that solemn instruments declare the truth, until error, mistake, or imposition be shown. *McDonald v. McLeod*, 1 Ired. Equ. 226.

unless A in one week pay the deficiency, the mortgage to be considered as absolutely assigned. The receipts having fallen short of \$300, held, this was a mortgage or pledge, not a conditional sale, and that A should have relief in equity, on making up the \$300.(1)

46. A power may be given to a mortgagee, in case of non-payment at the time, to sell the estate.(u) He may pass a title without the mortgagor's joining in the deed; and the latter will be divested of all right and interest, and, if in possession, become a mere tenant at sufferance. Such power passes to an assignee of the mortgage.(2)

47. Such power having been inserted in a deed of defeasance, the proceeds to be first applied to the debt, and the surplus paid to the mortgagor, the mortgagee, on failure of payment, agreed with a third person to convey the land to him. The court decided, that this agreement was not equivalent to an actual sale, but seemed to take it for granted, that such conveyance would be effectual to pass the estate.(3)

48. In a similar case, the land having been sold at auction, the purchaser required the concurrence of the mortgagor, who refused to join, alleging that the sale was made at a sacrifice, and without his consent. The purchaser then brings a bill against the mortgagee and mortgagor, which was sustained against the former, but dismissed as to the latter.(4)

49. Lord Eldon considered the power in question as a dangerous and extraordinary one, and of modern introduction, and thought it should be vested in some third person as a trustee for both parties. But Chancellor Kent remarks, that the mortgagee himself, under such power, becomes a trustee for the surplus; and that unless due notice be given of a sale, equity will set it aside.(5)

51. It is said, the only doubt as to the validity of such power seems to be, as it affects the rights of subsequent mortgagees.(6)

52. In Maryland, by statute, real estate mortgaged in the city of Baltimore may be sold under such power.(7) The validity of a power to sell is also recognized in other States.

53. If, upon a sale under a power, the mortgagee himself purchases, the sale is voidable in equity, by the mortgagor, for good grounds, though not absolutely void. In New York and Michigan, the mortgagee is authorized to purchase, if it be done fairly; and, in New York, the affidavit of sale, without deed, will perfect his title. In the same State, the power, to be effectual, must be registered or recorded, and

(1) *Solomon v. Wilson*, 1 Whart. 241.

(2) *Corder v. Morgan*, 18 Ves. 344. See *Kinsley v. Ames*, 2 Met. 29; *Hobson v. Bell*, 2 Beav. 17; *Gorson v. Blakey*, 6 Misso. 273; *Cameron v. Irwin*, 5 Hill, 272; *Holden v. Gilbert*, 7 Paige, 208; *Gates v. Jacob*, 1 B. Monr. 307; *Dobson v. Racey*, 3 Sandf. Cha. 60; *Stabback v. Leat*, Coop. 46; *Curling v. Shuttleworth*, 6 Bing. 121; *Green v. Tanner*, 3 Mett. 423; *Clay v. Willis*, 1 B. & C. 364; *Destrehan v. Scudder*, 11 Mississippi, 484; *Longwith v. Butler*, 3 Gilm. 32; *Sanders v. Richards*, 2 Coll. 568; *Hobson v. Bell*, 2

Beav. 17; *Hyndman v. Hyndman*, 19 Verm. 9; *Major v. Ward*, 5 Hare, 598; *Wright v. Rose*, 2 Sim. & St. 323; *Moses v. Murgatroyd*, 1 John. Cha. 119; *Coutant v. Servoss*, 3 Barb. 128; *Jencks v. Alexander*, 11 Paige, 619.

(3) *Croft v. Powell*, 2 Com. R. 603.

(4) *Clay v. Sharp*, 2 Cruise, 95; Sug. on Vend. 6th ed. App. 14

(5) *Roberts v. Bozon*, (Feb 1825), 4 Kent. 146. See *Brisbane v. Stoughton*, 17 Ohio, 482.

(6) *Walk. Intro.* 306.

(7) *Md. St.* 1836,—7, ch. 249.

(u) By the civil law, the mortgagee has this power by implication, and even an express agreement will not deprive him of it. 1 Dom. 360. It is said to be invalid in Virginia. 4 Kent, 148, n.

the sale is made equivalent to a foreclosure, as against the mortgagor and all claiming by title subsequent to the mortgage. Similar provisions in Maryland and Maine. (See *Powers*.) In Michigan, the mortgagee cannot sell, if he has previously commenced a suit, which is pending. In Mississippi, without six months' notice.(1)

54. It has been held in Massachusetts, that the giving of a power to sell, in an instrument which would otherwise be a mortgage, does not change the character of the mortgagee's estate. For, although he may pass an *absolute* title to a third person, by executing the power, yet, until it is executed, he, himself, has only a *conditional* title. And even a purchaser will not take an *absolute* estate, it seems, if he has notice of the original nature of the transaction, and purchases with some reference to the conditional character of the title.(2)

CHAPTER XXX.

MORTGAGE—WHAT ESTATE IT CREATES IN THE MORTGAGOR AND THE MORTGAGEE.

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| 1. Estate remains in the mortgagor, as to third persons, but not as to the mortgagee.
7. Mortgagee may take possession, when.
8. Agreement for mortgagor's possession.
16. Mortgagor in possession, nature of his estate—tenancy at will, &c. | 17. Cannot commit waste, but not bound to repair.
18. Lease by mortgagor before or after the mortgage; rights of the lessee and mortgagee.
34. Waste by mortgagee.
35. Lease by mortgagee. |
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1. ALTHOUGH a mortgage, in form, purports to convey a present estate to the mortgagee, liable to be defeated by performance of the condition named; yet the well-settled modern doctrine is, that, notwithstanding the conveyance, the mortgagor, not only in equity but at law, remains owner of the land, till some further act is done to vest it in the mortgagee. In other words, although the condition of a mortgage is in form *subsequent*, operating to divest an interest once vested; yet it is in substance and practice *precedent*, operating to vest an estate which previously remained in the mortgagor. The *language* of the transaction is, that A conveys to B, reserving the right to take back the estate on doing a certain act; while the *effect* of it is, that A transfers to B a mere claim or lien upon the land, with the right of gaining the land itself, upon A's failing to perform such act.

2. Several considerations seem to show, that this is the true view of the relation between mortgagor and mortgagee. The mortgagor is a *freeholder* in respect to the estate mortgaged. This estate, in his hands, is regarded as real property, and as such must be inherited, conveyed,

(1) *Munroe v. Allaire*, 2 Caines' Case in Er. Middlesex, &c. v. Minot, 4 Met. 325; King v. 19; *Davoue v. Fanning*, 2 John. Cha. 252.* Duntz, 11 Barb. 191.
Slee v. Manhattan Co., 1 Paige, 48; 2 N. Y. Rev. St. 546; 4 Kent. 147; Me. St. 1838, ch. 333; N. Y. Stat. 1842, ch. 277, sec. 8; Miss. Rev. St. 499; Miss. St. 1840, 28, 9;
 (2) *Eaton v. Whiting*, 3 Pick. 484. This case seems to recognize the validity of the power in question; though the conveyance was here expressly *in trust* to sell, and the condition contained in a subsequent clause.

* These were cases of trust.

leased, devised, or taken upon legal process; while the mortgagee's interest, on the other hand, is merely personal, as will be more fully explained hereafter. The mortgagor may maintain an ejectment or real action for the land, to which the mortgage cannot be set up as a defence. A mortgage is not an *alienation* or *sale* of the land in a technical sense; as, for instance, for the purpose of revoking a devise or forfeiting the rights of a party insured, or violating an obligation not to *sell*, without first offering the land to the obligee. So, it has been held, on the other hand, that a *power* to sell does not involve a power to mortgage. So, a mortgagor *gains a settlement* as owner, is required or entitled to serve as juror or member of the legislature, or may be received as bail.(1)(a)

3. Lord Mansfield said, "it is an affront to common sense to say that the mortgagor is not the owner of the land."(2)(b) In South Carolina, a statute expressly declares him to be such.(3) There, (as in New York,) even after condition broken, or after the time stipulated for redemption is past, the mortgagee can maintain no possessory action, but is limited to his statutory remedy; and the right to redeem is a *legal right*, not a mere equity.

4. It will be at once perceived, however, that all the particulars above named have reference to the relation which a mortgagor sustains to *third persons*. A mortgage being merely security for a debt, there would be little propriety in attributing to it the effect of passing away the estate from the former owner, except so far as is requisite to effect

(1) Jackson v. Willard, 4 John. 41; Huntington v. Smith, 4 Conn. 235; Willington v. Gale, 7 Mass. 138; M'Call v. Lenox, 9 S. & R. 302; Ford v. Philpot, 5 Har. & J. 312; Wilson v. Troup, 2 Cow. 195; Blaney v. Bearce, 2 Greenl. 132; Astor v. Miller, 2 Paige, 68; Miami, &c. v. Bank, &c., Wright, 249; Den v. Dimon, 5 Halst. 156-7; Winslow v. Merchants, &c., 4 Met. 310; Clark v. Beach, 6 Conn. 142; Wilkins v. French, 20 Maine, 111; Cooper v. Davis, 15 Conn. 556; Doe v. McLoskey, 1 Alab. (N. S.) 708; Doe v. Goldwin, 2 Ad. & El. (N. S.) 143; ——— v. Day, Ib. 147; Ewer v. Hobbs, 5 Met. 3; Glass v. Ellison, 9 N. H. 69; Smith v. Moore, 11. 55; Ellison v. Daniels, Ib. 274; Perkins v. Dibble, 10 Ohio, 438; Ralston v. Hughes, 13 Illin. 469; Meacham v. Fitchburg, &c., 4 Cush. 291; Davis v. Anderson, 1 Kelly, 176; Mayo v. Fletcher, 14 Pick. 531; Heath v.

Williams, 25 Maine, 209; Howard v. Robinson, 5 Cush. 123; Wilson, 2 Ves. & B. 252; Cholmondeley v. Clinton, 2 Jac. & W. 183; Great Falls, &c. v. Worster, 15 N. H. 412; Thorne v. Thorne, 1 Vern. 141-182; Hall v. Dench, 1 Vern. 329; Lovering v. Fogg, 18 Pick. 540; McTaggart v. Thompson, 2 Harr. 149; Neilson v. Lagow, 12 How. 98; Albany &c. v. Bay, 4 Comst. 9; Conover v. The Mutual, &c., 3 Denio, 254; Howard v. Robinson, 5 Cush. 119; The King v. St Michael's, &c., Dougl. 632; Rex v. Mattingley, 2 T. R. 12; ——— v. Chailey, 6 T. R. 755; Montgomery v. Bruere, 1 South, 267; 1 Pow. 170 a; Beamish v. The Overseers, &c., 7 Eng. L. & Equ 485.

(2) Rex v. St. Michaels, Dougl. 632.

(3) 1 Brev. Dig. 175; State v. Laval, 4 M'Cord, 340.

(a) A mortgagee, before taking possession, is not so far an *owner*, as to be entitled to notice of the proposed laying out of a road over the land, or to damages. Parish v. Gilman, 11 N. H. 293. See Wright v. Tukey, 3 Cush. 290.

(b) In New Hampshire, the old and literal construction of a mortgage seems to be, at least in theory, substantially retained. It is there said, that the mortgagor retains only a *power to regain the fee*, and that the condition *as to him* (not as to the mortgagee,) is a precedent one, he being a mere tenant at sufferance, and having no right of possession. Brown v. Cram, 1 N. H. 171. See also Haven v. Low, 4 N. H. 16; Chamberlain v. Thompson, 10 Conn. 243; 1 Pow. 107, u.; Montgomery v. Bruere, 1 South. 268; Heighway v. Pendleton, 15 Ohio, 735; Jamieson v. Bruce, 6 Gill & J. 74; Goodwin v. Stephenson, 11 B. Mon. 21; (deciding that a mortgagor cannot sue upon the covenants in the deed to him of the land mortgaged, the mortgagee being legal owner.) Gambriel v. Doe, 8 Blackf. 140; Meyer v. Campbell, 12 Mis. 603; (holding that a mortgagor cannot recover in ejectment.)

the object of the transaction. But to this extent, or, in other words, as between the mortgagor and the mortgagee, for the purpose of rendering available the security given; a different rule prevails, and the mortgagee has all or most of the rights of a legal owner.

5. A, by consent of B, a mortgagor in possession, built a house upon the land. The house was sold on execution as A's, and C, the purchaser, brings a suit for it against D, who claimed under a purchase from B. Held, the mortgagee having a mere lien on the property, if any interest in it, D could not defend on the ground that the mortgagee did not consent to the erection of the house, and forbade its removal; that the rights of the latter would not be affected by the event of this suit, and the house would remain subject, as before, to his claim.(1) It was intimated by the court, that the mortgagee acquired no lien upon a house thus erected, although he might secure the rents by taking possession; but that it was the *personal property* of A.(2)

6. The distinction above pointed out, seems to have been reversed by an observation of the court in Massachusetts; that "the mortgagee has the whole estate *against all but the mortgagor*, in the same manner as if it were absolute."(3) This, however, is a mere *dictum*, and the law seems to be well settled as above stated.

7. A mortgage gives to the mortgagee an *immediate right of possession*, which he may assert by entry or action, unless there be an express stipulation to the contrary. But this is often the case, and is said to be a very ancient practice, as early as the time of James I.(4)(a)

8. A parol agreement, that the mortgagor shall remain in possession till breach of condition, is insufficient; though the condition be to support the mortgagee and his wife, which could probably be done only out of the estate mortgaged.(5)

9. But an agreement or understanding, that the mortgagor is to remain in possession, may be implied from the terms of the deed or other accompanying instrument. It may operate by *estoppel*, *covenant*, *condition* or *reservation*.(6)

10. A sold to B a mill, took a mortgage back, and gave B a bond, stating the privileges which B was to enjoy in using the water, dam, &c., covenanting to build machinery in the mill, and not follow himself,

(1) *Jewett v. Patridge*, 3 Fairf. 243.

(2) *Ib.* 252. See *Evans v. Merriken*, 8 Gill & J. 39.

(3) *Fay v. Brewer*, 3 Pick. 404.

(4) *Powsely v. Blackman*, Cro. Jac. 659; *Patridge v. Bere*, 5 B. & A. 604; *Jackson v. Bronson*, 19 John. 325; 14 Pick 530-1; *Dickenson v. Jackson*, 6 Cow. 147; *Wilkinson v. Hall*, 4 Scott, 301; *Doe v. Giles*, 5 Bing. 421; *Doe v. Cadwallader*, 2 B. & Ad. 473; *Doe v. Maisey*, 8 B. & C. 767; *Partington v. Woodcock*, 6 Ad. & Ell. 695; *Doe v. McLoskey*, 1 Alab. (N. S.) 708; *Luckey v. Holbrook*, 11 Met. 460; *Allen v. Parker*, 27 Maine, 531; *Miner v. Stevens*, 1 Cush. 485;

Hobart v. Sanborn, 13 N. H. 226; *Harmon v. Short*, 8 Sm. & M. 433; *Walcop v. McKinney*, 10 Mis. 229; *Smith v. Taylor*, 9 Ala. 633; *McIntyre v. Whitfield*, 13 Sm. & M. 88; *Brown v. Stewart*, 1 Md. Cha. 87; *Reed v. Davis*, 4 Pick. 217; *Rogers v. Grazebrook*, 8 Ad. & Ell. (N. S.) 895.

(5) *Colman v. Packard*, 16 Mass. 39; *Blaney v. Bearce*, 2 Greenl. 132.

(6) 11 Pick. 477; *Dearborn v. Dearborn*, 9 N. H. 117; *Flanders v. Lamphear*, *Ib.* 201. See *Wilkinson v. Hall*, 4 Scott, 301; *Lamb v. Foss*, 8 Shepl. 240; *Rhoades v. Parker*, 10 N. H. 83; *Holmes v. Fisher*, 13 N. H. 9; *Coote*, 376.

(a) Where a mortgage is upon this condition, the mortgagor may be allowed to redeem, upon the terms of a pecuniary compensation for past and future support. *Austin v. Austin*, 9 Verm. 420.

or suffer others to follow the same occupation, while B continued it; and reserving to himself the use of a room in the mill for a certain time. Held, the bond amounted to a covenant, that B might occupy the mill till breach of condition, and that A could not maintain a writ of entry at common law against B.(1)

11. So where the condition of a mortgage was, that the mortgagor should carry on the farm during the life of the mortgagee, and deliver him one-half of the produce; held, the mortgagee had no right to enter, till condition broken or waste committed; or except for the purpose of taking his share of the produce.(2)

12. Where the mortgagor of a leasehold estate reserves the right to remain in possession till breach of condition, and holds over after such breach, he is not liable *for rent* to the mortgagee, previous to the entry of the latter. And, if a mortgagor have tendered the debt after it fell due, the title to the estate cannot be tried in a suit for rent.(3)

13. A mortgagor, reserving the right to keep possession till breach of condition, may allow a stranger to occupy under him; and the latter, having entered before breach, is not a trespasser in continuing to occupy afterwards.(4)

14. In Vermont and Wisconsin, a statute provides that the mortgagor shall have the right of possession till breach of condition, unless the deed clearly show the contrary.

15. In Massachusetts and Maine, on the other hand, the mortgagee's right of possession is recognized, unless (in Massachusetts) there is an agreement to the contrary.(5)

16. Where there is no agreement, express or implied, that the mortgagor shall retain possession, his possession is strictly *at the will of the mortgagee*. It is not *adverse* to the latter. He has often been called a *tenant at will*. But, technically, there is little propriety in this designation. In the first place, a mortgagor wants the chief mark or characteristic of a tenant or lessee, which is the payment of rent; for, while a mortgagor, or any one holding under him, remains in possession, he receives the rents and profits for his own account; and, in the second place, he has none of the privileges of a tenant at will, in regard to notice to quit, but may be immediately turned out without any notice, and without the privilege of emblements, the crop being liable for the debt.(a) Lord Mansfield very justly denominated him a *quasi* tenant at will; (b) at the same time remarking, with reference to the prevailing language of the law on the subject, that "nothing is so apt to confound as a simile." It has been justly observed, however, that whatever charac-

(1) Bean v. Mayo, 5 Greenl. 89.

(2) Hartshorn v. Hubbard, 2 N. H. 453; Flaggs v. Flaggs, 11 Pick. 475.

(3) Mayo v. Fletcher, 14 Pick. 525.

(4) Ib.

(5) Verm. Rev. St. 215; Mass. Rev. St. 635; Me. Rev. St. 553; Ruby v. Abyssinian, &c., 3 Shepl. 206.

(a) A mortgagee, not in possession, has no emblements. Toby v. Reed, 9 Conn. 225. See Gillett v. Balcom, 6 Barb. 370; Jones v. Thomas, 8 Blackf. 428; Shepard v. Philbrick, 2 Denio, 174.

(b) It will be seen presently, that while a mortgagor, in most respects, has a less estate than a tenant at will, he is, in one particular, treated more favorably than the latter. It has been stated, (*Estate at Will*), that the *assignee* of a tenant at will becomes a trespasser by entry upon the land; while the better opinion is, that the assignee of a mortgagor is not a trespasser, but succeeds to all the rights of the mortgagor.

ter we may give to the mortgagor in possession by sufferance of the mortgagee, he is still a *tenant*; and that he has sometimes been called an *agent*, but without foundation, for he is not liable to *account*. Nor is he a *servant*, because the mortgagee has no possession. Nor can the mortgagor, or one claiming under him, be a *disseizor*.(1)

17. A mortgagor will be restrained by the Court of Chancery from committing *waste*, even before condition broken, though not liable therefor at law; and thereby diminishing the security of the mortgagee. (*Infra*, s. 25.) But the mortgagor is not bound to make repairs. If he cut down trees before breach of condition, the mortgagee cannot have trover against him. On the other hand, if the mortgagor in possession severs anything from the land, sells it to a third person, and the mortgagee then takes it from such purchaser, the purchaser may maintain an action against him.(2)(a)

18. A mortgagor in possession cannot make a *lease*, to bind the mortgagee.(3) His possession cannot be considered as holding out a false appearance, or inducing a belief that there is no mortgage, for it is the nature of the transaction that he should remain in possession, and the mortgagee receive interest; and whoever wants to be secure, when he takes a lease, should inquire after and examine the title deeds. Whenever one of two innocent persons must be a loser, the rule is, "*qui prior in tempore, potior est in jure*." Hence, the mortgagee may maintain ejectment for the land against the lessee.

19. Such are the principles laid down by Lord Mansfield on this sub-

(1) *Moss v. Gallimore*, Doug. 279; 1 T. R. 378; Doug. 21; 14 Pick. 500-1; *Jackson v. Fuller*, 4 John. 215; *Crews v. Pendleton*, 1 Leigh, 297; *Rockwell v. Bradley*, 2 Conn. 1; *Wakeman v. Banks*, Ib. 445; 4 Kent, 155-6; *Blaney v. Bearce*, 2 Greenl. 132; *McCall v. Lenox*, 9 S. & R. 311; *Souders v. Van Sickie*, 3 Halst. 316; *Partridge v. Bere*, 5 B. & A. 604; *Christophers v. Sparke*, 2 Jac. & W. 234; *Noyes v. Sturdivant*, 6 Shepl. 104; *Castleman v. Belt*, 2 B. Monr. 158; *Hitchman v. Walton*, 4 Mees. & W. 409; *Cooper v. Davis*, 15 Conn. 556; *Joyner v. Vincent*, 4 Dev. & B. 512; *Miner v. Stevens*, 1 Cush. 485; *Doe v. Maisey*, 8 B. & C. 767; *Litchfield v. Ready*, 1 Eng. L. & Eq. 460; *Stedman v. Gasset*, 18 Verm. 346; *Doe v. Tom*, 4 Qu.

B. 615; — *v. Olley*, 12 Ad. & Ell. 481; *Fuller v. Wadsworth*, 2 Ired. 263.

(2) *Farrant v. Lovel*, 3 Atk. 723; *Smith v. Goodwin*, 2 Greenl. 173; *Campbell v. Macomb*, 4 John. Cha. 534; *Fay v. Brewer*, 3 Pick. 203; *Peterson v. Clark*, 15 John. 205; 15 Conn. 556; *Salmon v. Clagett*, 3 Bland, 380; *Murdock*, 2, 461; *Usborne v. Usborne*, 1 Dick. 75; *Johnson v. White*, 11 Barb. 194; *Boston, &c. v. King*, 2 Cush. 400; *Van Wyck v. Alliger*, 6 Barb. 507; *Ensign v. Colburn*, 11 Paige, 503; *Gray v. Baldwin*, 8 Blackf. 164; *Brown v. Stewart*, 1 Md. Cha. 87; *Brick v. Getzinger*, 1 Halst. Cha. 391; *Humphreys v. Harrison*, 1 Jac. & W. 581; *Hampton v. Hodges*, 8 Ves. 105; *Goodman v. Kine*, 8 Beav. 379.

(3) *Keech v. Hall*, Dougl. 21.

(a) But it has been held, that the mortgagee may bring an action for timber cut by one who entered under the mortgage. *Bussey v. Paige*, 2 Shepl. 132; *Gore v. Jenness*, 1 Appl. 53. See *Frothingham v. M'Cusick*, 11 Shepl. 403; *Langdon v. Paul*, 22 Vern. 205; *Van Pelt v. McGraw*, 4 Comst. 110; *Lull v. Matthews*, 19 Verm. 322. In case of redemption, he is bound to account for what he receives. Ib. If the mortgagee has expressly or impliedly authorized the cutting of timber, it belongs, when cut, to the mortgagor; otherwise, the mortgagee may either have an injunction in equity, an action at law, or claim the timber itself, unless the rights of third persons have intervened. *Smith v. Moore*, 11 N. H. 55. A mortgages to B, then to C; neither of whom takes possession. A cuts timber from the land, after which B's mortgage is discharged. Held, C might maintain trespass against A. *Sanders v. Reed*, 12 N. H. 558. It has been held, that a mortgagee has not a sufficiently vested, immediate or direct title to the property, to maintain an action for injuries done to it by a third person, except in case of a direct intent to wrong and defraud him, and the mortgagor's insolvency or inability to pay the mortgage debt. *Lane v. Hitchcock*, 14 John. 213; *Bank, &c. v. Mott*, 17 Wend. 554; *Gardner v. Heartt*, 3 Denio, 232.

ject. In the United States, they derive additional force from the universal practice of registering mortgages as well as other deeds. If not recorded, a mortgage will be invalid against a subsequent lease; but, if it is recorded, the lessee has implied notice, and takes subject to the mortgage.

20. In the case decided by Lord Mansfield, it is said the mortgagee had no notice of the lease, nor the lessee of the mortgage; and that, if the mortgagee had encouraged the tenant to lay out money, he would be bound by the lease. How far this fact would qualify the effect of registration, is perhaps a doubtful question.

21. It is to be observed, however, that an assignee of the mortgage succeeds to all the rights of the mortgagee himself. Hence, if after a lease by the mortgagor, the mortgagee assigns the mortgage, the assignee may have ejectment against the tenant.(1)

22. It has been said, that the mortgagee may consider the lessee of the mortgagor as a *trespasser*, a *disseisor*, or a *lessee*, at his election. It seems, however, that the mere entry of such lessee does not constitute him a trespasser, but only his refusal to quit, when required. In *Keech v. Hull*, the case above cited, it is said, "the tenant stood exactly in the situation of the mortgagor," against whom, clearly, trespass would not lie without previous notice.(2)

23. So the mortgagee cannot recover, in an action of trespass for mesne profits against an assignee of the mortgagor, the rents and profits accruing after commencement of a suit by the mortgagee to obtain possession.(3)(a) In deciding this point, the court remark, "it seems to be admitted, that the mortgagor was not a trespasser before he was served with the writ in the action to foreclose." "The question submitted is the same as if the action were between the mortgagee and mortgagor."(4) "He cannot be considered a trespasser until after an entry by the mortgagee."(5) Chancellor Kent is of opinion, that the assignee is no more a trespasser than the mortgagor himself; and that this is the better and more intelligible American doctrine.(6)(b)

24. In Massachusetts, Connecticut and Pennsylvania, the English

(1) *Thunder v. Belcher*, 3 E. 449.

(2) 2 Cruise, 76; 1 Pow. 159, n., 160. See *Evans v. Elliot*, 9 Adol. & Ell. 342; *Doe v. Barton*, 11, 307. If the mortgagee adopt the lessee as his tenant, he does not thereby affirm the lease, but the lessee holds from year to year. *Doe v. Bucknell*, 8 Carr. & P. 566; *Brown v. Storey*, 1 Scott, N. 9. See *Hill v. Jordan*, 30 Maine, 367; *Dixie v. Davies*, 8 Eng. L. & Equ. 510; *Zeiter v. Bowman*, 6 Barb. 133; *Clark v. Abbott*, 1 Md. Ch. 474; *Henshaw v. Wells*, 9 Humph. 568; *Smith v. Taylor*, 9 Ala. 633; *Doe v. Warburton*, 11 Ad. & Ell. 307; — *v. Goodier*, 16 L. J. Q.

B. (N. S.) 436; *Wilton v. Dunn*, 7 Eng. L. & Equ. 406; *Knowles v. Maynard*, 13 Met. 352; *Doe v. Olley*, 12 Ad. & Ell. 481; *Wheeler v. Brancomb*, 5 Q. B. 373; *Field v. Swan*, 10 Met. 114; *Crosby v. Harlow*, 8 Shepl. 499; *Samers v. Saltus*, 13 Denio, 214; *Turner v. Camerons, &c.*, 2 Eng. L. & Equ. 342; *Coke v. Pearsall*, 6 Ala. 542; *Massachusetts v. Wilson*, 10 Met. 126.

(3) *Wilder v. Houghton*, 1 Pick. 87.

(4) *Ib.* 88.

(5) *Ib.* 89.

(6) 4 Kent, 156-7.

(a) But, where one in possession, claiming under the mortgagor, refuses possession to the mortgagee upon his entry for breach of condition, the latter may maintain an action against him for mesne profits, though the entry be insufficient for foreclosure. *Northampton, &c. v. Ames*, 8 Met. 1.

(b) Where the mortgagee himself purchases under a sale for foreclosure after the decree, he may treat an occupant under the mortgagor as a tenant or a trespasser. He is entitled to the rents from the time of demanding possession or obtaining a conveyance. *Castleman v. Belts*, 2 B. Monr. 158.

rule, by which a mortgagor is not entitled to notice to quit, has been adopted. In New York, on the other hand, it has been held, that ejectment would not lie against a mortgagor as a trespasser, without notice; there being a privity of estate and a tenancy at will by implication. But it would lie against an assignee of the mortgagor. It will be seen, hereafter, that the action of ejectment by a mortgagee is now abolished.(1)

25 Though mere occupancy does not constitute the mortgagor a trespasser, yet, for any wrongful act on his part relating to the estate, the mortgagee may maintain trespass against him; as, for instance, the cutting and carrying away of timber trees. (*Supra*, s. 16.) Where the land mortgaged is wild land, a question has been made, whether a general usage to cut timber upon such land is to be held equivalent to an implied license. Trespass also lies, by an assignee of the mortgage, against an assignee of the mortgagor, for the removal of fixtures, though erected by the latter assignee.(2)

26. A lease by the mortgagor, subsequent to the mortgage, is valid between him and the lessee, and as to all the world but the mortgagee, and entitles the lessee to redeem.(3)

27. Where a lease has been made before the mortgage, the mortgagee takes, of course, subject to the former, and cannot interfere with the lessee's possession, so long as the latter fulfils his own obligations in regard to the land. But a mortgagee, under such circumstances, seems to stand on the footing of any other assignee of a reversion, and, after condition broken, may call on the tenant to pay rent to him instead of the mortgagor. Since the statute of Anne, no *attornment* is necessary to create this liability on the part of the tenant. Although the statute provides, that any payment of rent by the tenant shall be effectual, until he has notice of the assignment; yet, upon the giving of such notice, the title of the assignee relates back to the time of the assignment. Upon this principle, the mortgagee, in the case supposed, may call on the tenant to pay him not only future rents, but those at the time in arrear, and may distrain for them. This remedy is said to be a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.(4) It has been seen, that in several of the States, by express statutes, a lessee may attorn to a mortgagee after forfeiture. (See *Attornment*.)

28. Hence it appears, that, although the relation of landlord and tenant does not subsist between mortgagee and mortgagor, it may arise between the mortgagee and the lessee of the mortgagor.

29. In the case above referred to, where the mortgagee's claim of rent was made upon breach of condition by the mortgagor, it is said, the mortgagor previously received the rent by a tacit agreement with the mortgagee; but the mortgagee may put an end to this agreement when

(1) *Rockwell v. Bradley*, 2 Conn. 1; *Wake-man v. Banks*, *Ib.* 445; *Groton v. Boxborough*, 6 Mass. 50; *McCall v. Lenox*, 9 S. & R. 311; *Jackson v. Laughhead*, 2 John. 75; *Jackson v. Fuller*, 4, 215; *Jackson v. Hopkins*, 18, 487; 2 N. Y. R. S. 312. In New Hampshire, the mortgagor may be treated as a trespasser. *Pettengill v. Evans*, 1 N. H. 54.
(2) *Stowell v. Pike*, 2 Greenl. 387; *Smith v. Goodwin*, 2 Greenl. 173.

(3) See *Bacon v. Bowdoin*, 22 Pick. 401; Mass. Rev. St. ch. 107, sec. 13.

(4) *Moss v. Gallimore*, Doug. 279; *Birch v. Wright*, 1 T. R. 384; *Smith v. Shepard*, 15 Pick. 147; *Mansony v. U. S. & c.*, 4 Alab. N. S. 735; *Castleman v. Belt*, 2 B. Mon. 158. In Kentucky, he may bring an action for use and occupation. *Ib.* See *Rawson v. Eicke*, 7 Ad. & Ell. 451; *Field v. Swan*, 10 Met. 112.

he pleases. Whether this tacit agreement would prevent the mortgagee from claiming rent immediately upon the execution of the mortgage, is a point not distinctly decided; but, on principle, it would seem to have no such effect. The true view of the matter would appear to be, that where the mortgage is made before the lease, the latter is wholly invalid against the former; but where the lease is made first, it is by priority paramount to the mortgage, and the lessee cannot therefore be disturbed; but still the mortgagee takes the place, and succeeds to all the rights, of the mortgagor.^(a)

30. If the mortgagee himself take a lease from the mortgagor, he shall not set up the mortgage as a defence to a suit for the rent. If the lease be made first, he may refuse to pay rent, which shall go to extinguish the mortgage debt.⁽¹⁾

31. The lessee of a mortgagor, the mortgage being prior to the lease, if ejected by the mortgagee, is not entitled to emblements.⁽²⁾

32. The doctrine that, where a mortgage is *prior* to a lease made by the mortgagor, the mortgagee may claim rent of the lessee as his tenant, has been strongly denied in New Jersey and New York. It is said that the case of *Birch v. Wright*, (1 T. R. 378,) the only case where the point is pretended to have been settled, does not decide it, but stands upon other grounds.

33. A mortgaged land to B, but remained in possession and conveyed to C. C admitted D as his tenant. C's interest in the land was afterwards sold on execution to E. Immediately upon the sale, and before a deed was given, D attorned to E, and agreed to occupy at a certain rent. B afterwards notified D to pay rent to him, and D, receiving an indemnity, accordingly paid it. E brings an action against D for the rent. Held, these facts furnished no defence to the suit. A distinction was taken between the case of a lease prior to the mortgage, and the present case, where it was subsequent to the mortgage. In the former case, the rent passes as incident to the reversion which is mortgaged, and the mortgagor is estopped by his own deed to claim it afterwards. But in the present case, the defendant was never tenant to the mortgagee, nor even to the mortgagor. Moreover, a statute, (Revised L. 192,) provides, that a tenant shall not attorn to a *stranger*. Therefore, D could not lawfully attorn to any one but C or his grantee, and E, holding under an execution sale against C, was to be regarded as his grantee; while, on the other hand, B was to be held a *stranger*. Nor was the attornment to B justified by the statutory provision, which excepts mortgagees from the general prohibition of attornment; for this merely leaves attornment to a mortgagee to be valid or void according to the circumstances of the case, but does not justify attornment to any but the grantee of the landlord.^{(3)(b)}

(1) Newall v. Wright, 3 Mass. 138. See Wolcott v. Sullivan, 1 Edw. 399.

(2) Lane v. King, 8 Wend. 584.

(3) Souders v. Van Sickle, 3 Halst. 314; M'Kircher v. Hawley, 16 John. 289. See Cavis v. M'Clary, 5 N. H. 529.

(a) The tenant is held liable to pay to the mortgagee the rents due at the time of notice, as well as those accruing subsequently. Pope v. Biggs, 9 B. & C. 245.

(b) If a mortgagee enter for breach of condition, and order a lessee in possession to pay him the rent; though the entry be not such as is necessary for foreclosure, it will still give the mortgagee a title to the rent as against the mortgagor. Stone v. Patterson, 19 Pick. 476.

34. A mortgagee in possession, being the legal owner of the inheritance, has power at law to commit *waste*. (See ch. 31, s. 52.) But a court of chancery will restrain him from doing it, unless the security is defective; or will decree an account of the trees cut down, and an application of the proceeds to pay, first the interest, and then the principal, of the mortgage debt.(1)(a) In Maine, a question has been made, whether a mortgagee after entry may cut and carry away for sale, timber and other trees. He must account for the proceeds of timber cut by a third person, which are received by him.(2)

35. A mortgagee in possession cannot make a lease of the land to bind the mortgagor, unless there be an absolute necessity for it;(b) and if the mortgagor bring a bill in equity for reconveyance, and tender the amount due, although the mortgagee set up such lease in his answer, and offer to reconvey upon the plaintiff's assenting thereto, a reconveyance will be decreed free from this condition.(3)

(1) *Hanson v. Derby*, 2 Vern. 392; Sel. Cas. in Chan. 30; 2 Cruise, 81. See *Evans v. Thomas*, Cro. Jac. 172; *McCormick v. Digby*, 8 Blackf. 99.

(2) *Blaney v. Beace*, 2 Greenl. 132; *Gore v. Zeneess*, 1 Appl. 53. (See *infra* 31.)
(3) *Hungerford v. Clay*, 9 Mod. 1.

A tenant of the mortgagor, if the mortgage be forfeited during his lease, may attorn to, and take a lease from, the mortgagee, and the mortgagor can then maintain no action for the rent. *Jones v. Clark*, 20 John. 51; *Magill v. Hinsdale*, 1 Conn. 464; *Jackson v. Delancy*, 11 John. 365. But mere notice to a lessee by the mortgagee will not make him his tenant. *Johnson v. Jones*, 9 Ad. & Ell. 809; *Evans v. Elliott*, Ib. 342.

A mortgagee remained in possession six years, without acknowledgment of the mortgagor's title, bought out a tenant for life of the equity, and occupied twenty years more. Held, his occupancy was not adverse during the tenancy for life, and the reversioner might redeem. *Hyde v. Dallaway*, 2 Hare, 528.

In connection with the subject of leases made by a mortgagor, may be stated the rule of law applicable to the liability on the part of the mortgagee, created by a mortgage of leasehold property.

It was once held that, where a leasehold is assigned by way of mortgage, the mortgagee does not, like other assignees, become liable to the covenants of the lease *immediately*, but only after entry. But the law seems to be now settled otherwise. To guard against this consequence of an assignment, it is usual to mortgage a term by way of under-lease. But the mortgagee thereby loses the right of *renewal*, which he would have as assignee. The mortgagee is liable only for rent due after the mortgage is made, not for prior instalments. *Eaton v. Jaques*, Doug. 457; *Williams v. Bosanquet*, 1 Brod. & B. 238; 2 Cruise, 103, n. a.; 1 Pow. on Mort. 197, n. 1; *Blaney v. Bearce*, 2 Greenl. 132; *Astor v. Miller*, 2 Paige, 68; *Morris v. Mowatt*, Ib. 586; *McMurphy v. Minot*, 4 N. H. 251.

Devise to A, B and C, subject to a life estate, and charged with the payment of £200, a legacy to the children of the testator's niece. Before the death of the tenant for life, A and B conveyed their reversion by way of mortgage for 500 years. Held, an action of debt would not lie against the mortgagees for the legacy. *Braithwaite v. Skinner*, 5 Mees. & W. 313.

(a) So a mortgagee will be held liable for pulling down cottages on the land. *Sandon v. Hooper*, 6 Beav. 246.

(b) Otherwise by the civil law. 1 Dom. 356.

CHAPTER XXXI.

EQUITY OF REDEMPTION—NATURE OF THE ESTATE—WHO MAY REDEEM, ETC.

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| <ol style="list-style-type: none"> 1. Distinction between an equity of redemption and a trust. 2. Mortgagor has seizin. 3. Curtesy. 4. Dower. 8. Whether assets. 9. Subject to legal process. 12. Who may redeem. 13. Subsequent incumbrancers. 16. Dowress, &c.—on what terms. | <ol style="list-style-type: none"> 22. The Crown. 22 <i>a.</i> Heirs, &c. 23. Whether the whole debt must be paid. 25. <i>Tacking.</i> 29. Whether known in U. S. 30. Future advances, &c. 37. <i>Time</i> of redemption. 43. No redemption in case of <i>fraud</i>. 45. Terms of redemption—account—repairs interest, &c. |
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1. AN equity of redemption has been held to resemble a *trust*. But in some respects the rights of a mortgagor are better protected by the law, than those of a *cestui*. A trust is said to be created by the contract of the party, and therefore subject to his directions. But an equity of redemption is *inherent in the land*, and, as has been seen, not liable to be impaired even by express restrictions. It is in fact the creature of a court of equity, and not an interest reserved by the parties. The former, anciently, did not bind a party coming to the estate *in the post*; while the latter adhered to the estate, into whose hands soever it might come.(1)(a)

2. A mortgagor, after breach of condition, if in possession, has, in the view of a court of equity, an equitable seizin, equivalent to a legal seizin in the view of a court of law. Hence, his estate is subject to conveyance, devise, descent, entailment, mortgage, and to be charged with an annuity. It is not *a mere right*, but *an estate in the land*, whereof in equity there may be a seizin. The mortgage itself being only a

(1) *Pawlett v. Att'y-Gen.*, Hard. 469; 17 Ves. 133; 2 Cruise, 88; *Wood v. Jones*, Meigs, 513.

(a) An equity of redemption is *a title in equity*, not merely a *trust*. 1 Sand. Us. 203. See *Sampson v. Pattison*, 1 Hare, 533; *Downe v. Morris*, 3 Hare, 404. A mortgage deed does not *per se* create a trust; it conveys the estate subject to a condition. The mortgagee is not accountable to any one until he enters, takes possession, and receives the rents and profits, in which case he may in some sense be considered as a trustee, for he is to render an account; but this must be done in the manner and for the purposes provided in the several statutes for redeeming mortgages, and he is not trustee in any other light. Hence, under the statute giving equity jurisdiction of trusts to the Supreme Court in Massachusetts, the assignee of a mortgagor cannot maintain a bill for injunction against the mortgagee, who is proceeding to recover possession at law; and for a decree that the mortgage be cancelled. *Hunt v. Maynard*, 6 Pick. 489. See *Eastman v. Foster*, 8 Met. 19.

A mortgagee is not precluded, by the nature of his relation to the mortgagor, from buying the land, under a mortgage sale, at a low price. *Mott v. Walkley*, 3 Edw. 590. Conveyance to A in trust, chargeable with a certain sum, subject thereto in trust for B, and with a power of sale to A. Held, A could not *foreclose*. 1 Hare, 533. See, as to the nature of the estate or title called an equity of redemption, *Burgess v. Wheate*, 1 N. Bl. 145; *Preston v. Christmas*, 2 Wils. 86; *Viscount, &c. v. Morris*, 3 Hare, 407; *Asay v. Hooner*, 5 Barr, 21; *Borst v. Boyd*, 3 Sandf. Ch. 501; *Silvester v. Jarman*, 10 Price, 84; *Coates v. Woodworth*, 13 Illin. 654; *Chapman v. Mull*, 7 Ired. Equ. 292; *Clarke v. Sibley*, 13 Met. 210; *Hewitt v. Huling*, 11 Penns. 27; *Pratt v. Thornton*, 28 Maine, 355; *Bank, &c. v. Whyte*, 1 Md. Cha. 536.

chose in action, unless the ownership of the land is in the mortgagor, it is in nobody. The interest of the latter is no otherwise a right of action than every *trust*, which, though not to be executed but by *sub-pœna* out of Chancery, is still regarded as real estate.(1) In South Carolina and Pennsylvania, the right of redemption is not an equitable, but a strictly legal right.(2)

3. On the same principle, an equity of redemption is subject to *curtesy*, if the wife is in possession of the land during coverture. For, though such possession is a mere tenancy at will, it is in equity that of *the real owner*, subject only to a pecuniary charge. Nor is the husband to be deprived of curtesy on the ground of *laches*, in not paying off the mortgage and thereby acquiring an absolute title, by analogy to the rule which requires of him actual entry upon a legal estate of the wife; for the payment of a mortgage is a far more difficult matter than a mere entry upon land; besides that the mortgagee is entitled to notice, before he is bound to accept such payment. Upon these grounds, a decision of Sir Joseph Jekyll, disallowing curtesy in an equity of redemption, was reversed by Lord Hardwicke.(3)

4. But, in England, independently of an express statute, an equity of redemption is not subject to *dower*. In this respect, it is placed on the same footing with a *trust*.(4) In one case, (*Banks v. Sutton*),(5) the Master of the Rolls said, he did not know, or could find any instance, where dower of an equity of redemption was controverted and adjudged against the dowress; and decreed in favor of the claim. But afterwards, (in *Attorney-General v. Scott*),(6) Lord Talbot made a contrary decision in regard to a trust, which has been since uniformly adhered to. And no peculiar equities on the part of the wife will operate to change the rule in her favor; as, for instance, the facts, that the husband expressed his expectation and desire that she should have dower, and was so instructed by the person who drew his will; that the wife is left for the most part otherwise unprovided for; and that certain articles of luxury, such as a coach and horses, and plate, are bequeathed to her, for which she can have no use without dower to support her.(7)(a)

5. In the United States, the English rule is not adopted. It has been seen, that in several of the States dower is allowed, by express statute, in all *equitable* estates; and decisions to the same effect, in regard to equities of redemption, have been made in New York, Connecticut and Massachusetts. Chancellor Kent says, that dower is allowed in equities of redemption in Massachusetts, New York, Con-

(1) 2 Cruise, 113; 2 Abr. Eq. 728; *Casborne v. Scarle*, 1 Atk. 603; *Ellithorpe v. Dewing*, 1 Chpm. 140.

(2) *State v. Laval*, 4 M'C. 340; *Anderson v. Neff*, 11 S. & R. 223.

(3) *Casborne v. Inglis*, 2 Abr. Equ. 728; 1 Atk. 603.

(4) 2 Cruise, 122.

(5) 2 P. Wms. 719.

(6) For. 138; 1 Cruise, 444.

(7) *Dixon v. Saville*, 2 Cruise, 117.

(a) By a recent statute, dower is allowed in equitable estates. In Maryland, and the Maryland part of the District of Columbia, the old English rule prevailed, till expressly changed by statute in the year 1818. See *Miller v. Stump*, 3 Gill, 304; *M'Iver v. Cherry*, 8 Humph. 713; *Stelle v. Carroll*, 12 Pet. 201; *Mayburry v. Brien*, 15 Ib. 21.

necticut, New Jersey, (a) Pennsylvania, Virginia, Alabama, Indiana, and probably most or all of the other states. (1)

6. Thus, if the executor, &c., of the husband redeem the mortgage, the widow shall have dower. (2)

7. Even in England, where a mortgage is made *for years*, and not in fee, dower is allowed in the equity of redemption. If the mortgage has been satisfied, Chancery will remove the term for the benefit of the widow; if not, she will be bound to pay one-third of the interest or of the principal. (3)

8. In England, an equity of redemption was formerly not legal *assets* in the hands of the heir, but he might plead "*riens per descent*." Since the statute of frauds, like a trust, it has been held to be assets in equity; but only to pay debts of that description, to which the land would have been liable, if it had been a legal estate. Where the mortgage is made for years, the equity, being incident to the reversion in fee, is, like the latter, *legal assets*. (4) By St. 3 and 4 Wm. IV, c. 104, equities of redemption, generally, are made legal assets.

9. In England, an equity of redemption has been held not liable to be taken on *execution*. (5) And it has been doubted, whether this principle is changed by St. 1 and 2 Vict., c. 110. But a *judgment* is a lien upon an equity of redemption. But, in the United States, equities of redemption are almost universally made subject to legal process for the debts of the mortgagor. This subject will be considered hereafter. (6) (See ch. 35.)

10. On the other hand, the interest of a mortgagee cannot be taken upon execution before foreclosure. (6)

11. Although an equity of redemption is liable to be taken on execution by third persons, the mortgagee himself shall not be allowed to take it upon a judgment recovered for the mortgage debt; because a

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| <p>(1) 4 Kent, 44; Cooper v. Whitney, 3 Hill, 95. See, also, Mich. Rev. Sts. 262, 263; Ark. Rev. Sts. 337; Verm. Rev. Sts. 289; Wisc. Rev. Sts. 333; Thompson v. Boyd, 1 N. J. 58; 2, 543; Tabele v. Tabele, 1 John. Cha. 45; Titus v. Neilson, 5, 452; Mantz v. Buchanan, 1 Md. Ch. 202; Hoogland v. Watt, 2 Sandf. Cha. 148; Denton v. Nanny, 8 Barb. 618; Frost v. Peacock, 4 Edw. Cha. 678; Bolton v. Ballard, 13 Mass. 229; Hildreth v. Jones, 13 Ib. 525; Niles v. Nye, 13 Met. 135; Lund v. Woods, 11 Met. 566; Wedge v. Moore, 6 Cush. 8; Raynham v. Wilmarth, 13 Met. 414; Gage v. Ward, 25 Maine, 101;</p> | <p>Littlefield v. Crocker, 30, 192; Rossiter v. Cossit, 15 N. H. 38; Clough v. Elliott, 3 Foster, 182; Matthewson v. Smith, 1 Ang. 22; Danforth v. Smith, 23 Verm. 247; Brown v. Lapham, 3 Cush. 553; Tillinghast v. Fry, 1 Ang. 53; Van Vronker v. Eastman, 7 Met. 157; Thayer v. Richards, 19 Pick. 398; Henry's case, 4 Cush. 257.
(2) 13 Mass. 227, 525.
(3) 2 Cruise, 123.
(4) 2 Cruise, 123-4.
(5) Plunket v. Penson, 2 Atk. 290; Forth v. Duke, &c., 4 Madd. 501; Coote, 79, 80.
(6) 1 Pow. 255, n. 1. (See ch. 32.)</p> |
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(a) In this State, a contrary doctrine was formerly held. Montgomery v. Bruere, 1 South. 260. In Ohio, where the condition is broken before marriage, and the equity of redemption released after, there is no dower. Rands v. Kendall, 15 Ohio, 671.

(b) In that part of the District of Columbia ceded by Maryland, they are not thus liable. Van Ness v. Hyatt, 13 Pet. 294. See, also, for the law in South Carolina, State v. Laval, 4 McC. 340; Hill v. Smith, 2 McL. 448.

In New York, an equity of redemption is held liable to execution, by the common law of that State. Jackson v. Willard, 4 John. 41; Hitchcock v. Harrington, 6, 290; Collins v. Torry, 7, 278.

shorter time is allowed for redeeming an equity, sold on execution, than for redeeming the land itself.(1)(a)

12. With regard to the persons who are entitled to redeem, it is of course to be understood, that any party in whom the law vests an equity of redemption, either by its own operation, or by his voluntary act, may redeem the mortgage; indeed, the latter part of the proposition is a mere repetition of the former, since an equity of redemption is itself nothing else but the right or power to redeem. It seems, any one may redeem a mortgage, who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him.(2)(b)

13. Any *subsequent incumbrancer* may redeem, and thereby take the place of the prior one; such as a judgment creditor, in those States where a judgment constitutes a lien on real estate.(c) And in England, the *cognizee of a statute*, (see ch. 29, sec. 1, n.,) acknowledged after the filing of a bill for foreclosure, has been allowed to redeem even after the foreclosure, if recent, and although the mortgagee had no notice. So where a tenant mortgages for years, and the land escheats, the lord

<p>(1) <i>Atkins v. Sawyer</i>, 1 Pick. 351; <i>Camp v. Cox</i>, 1 Dev. & B. 52; <i>Goring v. Shreve</i>, 7 Dana, 64; <i>Palmer v. Foote</i>, 7 Paige, 437; <i>Waller v. Tate</i>, 4 B. Mon. 531; <i>Lyster v. Holland</i>, 1 Ves. jun. 431; <i>Tice v. Annin</i>, 2 John Ch. 130.</p>	<p>(2) <i>Gibson v. Crehore</i>, 5 Pick. 149; <i>Grant v. Duane</i>, 9 John. 591; <i>Ib.</i> 611; <i>Smith v. Manning</i>, 9 Mass. 422; 4 Kent, 156; <i>N. Y. St.</i> 1838, 262; <i>Parvis v. Brown</i>, 4 Ired. Equ. 413; <i>Boarman v. Catlett</i>, 13 Sm. & M. 149.</p>
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(a) But where a negotiable note secured by mortgage is assigned without the mortgage, the equity of redemption may be attached and sold on execution by the indorsee. *Crane v. March*, 4 Pick. 131.

One holding a note secured by mortgage, indorsed the note and assigned the mortgage to a third person. The mortgagor afterwards died, having devised all his real estate to the mortgagee. The latter gave his own note to the assignee for the amount of the first note, with the interest which had accrued on it, the second note bearing a memorandum, that when paid it would discharge the first. The assignee retained the first note, brought a suit on the second, recovered judgment, levied on the right of redemption, and indorsed the proceeds on the first note in part payment. In an action brought by the purchaser of the equity, held, the levy was void, the facts showing a sale in behalf of the mortgagee of the right of redemption, for the purpose of paying the mortgage debt. *Washburn v. Goodwin*, 17 Pick. 137.

In New York, an equity of redemption cannot be sold, upon an execution founded on a judgment at law, for the mortgage debt. 2 Rev. St. 368.

In Pennsylvania, the sale of land mortgaged, under an execution upon the debt, extinguishes the incumbrance and passes an absolute title to the purchaser. *Pierce v. Potter*, 7 Watts, 475. If the mortgagee purchases the land for less than the debt, the mortgagor cannot compel an entry of satisfaction on the mortgage. *Ib.*

In Kentucky, it is held, that, although an equity cannot lawfully be sold on execution, in a suit by the mortgagee; yet, if sold, and if the purchaser pay the mortgage debt, he stands in the place, and succeeds to the rights, of the mortgagee. *Goring v. Shreve*, 7 Dana, 221. If land be mortgaged to a surety as indemnity, it cannot be taken on execution for the debt. *Bronson v. Robinson*, 4 B. Monr. 143. See *Roe v. Couch*, 1 Root, 452; *Buck v. Sherman*, 2 Doug. (Mich.) 176; *Bratton, &c.*, 8 Barr, 164; *Mott v. Clark*, 9, 399; *Towers v. Tuscarora, &c.*, 8, 297; *Hartz v. Woods*, *Ib.* 471; *Cathcart's, &c.*, 13 Penns. 416; *Klock v. Cronkhite*, 1 Hill, 108; *Brouster v. Robinson*, 4 B. Mon. 143; *Freeby v. Tupper*, 15 Ohio, 467.

(b) Thus, a lessee, who took a lease after the mortgage. So, it seems, the holder of a mere easement in the land. *Bacon v. Bowdoin*, 22 Pick. 401. Where one co-tenant conveys a parcel of the land by metes and bounds, takes back a mortgage and assigns it; a lessee for years from the mortgagor may redeem the mortgage from the assignee, if he has no title under the other co-tenant. *Ib.* 2 Met. 591.

(c) In New Hampshire, an attaching creditor. *N. H. St.* 1845, 233. But not, in general, a mere equitable owner, such as a *cestui que trust*; nor one having a mere *personal claim*, such as an annuitant, or a party holding a *contract* in relation to the land. 2 Story's Equ. sec. 1023; *Upham v. Brooks*, 2 W. & M. 407; *Porter v. Read*, 1 Appl. 363.

of the manor may redeem. So, the assignee of a bankrupt; even a *proving* assignee, who buys an equity long abandoned for a trifling sum.(1)

14. In Massachusetts, where an equity of redemption is attached, the owner may still make another mortgage of it, and the second mortgagee, or his assignee, may redeem from the execution purchaser.(2)

15. On the same principle, the purchaser of an equity of redemption, sold upon execution against the mortgagor, may redeem the mortgage.

16. A dowress or jointress may redeem. So, a tenant by the curtesy.

17. In one case, in Massachusetts,(3) it was doubted, on account of the court's limited equity jurisdiction, whether a widow could redeem, for the purpose of entitling herself to dower. But it seems to be now well settled that she may. But dower is subject to the rights of the mortgagee, and he may defend against the claim till his mortgage is satisfied.

18. It has been heretofore held, that, where a purchaser of the equity of redemption pays the mortgage debt, and takes an assignment of the mortgage, the widow cannot redeem without paying the whole debt. But a recent case in Massachusetts decides, that a wife who signed the mortgage, releasing her dower, may redeem after the husband's death, by paying her proportion of the debt, estimated according to the value of the rest of the estate, including the reversion. If another person, claiming under the mortgagor, redeems, she will be entitled to her share of the land, by paying her share of the debt, according to the value of her life interest in one-third of the estate.(4)(a)

(1) *Crisp v. Heath*, 7 Vin. Abr. 52; 2 Litt. 334; *Bank, &c. v. Carroll*, 4 B. Monr. 45; *Downe v. Morris*, 3 Hare, 404; 1 Pow. 262 a, 263 a. Whether a second mortgagee can redeem from one who purchases at a sale under the first mortgage, *qu. Ib.* In Alabama, a second mortgagee may either pay the first mortgage, and then file a bill to have a sale for payment of both mortgages, or he may file a bill for foreclosure without payment, making all necessary parties, and have a de-

eree for sale to pay both. *Cullum v. Irwin*, 4 Alab. (N. S.) 452; *Chambers v. Mauldin*, 4 Alab. (N. S.) 477.

(2) *Bigelow v. Willson*, 1 Pick. 485. See ch. 32.

(3) *Bird v. Gardner*, 10 Mass. 364. See *Wilkins v. French*, 2 Appl. 111.

(4) *Van Duyne v. Thayer*, 14 Wend. 233; *Gibson v. Crehore*, 5 Pick. 146; 5 John. Cha. 482; *Cass v. Martin*, 6 N. H. 25; *Van Vroncker v. Eastman*, 7 Met. 157.

(a) Where a wife pledges her own land for a debt of the husband, she has all the rights of a surety. But, if she joins in a mortgage of his land, she cannot claim that it be satisfied from his interest alone, so as to give her a right of dower. *Hawley v. Bradford*, 9 Paige, 200. In case of a sale under the mortgage, she shall have dower only in the surplus remaining after payment of the debt; but the costs of suit will not be allowed as against her. *Ib.*

In Michigan, if the heir or other representative of the mortgagor redeem the land, the widow may either pay her share and take one-third of the land, or take so much less than a third as will be equivalent to her share of the debt. *Mich. Rev. St.* 262-3.

In Arkansas, where land subject to mortgage is sold for the mortgage debt after the husband's death, she will be entitled to the interest of one-third of any surplus. *Rev. St.* 337. In Vermont, the widow of a mortgagor has dower upon payment of her proportion of the debt, under direction of the Probate Court. If the heir, &c., pay the debt, she has one-third of the land, deducting the value of the payment. The administrator is required to pay the mortgage, if for the benefit of those interested to redeem, either from the personal, or by sale of the real estate. If there is sufficient personal estate, the court may order dower in the whole land. *Verm. Rev. St.* 289.

19. If the purchaser of an equity of redemption takes an assignment of the mortgage, and continues in possession of the land more than three years from such assignment, the condition having been broken before the sale, and then the husband dies; the widow may redeem, unless she has had notice of his being in possession for condition broken. And, in such case, the defendant shall account only for rents received, and be allowed only for repairs made, since the husband's death.(1)

20. A mortgagor devised the estate mortgaged to his son, who died, leaving a widow. The executor sold the equity, purchased it himself, and redeemed the mortgage, paying one-half of it with assets in his hands as executor, according to the directions of the will, and the rest with his own funds. The sale was affirmed by the son's widow and heirs. Held, the widow should have for her dower the interest for her life of one-third of the price of the equity, and one-third of the amount paid from the testator's estate to extinguish the mortgage.(2)

21. A mortgaged land, his wife, B, joining, to release her dower. After the death of A, his administrator sold the equity of redemption to C, who took possession of the land. C then paid the mortgage debt, took an assignment of the mortgage, and afterwards made a declaration that he held for the purpose of foreclosure. B had no notice of his purpose to foreclose, and brought a bill in equity to redeem. Decreed for the plaintiff, and that the defendant should account from the time of assignment.(3)(a)

22. In England, *the crown* may redeem a mortgage on an estate forfeited for crime.(4)

22 a. In case of the mortgagor's death, his heir or assignee alone can redeem. And, even though the estate be insolvent, this is no ground of objection to a redemption by the heirs; more especially after the lapse of a long time from the mortgagor's death, during which the creditors have done no act towards redemption.(5)

23. A party interested cannot redeem a mortgage, without paying *the whole debt*; (but see sec. 18,) and, if he has only a partial interest in the property, he will stand in the place of the party, whose interest in the estate he discharges. The mortgagor cannot claim to have a part of the land estimated for the purpose of payment, and thereby entitle himself to redeem the rest by paying the balance of the debt. And the whole debt must be paid, though the whole or a part of it has been separated from the mortgage, and is owned by a different person. In carrying into effect the right of redemption, equity may *marshal* the

(1) *Eaton v. Simonds*, 14 Pick. 98.

(2) *Jennison v. Hapgood*, 14 Pick. 345.

(3) *Gibson v. Crehore*, 5 Pick. 146.

(4) 2 Cruise, 127.

(5) *Smith v. Manning*, 9 Mass. 422; *Elliot v. Patton*, 4 Yerg. 10; *Shaw v. Hoadley*, 8 Blackf. 165; *Wells v. Morse*, 11 Verm. 17.

(a) A mortgagor may devise his equity in lieu of dower. So, the Probate Court may assign it. The widow may then redeem, or the heir, who may then eject her till she refunds. *Wilkins v. French*, 2 Appl. 111. Where one of several mortgagees was to have possession of part of the premises for life, and a pecuniary provision, under certain circumstances, not exceeding a particular sum; held, a tender by the widow to an assignee of the husband of a sum of money, as an indemnity against such provision, did not discharge the mortgage, or give her a claim to dower. *Ballard v. Bowers*, 10 N. H. 500. The husband or his assignee would be entitled to possession, and the widow to dower, until a claim made for such provision. *Ibid*.

burden among the respective claimants, according to their respective proportions.(1)

24. One person, having a partial interest in property mortgaged, cannot compel other owners to contribute for its redemption; because, a foreclosure may perhaps be for their benefit. But, if he redeem alone, he may hold the whole till he is reimbursed. He is an assignee, and stands in the place of the mortgagee. So, if one of several mortgagees, in a subsequent mortgage, elects not to pay his share in redeeming a prior one; the others, who do redeem, have a prior lien for the sum paid, and may in equity compel the former to pay his share, or convey his interest to themselves.(2)(a)

25. In England, agreeably to the maxim, that "he who will have equity must do equity," it has been held, that a mortgagor cannot redeem the mortgaged estate, without paying not only the mortgage debt, but a subsequent bond given by him to the mortgagee for money borrowed. But this doctrine was not adhered to with respect to the mortgagor himself. It is, however, still retained as against *the heir or devisee* of the mortgagor; for a bond debt of the ancestor becomes his own, and the descended estate is assets in his hands; and, therefore, he will not be allowed to redeem without paying it.(3)

(1) 4 Kent, 162-3-4; *Calkins v. Munsell*, 2 Root, 333; *Noyes v. Clark*, 7 Paige, 179; *Robinson v. Leavitt*, 7 N. H. 97; *Johnson v. Candage*, 31 Maine, 28; *Spring v. Haines*, 8 Shepl. 126. See *Jenness v. Robinson*, 10 N. H. 215. It is said, one mortgagor cannot redeem and take a conveyance of the land, without the consent of the other. *Porter v. Clements*, 3 Pike, 464.

(2) 5 Pick. 152; *Messiter v. Wright*, 16, 153; *Saunders v. Frost*, 5 Ib. 259. See *Brooks v. Harwood*, 8, 497; *Chittenden v. Barney*, 1 Verm. 28; *Smith v. Kelly*, 27 Maine, 237; *Hubbard v. Ascutney*, &c., 20 Verm. 402; *Brown v. Worcester*, &c., 8 Met. 47.

(3) 2 Cruise, 127-134. See *White v. Hillacre*, 3 Y. & Coll. 597; *Grugeon v. Gerrard*, 4, 119; *Second, &c. v. Woodbury*, 2 Shepl.

281; *Williams v. Owen*, 13 Sim. 597; *Aldworth v. Robinson*, 2 Beav. 287; *Young v. English*, 7 Beav. 10; *Watts v. Symes*, 8 Eng. L. & Equ. 247; *Brace v. Duchess*, &c., 2 P. Wms. 491; *Gray v. Jenks*, 3 Mas. 522; *White v. Hillacre*, 3 Y. & Coll. 608; *Harrison v. Ferth*, Pre. Cha. 61; *Edmunds v. Povey*, 1 Vern. 187; *Barnett v. Weston*, 12 Vez 130; *Purefoy v. Purefoy*, 1 Vern. 29; *Shuttleworth v. Laycock*, 2 Vern. 286; *Margrave v. Le Hooke*, Ib. 207; *Pope v. Onslow*, Ib. 286; *King*, 1 Atk. 300; *Titley v. Davis*, 2 Y. & C. (N. R.) 399; *Roe v. Soley*, 2 Bl. 726; *Demainbray v. Metcalf*, Pr. Cha. 421; *Cator v. Charlton*, Coote, 468; *Collett v. Munden*, Ib; *Jones v. Smith*, Ib; *Hooper*, 19 Vez. 477; *Ireson v. Denn*, 2 Cox, 425; *Bowker v. Bull*, 1 Sim. (N.) 29.

(a) Where a suit for foreclosure is brought against more than one defendant, it will not be delayed to give them opportunity of litigating their own mutual rights; unless it appear, upon a cross bill filed by them, that this is absolutely necessary for their protection. *Farmers, &c. v. Seymour*, 9 Paige, 538.

A mortgagor of two parcels of land, who conveys one of them, cannot compel his grantee to contribute to a redemption of the mortgage. *Allen v. Clark*, 17 Pick. 47. But if, after such conveyance, together with a mortgage back for the purchase-money, the mortgagor convey the other parcel to another grantee, and become insolvent, and the second grantee refuse to contribute to a redemption, the first grantee, upon redeeming, may claim an assignment of the mortgage, and thus compel contribution. Ib.

Mortgage of two lots of land. The right of redeeming one was transferred to A, and the right of redeeming the other to B, and the mortgagee afterwards released the former. Held, B, in redeeming, could not compel A to contribute, but was entitled to an abatement of such proportion of the sum due on the mortgage, as the value of A's parcel bore, at the time of making the mortgage, to the value of both parcels. *Parkman v. Welch*, 19 Pick. 231.

If a mortgage debt is payable by instalments, and for non-payment of the first of them the mortgagee enters, and after all have become due the mortgagor brings a bill to redeem; he will be required to pay the whole debt, as the condition of redemption. *Mann v. Richardson*, 21 Pick. 355.

If, in such case, a part of the instalments are not due, and the mortgagee refuses to re-

26. The same doctrine has been applied, where one who has loaned money upon land afterwards takes an assignment of a mortgage made by the borrower. So, if part of a debt is paid, and more money borrowed upon a defective security, the mortgagor shall not redeem without paying the whole amount due.

27. But the principle is not adopted, as against an assignee of the equity of redemption, or any subsequent incumbrancer; who may always redeem, without paying any independent claim held by the mortgagee against the mortgagor.

28. It has been said, that, here one makes two distinct mortgages of separate estates, one of which proves defective in title or value; neither he, nor a purchaser of one of the estates holding under him, will be allowed to redeem one, without redeeming both.(1)

29. The rules above stated, by which equity imposes upon a party, who seeks its aid in redeeming a mortgage, terms that are not provided for by the mortgage itself; have been said to be, in some particulars, solely matters of arrangement, to prevent a circuitry of suits, and to have no foundation in natural justice. They are strikingly at variance with the *registration system* universally practised upon in the United States, and, chiefly on this ground, perhaps, have never been generally adopted as a part of American law.(2)(a) In Massachusetts, Vermont, New Jersey, Tennessee and Illinois, cases have occurred, in which the courts have had occasion to advert to them, but have denied their binding force in those States. While in Maryland, Virginia and Connecticut, they have been to some extent recognized and enforced.(3)

30. In this connection we may consider the question, which has been somewhat discussed, how far a mortgage may be made to operate as security for future advances made, or liabilities incurred, by the mortgagee. The principle is said to be, that subsequent advances cannot be tacked to a prior mortgage, to the prejudice of a *bona fide* junior incumbrancer; but a mortgage is always good to secure future loans, when there is no intervening equity. In other words, where a mortgage is expressly made to cover future debts, these debts will be secured by it, in preference to the claim of a third person, who takes another mortgage between the making of the first and the incurring of the proposed future debts, with notice, express or implied, of the first

(1) 2 Cruise, 127-34.

(2) Loring v. Cooke, 3 Pick. 48.

(3) Lee v. Stone, 5 Gill & J. 21-2; 2 Swift, 186-7; Scripture v. Johnson, 3 Conn. 213. But, in Maryland, tacking is now unknown. Coombs v. Jordan, 3 Bland, 330. And a mortgage is valid only for what appears upon the face of it. Md. L. 825; Hopper v. Sisco, 1 Halst. Cha. 343, n.; Loring v. Cooke, 3 Pick. 48; Van Vronker v. Eastman, 7 Met.

157; Green v. Tanner, 8 Met. 411; Hicks v. Bingham, 11 Mass. 300; Green v. Chester, 7 Humph. 77; Lawson v. Sutherland, 13 Verm. 309; Frye v. Bank, &c., 11 Illin. 367; Lee v. Stone, 5 Gill & John. 21-2; Md. L. 825; Robertson v. Campbell, 2 Call. 362; Chamberlain v. Thompson, 10 Conn. 251; Orvis v. Newell, 17 Conn. 97; Woodson v. Perkins, 5 Gratt. 345.

ceive them; the court will, by special decree, order that the case stand open, the mortgagee to retain possession till they become due. Ib. See Tillinghast v. Fry, 1 R. I. 406; Towle v. Hait, 14 N. H. 61. The rule stated in the text does not necessarily operate to debar a party from redeeming part of the land, because the right of redeeming another part has been lost. Dexter v. Arnold, 1 Sumn. 118.

(a) The doctrine of *tacking* was first attacked and exploded in the case of Grant v. U. S. Bank, 1 Caines Cas. in Er. 112; in which Gen. Hamilton made a celebrated argument against it.

mortgage. But a mortgage cannot be enlarged by tacking subsequent advances to it in virtue of a parol agreement; nor, it seems, under a written contract, unless the subsequent mortgagee has full notice of it.(1) It has been held, that a mortgage may be given to secure future advances, or as a general security for future balances. So, when a mortgagee has indorsed bills in blank, and taken the mortgage as security, it is not affected by subsequent mortgages, though made before the bills are put in circulation. So, a mortgage is good to secure a future book account.(2) It is said,(3) the question of the validity of such a mortgage may arise under several different aspects. One inquiry is, what language in the deed itself, or what evidence independent of the deed, is necessary and sufficient to create such a security. Another consideration is, whether the question is between the parties to the mortgage, or between the mortgagee and creditors of the mortgagor, or subsequent incumbrancers; also, how far such creditors and incumbrancers are bound by the registration of the first mortgage, and the first mortgagee by a registration of the second mortgage, in reference to all subsequent advances.

31. To render a prior mortgage valid against subsequent incumbrances, the condition of the former need not be so completely certain, as to preclude the necessity of extraneous inquiry, but only sufficiently definite to give the necessary information, with the exercise of common prudence and diligence.(4)(a)

32. A mortgage from A to B, dated May 18, was conditioned as follows—"whereas B has indorsed for A a note for \$1,000, and has agreed to indorse \$1,000 in a note or notes, hereafter, when thereto requested;" if A shall pay said notes, the deed to be void. June 16, B indorsed a note for A for \$1,000, which B was afterwards obliged to pay. In November, A mortgaged the same land to C, a *bona fide* creditor. On a bill for foreclosure by B against C, held, the mortgage was a valid security for the second note.(5)

(1) 4 Kent, 175; James v. Morey, 2 Cow. 292; Heudricks v. Robinson, 2 John. Cha. 309; Averill v. Guthrie, 8 Dana, 83; Leeds v. Cameron, 3 Sumn. 492; Walling v. Aiken, 1 M'Mul. 1; *Ec parte* Hooper, 19 Ves. 477; Walker v. Snediker, 1 Hoffm. 146; Johnson v. Bowie, 2 Y & Coll. 268; Welland v. Gray, Ib. 199; Watson v. Dickens, 12 Sm. & M. 608; Craig v. Tappin, 2 Sandf. Cha. 78; Quinebaug, &c. v. French, 17 Conn. 129; Torrey v. Bank, &c., 9 Paige, 649; North v. Crowell, 11 N. H. 251; McDaniels v. Colvin, 16 Verm. 300; Collins v. Carlile, 13 Illm. 254; Bank v. Finch, &c., 3 Barb. Cha. 297; Lewis v. De Forest, 20 Conn. 427; Mix v. Cowles, 20 Conn. 420; Hawkins v. May, 12 Ala. 673;

Kramer v. Bank, &c., 15 Ohio, 253; Gordon v. Graham, 2 Equ. Cas. Abr. 598; Truscott v. King, 6 Barb. 346; Stuyvesant v. Hall, 2 Barb. Ch. 151; Bank, &c. v. Christie, 8 Cl. & Fin. 214.

(2) Bank, &c. v. Finch, 3 Barb. Ch. 293; Burdett v. Clay, 8 B. Mon. 287; McDaniels v. Colvin, 16 Verm. 300.

(3) 1 Hill on Mortg. 211

(4) Pettibone v. Griswold, 4 Conn. 158; St. Andrews, &c. v. Tompkins, 7 John. Ch. 14; Garber v. Henry, 6 Watts, 57; Hart v. Chalk-er, 14 Conn. 77.

(5) Hubbard v. Savage, 8 Conn. 215. See Smith v. Prince, Ib. 472.

(a) The condition of a mortgage was, to pay a debt due by note, dated May 10, 1834, on demand, with interest. Held, invalid against a subsequent mortgagee. Hart v. Chalker, 14 Conn. 77. See, also, Vanneter v. Vanneter, 3 Gratt. 148; Spader v. Lawler, 17 Ohio, 371. A mortgage, conditioned to pay all notes, which the mortgagee may give or indorse for the mortgagor, and all receipts which he may hold against him, is void against creditors. Pettibone v. Griswold, 4 Conn. 158. So, a mortgage conditioned to indemnify the mortgagee against a certain note indorsed by him, and all other notes thereafter indorsed by him, for the mortgagor's benefit, not exceeding a certain sum, is void, with respect to the latter notes, against a subsequent incumbrancer. Shepard v. Shepard, 6 Conn. 37.

33. Condition of a mortgage from A to B that, if A shall pay B the sums to be advanced him by B, according to an agreement mentioned in a certain bond of even date from A to B; and fulfil every other agreement mentioned in said bond, and build the bridge therein mentioned, and do all other things contained therein; the deed and bond to be void. A afterwards mortgages to C. Held, the mortgage to B should stand as security for advances made after the mortgage to C.(1)

34. A mortgaged to B, conditioned nominally to secure a certain specified sum, but in reality to secure different sums due at the time, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. Held, although the misrepresentation of the true condition subjected the mortgage to suspicion, yet, as it proved, on inquiry, to be a fair transaction, the mortgagee's claim was good, not only for debts due at the time, but for those subsequently incurred upon the faith of the mortgage, as against all persons except those injured and deceived by the misrepresentation; but that it should not hold to secure advances, made after notice of a subsequent conveyance by, or incumbrance against the mortgagor.(2)

35. A gave to B his note, secured by mortgage, to indemnify B from any loss arising from indorsements subsequently to be made by B for A, which were made accordingly. Held, such note was valid against creditors of A, whose claims accrued after the indorsement.(3)(a)

36. In Maryland, the validity of a mortgage to cover future advances seems to be recognized, though not distinctly decided. So in South Carolina. But in New Hampshire, a late statute seems to render it void.(4) The court in Massachusetts have remarked,(5) that a stipulation in a mortgage, for the security of future advances and responsibilities, may have a fraudulent aspect, or may be satisfactorily explained, according to the attending circumstances. A mortgage made for this consideration alone might be void against creditors, as tending to facilitate collusion, and enabling the mortgagor to get credit on his property without notice of the incumbrance. But, where the object is to secure an existing demand, the addition of a clause, securing future advances, does not necessarily avoid the mortgage. These remarks are evidently directed to the point, whether such a mortgage is *void for the*

(1) *Crane v. Deming*, 7 Conn. 387. See *Booth v. Barnum*, 9 Ib. 286.

(2) *Shirras v. Caig*, 7 Cranch, 34, 50-1.

(3) *Gardner v. Webber*, 17 Pick. 407.

(4) *Union, &c. v. Edwards*, 1 Gill & J. 363; *Clagett v. Salmon*, 5 Ib. 314; 1 M'Cord's

Cha. 265; N. H. L. 1829, 532; Rev. St. 246.

(5) *Badlam v. Tucker*, 1 Pick. 398; *Atkinson v. Maling*, 2 T. R. 462. See 7 Vin. Abr. 52-3.

(a) A being indebted to B, and B being also liable for him as surety, A gives a mortgage to secure a note, covering the whole amount of debt and liability; and the next day, before any payment by B, as surety, makes an assignment for benefit of his creditors. Held, the mortgage was valid, so far as to secure the debt due to B. *Sanford v. Wheeler*, 13 Conn. 165.

Mortgage to secure a note for \$500, such note being given solely on account of the mortgagee's suretyship for that amount, upon which he afterwards paid the debt. Held, as against a subsequent mortgagee, the mortgage was invalid. *North v. Belden*, 13 Conn. 376. Mortgage to secure A, the mortgagee, as indorser of certain notes. When these fell due, they were renewed by giving others with different names, but the original liability of A remained undischarged, no new credit was given, and he finally paid the new notes. Held, the mortgage was still valid. *Pond v. Clark*, 14 Conn. 334, (overruling *Peters v. Goodrich*, 3 Conn. 146.)

whole; not whether it is effectual to cover the future advances.(a) In another case, Judge Story remarks,(1) that a conveyance may be valid in point of law, although given for future advances, if it be *bona fide*, and for a valuable consideration; that this will hardly be denied, and has been most solemnly settled.(b)

37. With regard to the time within which a mortgage shall be redeemed, although no precise period of limitation is fixed by law, and matters in equity are governed by the course of the court; yet, in analogy to the statute of limitations, uninterrupted possession by the mortgagee for twenty years will raise a presumption, that the right of redeeming is abandoned, more especially as against the heir of the mortgagee.(c)

(1) *De Wolf v. Harris*, 4 Mas. 530.

(a) In New Hampshire, notwithstanding the statute above referred to, (sec. 36,) such mortgage is valid for the amount of present indebtedness. 3 Sumn. 488; *New Hampshire, &c. v. Willard*, 10 N. H. 210.

(b) In a late case in the same State, a note, secured by mortgage, duly recorded, was given by a firm to the plaintiffs, a bank, who at the same time gave the mortgagors a writing, setting forth that the note was held as collateral for other liabilities of the mortgagors to the bank, and that the note and mortgage were to remain for said purposes, so long as the bank should hold any note against the mortgagors, and so long as they should be under any liabilities to the bank; but this instrument was not recorded. Held, the mortgage was not fraudulent as against subsequent purchasers; that new notes, given the bank, whether in renewal of the original ones or not, were covered by the mortgage, though a third person had become a partner with the mortgagors, and the new notes were made or indorsed in the name of the new firm. *Commercial, &c. v. Cunningham*, 24 Pick. 270.

(c) It will be seen that the legal time of limitation is changed in many of the States. The rule in equity varies accordingly. See, as to the effect of lapse of time in equity, *Mitchell v. Thompson*, 1 M'Lean, 105; *Piatt v. Vattier*, Ib. 164; *Scott v. Evans*, Ib. 486; *Cook v. Colyer*, 2 B. Monr. 73; *Dexter v. Arnold*, 3 Sumn. 152; *Wells v. Morse*, 11 Verm. 9; *Humbert v. Rector, &c.*, 24 Wend. 587.

In England, by St. 3 & 4 Wm. IV, ch. 27, sec. 28, the time of redemption is now limited to twenty years next after the mortgagee's taking possession; or from any written acknowledgment given by him to the mortgagor of the right of the latter, if such exists. 1 Steph. 284. See *Hodges v. Croydon, &c.*, 3 Beav. 86; *Du Vigier v. Lee*, 2 Hare, 326.

It has been said, that "the right to foreclose and the right to redeem are reciprocal and commensurable." *Canefman v. Sayre*, 2 B. Monr. 206. So, also, in the case of a mortgagor coming to redeem, that court (equity) has, by analogy to the statute of limitations, which takes away the right of the plaintiff after twenty years' adverse possession, fixed upon that as the period, after forfeiture and possession taken by the mortgagee, no interest having been paid in the meantime, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. In respect to the mortgagee, who is seeking to foreclose, the general rule is, that where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged, by payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption,—as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like." *Hughes v. Edwards*, 9 Wheat. 497-8; acc. *Christophers v. Sparke*, 2 Jac. & W. 235; *Gates v. Jacob*, 1 B. Mon. 309.

The following remarks are made by the court in Massachusetts: "A question has been sometimes raised, whether the doctrine of presumption, arising from the lapse of time and total neglect to take any measure to enforce a claim, could properly be applied to the case of a mortgage of real estate; and, in some of the earlier English cases, the doctrine was advanced, that the common law presumption applicable to bonds, judgments, &c., arising from a delay of twenty years to enforce the same, did not apply in the case of a mortgage; as in such cases the legal estate was in the mortgagee, and the mortgagor was a mere tenant at will, and his possession was therefore the possession of the mortgagee. But this doctrine was repudiated by Lord Thurlow in the case of *Trash v. White*, (3 Bro. C. C. 289,) and by the Master of the Rolls in *Christophers v. Sparke*, in very strong language; and the cases of debts secured by mortgages are placed on the same footing with other demands, and held liable to be defeated by the same presumption, arising from lapse of time and laches of the mortgagee."

The effect of long-continued possession, as has been seen, upon the rights of mortgagee or mortgagor, has been usually made to depend upon general principles or analogies. It has been a point somewhat discussed and variously decided, whether a general statute of

So, where there has been a decree to redeem and account, the lapse of twenty years after such decree, the mortgagee being in possession, will be a bar to redemption. But the same disabilities—coverture, infancy, imprisonment, and absence from the country—which make an exception to the rule of limitation at law, will also save an equity of redemption from being barred in equity. But not *an absconding*, which is an avoiding or retarding of justice. And in equity, as at law, where twenty years had elapsed in the life of the ancestor, no subsequent disability in the heir will take the case out of the rule of twenty years' limitation. Where a bill for redemption itself shows that the mortgagee has had possession above twenty years, it has been held, (though since denied,) that the latter need not plead the limitation, but may demur to the bill. In equity, as at law, in case of disability, the party will, it seems, be allowed not twenty years, but only ten years, after its removal.(1)

38. The limitation above referred to, being founded chiefly upon the difficulty of a mortgagee's accounting after long continued possession, is not applicable, where an account has been settled within twenty years.

39. Thus, after there had been four descents on the part of the plaintiff, and three on the part of the defendant, but the mortgagee, within twenty years, upon a bill for foreclosure, had made up an account; a redemption was decreed. So, where there had been a stated account, with an agreement to turn interest into principal—although the mortgagee had been in possession forty years. So, where within twelve years the clerk of the mortgagor's solicitor had settled an account of what was due, in order to pay off the mortgage, though no farther proceedings were had.(2)

(1) *Gordon v. Hobart*, 2 Sumn. 401; *Agas v. Pickerell*, 3 Atk. 225; 2 Cruise. 135-6; *Phillips v. Sinclair*, 7 Shepl. 269; 1 Ch. Rep. 286; *White v. Ewer*, 2 Vent. 340; *Ashton v. Milne*, 6 Sim. 369; *St. John v. Turner*, 2 Vern. 418; *Cornel v. Sykes*, 1 Ch. R. 193; *Knowles v. Spence*, 1 Ab. Equ. 315; *Jenner v. Tracy*, 3 P. Wms. 287, n.; *Belch v. Harvey*, 3 P. Wms. 287, n.; 1 N. J. R. C. 412; *Dexter v. Arnold*, 3 Sumn. 152; *Bonham v. Newcomb*, 2 Ventr. 364; *Spring v. Haines*, 8 Shepl. 126; *Borst v. Boyd*, 3 Sandf. Ch. 507; *Davis v. Evans*, 5 Ired. 525; *Slee v. Manhattan, &c.*, 1 Paige, 56; *Bond v. Hopkins*, 1 Sch. & Lef. 429; *Martin v. Bowker*, 19 Verm. 526; *McDonald v. Sims*, 3 Kelly, 383; *Field v. Wilson*, 6 B. Mon. 479; *Gates v. Jacob*, 1, 309; *Giles v. Baremore*, 5 John. Ch. 552; *Dunham v. Minard*, 4 Paige, 443; *Cook v. Arnham*, 3 P. Wms. 283; *Newcomb v. St. Peter's, &c.*, 2 Sandf. Ch. 636; *Farrow v. Farrow*, 6 B. Mon. 482; *Evans v. Hoffman*, 1 Halst. Ch. 354; *Morgan v. Davis*, 2 Harr. & Met. 18; *Cook v. Sultan*, 2 Sim. & St. 154; *Dowling v. Ford*, 11 Mees. & W. 329; *Bennett v. Cooper*, 9 Beav. 252; *Noyes v. Sturdivant*, 6 Shepl. 104; *Murray v. Fishback*, 5 B. Mon. 403.

(2) 1 Sumn. 109; *Procter v. Cowper*, 2 Vern. 377; *Conway v. Shrimpton*, 5 Bro. Parl. 187; *Barron v. Martin*, 19 Ves. 327; 2 Cruise, 108; *Hyde v. Dallaway*, 2 Hare, 528; *Howell v. Price*, Gilb. 106; *Dallas v. Floyd*, 6 Sim. 379; *Palmer v. Eyre*, 6 Eng. L. & Eq. 355; *Crooker v. Jewell*, 31 Maine, 306; *Harsand v. Hardy*, 18 Ves. 455; *Fairfax v. Montague*, 12 Ves. 84; *Barron v. Martin*, Coop. 189; *Palmer v. Jackson*, 5 B. P. C. 281; *Lucas v. Dennison*, 13 Sim. 584; *Batchelor v. Middleton*, 6 Hare, 75; *Smart v. Hunt*, 4 Ves. 478 n.; *Hardy v. Reeves*, Ib. 480; *Trulock v. Robey*, 12 Sim. 402; *Calkins v. Calkins*, 3 Barb. 305; *Jackson v. Slater*, 5 Wend. 295.

limitation, as such, can be relied on by way of formal plea in case of mortgage; that is, whether the possession of one party can be considered *adverse* to the other. In England, late statutes (as has been seen *supra*, see also Sts. 7 Wm. IV & 1 Vict., c. 28) establish definite periods of limitation for suits of this description, and thereby place such suits on the same footing with other actions relating to real property. But in the United States, where, in general, no such statutes exist, the question still remains open, whether mere lapse of time can be set up as a statutory bar in cases not included within the specific provisions, hereafter to be mentioned, for foreclosure and redemption. *Hadley v. Healey*, 7 Ves. & B. 536; *Bailey v. Carter*, 7 Ired. Equ. 282; *Bacon v. McIntire*, 8 Met. 87; *Coates v. Woodworth*, 13 Illin. 654; *Fenwick v. Macey*, 1 Dana, 279; *Dexter v. Arnold*, 2 Sumn. 109.

40. Upon a similar principle, any deliberate act of the mortgagee, done within twenty years, by which he recognizes the existence of the mortgage as such, will prevent the equity from being barred by lapse of time, either in favor of the mortgagee or one claiming under him. Thus, where a mortgagee, twenty-three years after the mortgage, made a will devising that, if the mortgage should be redeemed, the money should go in a certain way; and sixteen years after the will, the mortgagor being dead, his heir brought a bill to redeem; a redemption was decreed. But parol evidence, it seems, is insufficient.(1)

41. So, an acknowledgment by the mortgagee, in an answer in equity, that the mortgage still subsists as such, is sufficient to preserve the right of redemption from being barred by lapse of time. But the acknowledgments of a mortgagee, made after he has transferred his interest, will not bind a purchaser without notice.(2)(a)

42. Although the rule above stated, as to the extinguishment of an equity of redemption by lapse of time, is well established, yet it is said, the relation between mortgagee and mortgagor is so far analogous to that of trustee and *cestui que trust*, that the possession of either party is, as to the other, *amicable*, not *adverse*, unless the former show an unequivocal intent to the contrary,—(see sec. 37, n. b;) and therefore, the statute of limitations does not run against the party out of possession: that a mortgagor cannot *disseize* the mortgagee. So, even where a mortgagee attempts to convey an absolute title, this is no disseizin of the mortgagor, but passes merely a defeasible estate.(3)

43. A court of equity will not aid a mortgagor in redeeming his estate, where such redemption would be a violation of good faith on his part, and an injury to the mortgagee, who has relied upon his statements and promises.

44. A, a mortgagor, encouraged B to purchase the mortgage from the mortgagee, C; saying that the land was not worth more than the debt, and that he would never redeem. B purchased the mortgage, and made expensive improvements upon the land. Held, A should not be allowed to redeem.(4)(b)

45. With regard to the terms upon which a mortgagor may redeem his estate, or the respective claims and allowances between him and the

(1) *Orde v. Smith*, Sel. Cas. in Chan. 9; *Heyer v. Pruyn*, 7 Paige, 465; *Dexter v. Arnold*, 3 Sumn. 152.

(2) *Dexter v. Arnold*, 2 Sumn. 109; 3 Mur. 218.

(3) *Fenwick v. Macey*, 1 Dana, 279; *Dexter v. Arnold*, 2 Sumn. 109.

(4) *Fay v. Valentine*, 12 Pick. 40.

(a) The question has been raised, whether even the debt itself, which is secured by mortgage, might not be thereby saved from the operation of the statute of limitations, by which it would otherwise be barred; and the prevailing doctrine seems to be, that the claim upon the personal security continues as long as that upon the land mortgaged; although in Massachusetts a different rule has been adopted. But in that State an action may be maintained upon the mortgage, notwithstanding the lapse of a period of time, sufficient to bar the debt, if it stood alone. The debt is said to remain, although the statute of limitations may discharge the remedy upon the note. But the non-production of the personal security, in connection with great lapse of time, may bar a suit to recover the land upon the mortgage. *Almy v. Wilbur*, 2 W. & M. 371; *Brocklehurst v. Jessop*, 7 Sim. 433; *Dowling v. Ford*, 11 Mees. & W. 329; *Balch v. Onion*, 4 Cush. 559; *Bennett v. Cooper*, 9 Beav. 252; *Crane v. Paine*, 4 Cush. 483; *Merrills v. Swift*, 18 Conn. 257; *Elkins v. Edwards*, 8 Geo 325; *Inches v. Leonard*, 12 Mass. 379.

(b) But a mortgagee will not lose his right of strict foreclosure, by a mere promise to give time to the mortgagor to redeem. *Danforth v. Roberts*, 7 Shepl. 367.

mortgagee, the general principle is, that a mortgagee in possession is a *steward* or *bailiff* of the mortgagor, without a salary, and accountable to him for all the profits of the land. So, also, is an assignee of the mortgagor or a subsequent mortgagee. In general, however, he is not responsible for all that might have been made from it, but only for the actual receipts; unless guilty of some gross neglect or wrong, as by rejecting a good tenant or admitting an insufficient one; nor is he subject to any account, unless the mortgage is redeemed.(1)

46. But where the mortgagee enters before condition broken, it seems the law will hold him to a very strict account of the rents and profits, such entry being regarded as a harsh proceeding, contrary to the intention of the transaction, and unwarranted by any default of the mortgagor. In Massachusetts and Maine, the mortgagee, in such case, shall account for the *clear rents and profits*.(2)

47. If it be proved, that the land was let by the mortgagee for a certain rent, it will be presumed that it was leased for the whole time on the same terms, unless the contrary be shown. And, if he has kept no account of the rents, he is chargeable with what he may be presumed to have received; and, if he himself occupy, with an occupation rent. But he is not chargeable with interest on the rents.(3)

48. If the mortgagee either enters on the land, but allows the mortgagor to take the profits, or permits him to use the mortgage for keeping off other creditors, he will be held accountable for the profits. But a first mortgagee, who enters for breach of condition, but allows the mortgagor to remain in possession, without accounting for rents and profits, is not himself liable thus to account, though he entered for the purpose of preventing an attachment of the crops by creditors of the mortgagor.(4)

49. If the mortgagee assign his mortgage, he is answerable for the profits, both before and after the assignment. And an assignee cannot excuse himself from accounting, by setting up an adverse title.(5)(a)

50. The mortgagee, in general, can claim no compensation for his own trouble in receiving the rents, and even a special agreement therefor will be disallowed. But, for the necessary services of an agent, he may have an allowance; and in Massachusetts he is usually allowed a commission of five per cent. for his own trouble, though there is no fixed rule upon the subject, and he is not restricted to this per cent-

(1) 1 Vern. 45; Gould v. Tancred, 2 Atk. 534; 1 Abr. Equ. 328; Hogan v. Stone, 1 Alab. N. S. 496; Ruckman v. Astor, 9 Paige, 517; Portland &c. v. Fox, 1 Appl. 99; Cholmondeley v. Clinton, 2 Jac. & W. 179; Moore v. Degraw, 1 Halst. Ch. 346; Beare v. Prior, 6 Beav. 183; Trulock v. Robey, 15 Sim. 265; Holabird v. Burr, 17 Conn. 556; Kellog v. Rockwell, 19, 446; Bank, &c. v. Rose, 1 Strobb. Equ. 257; Tennent v. Dewees, 7 Barr, 305; Walton v. Withington, 9 Miss. 549; Bennett v. Butterworth, 12 How. 367.

(2) Mass. Rev. St. 635; Me. Ib. 553; Ruby v. Abyssinian, &c., 3 Shepl. 306.

(3) Sel. Cas. in Chy. 63; Dexter v. Arnold, 2 Sumn. 109; 1 Ala. (N. S.) 496; Lloyd v. Mason, 2 My. & C. 487; Beare v. Prior, 6 Beav. 183.

(4) Coppring v. Cooke, 1 Vern. 270; Chapman v. Tanner, Ib. 267; Charles v. Dunbar, 4 Met. 498.

(5) 1 Abr. Equ. 328; Gordon v. Lewis, 2 Sumn. 143.

(a) After a decree of foreclosure, a mortgagee is not liable to account for subsequent rents, at law; nor before, unless allowed by the master in taking his account. Whether in equity, *qu.* Chapman v. Smith, 9 Verm. 153. In New York, he is thus liable. Ruckman v. Astor, 9 Paige, 517.

age.(1) But if he occupy himself, he shall not have, for his care of the estate, any commission on the rent with which he is charged.(2)(a)

51. A mortgagee shall account for all loss by gross negligence or wilful default, in bad cultivation and omission to repair.

52. So also, he shall account for *waste* committed by him; as, for pulling down cottages. But the English doctrine of waste is subject to the same modifications as between mortgagor and mortgagee, which have already been stated in relation to landlord and tenant. See also ch. 30, sec. 35.(3)

53. The mortgagee shall not be required to account for the proceeds of improvements made by himself.(4)

54. The mortgagee will be allowed for all necessary repairs, and for the expenses of defending the title to the land, both of which claims shall bear interest;(b) and he will be allowed for all necessary repairs and betterments, though the expense exceed the rents and profits. So for *taxes*, if paid by necessity.(5)

55. He will not be allowed, in general, for the clearing of wild lands,(c) nor for any ornamental improvements, or new erections, unless permanently beneficial, or absolutely necessary for the upholding of the estate; as in case of an aqueduct, requisite for supplying the premises with water. Nor will he be allowed for *insurance*, unless effected at the mortgagor's request. It is said, however, that there is no inflexible rule on this subject, but the question of allowance is in the discretion of the court, subject to the particular facts of each case. The mortgagee will not be permitted to make improvements, which will *cripple* the right of redemption.(6)

56. In Maryland, a mortgagee is allowed for necessary repairs and permanent improvements.(7)

(1) *Moore v. Cable*, 1 John. Cha. 385; 2 Mar. 339; *Gibson v. Crehore*, 5 Pick. 146; *Clark v. Robbins*, 6 Dana, 350; *Adams v. Brown*, Harr. Rep. (May, '51) p. 38.

(2) *Tucker v. Buffum*, 16 Pick. 46; *Eaton v. Simonds*, 14, 98.

(3) *Givens v. McCalmont*, 4 Watts, 460; *Bland*, 22 n.; *Sandon v. Hooper*, 6 Beav. 246.

(4) *Moore v. Cable*, 1 John. Cha. 385.

(5) 2 Sumn. 125, 6, 143; *Godfrey v. Watson*, 3 Atk. 518; *Reed v. Reed*, 10 Pick. 398; *Mix v. Hotchkiss*, 14 Conn. 32. See *Thornycroft v. Crockett*, 16 Sim. 445; *McConnel v. Holobush*, 11 Illin. 61; *Marine, &c. v. Biays*, 4 Harr. & J. 343; *Arnold v. Foot*, 7 B. Mon. 66; *Page v. Foster*, 7 N. H. 392; *Dobson v.*

Land, 14 Jur. 288; *White v. Brown*, 2 Cush. 412. *Pettibone v. Stevens*, 15 Conn. 19; *Lewis v. De Forest*, 20 Conn. 427; St. 8 & 9 Vict. c. 56.

(6) *Moore v. Cable*, 1 John. Cha. 385; 10 Pick. 398; *Russell v. Blake*, 2 Pick. 506; *Saunders v. Frost*, 5 Pick. 259; *Ford v. Philpot*, 5 H. & John. 312; *Quin v. Brittain*, 1 Hoffm. 353; *Clark v. Smith*, Saxt. 121; *Dougherty v. McColgan*, 6 Gill & J. 275; 4 Kent. 167, n.; *Mix v. Hotchkiss*, 14 Conn. 32; *Sandon v. Hooper*, 6 Beav. 246; *Horlock v. Smith*, 1 Coll. Cha. 287.

(7) *Rawlings v. Stewart*, *Bland*, 22 n.; *Neale v. Hagthorpe*, 3 Ib. 590.

(a) The question, whether a mortgagee's charges are reasonable, is not for a jury, but for the court, with reference to the facts found by the jury. And in an action by the mortgagor, or his assignee, to recover back money overpaid to a mortgagee in possession, in order to prevent a foreclosure, the same legal and equitable rules are to govern, which apply to a settlement of the mortgagee's account upon a bill for redemption. *Cazenove v. Cutler*, 4 Met. 246. In Maine, the mortgagor may have execution for the excess of rents received by the mortgagee over the repairs. And the court may deduct on this account from the money brought into court. Me. Rev. St. 557.

(b) By the civil law, he is allowed for improvements not absolutely necessary, with interest. 1 Donat. 365.

(c) On the contrary, if he cut timber, he may be chargeable for waste. *Givens v. McCalmont*, 4 Watts, 460.

57. Judge Story says, it seems, there is no universal duty in a mortgagee to make all sorts of repairs; but he is bound to make such as are reasonable and necessary, under the particular circumstances of each case. If a building is very old and dilapidated, there is no rule requiring him to incur a greatly disproportionate expense in repairing; and he certainly is not bound to make any new advances. And he is not allowed for improvements, unless they increase the value of the estate.(1)(a)

58. The mortgagee shall not get any advantage from the mortgage fund, beyond the principal and interest of his debt. It is the general rule, that where a mortgagee receives a sum exceeding the interest due, it shall go to sink the principal. But in decreeing an account, it seems, the Court of Chancery will not require that every trifling amount be thus applied; or in all cases, even that annual rests be made. It takes into view the hardship upon the mortgagee, of being obliged to enter and receive his debt in fractions, and obtaining no allowance for his care and trouble, though treated as a bailiff in his liability to account. In general, the mortgagee will be liable for an excess of the interest received by him over the interest of his debt; but it will be otherwise, where he retains it after satisfaction of his debt, by mistake. The party claiming to redeem shall allow interest upon the money which he tendered, and which the defendant refused to accept.(2)(b)

59. Where surplus rents remain in the hands of the mortgagee after satisfaction of his debt, they constitute a *chose in action*, which may be assigned by the mortgagor; and the assignee may maintain a bill for an account.(3) When the mortgage is accompanied with a *power of sale* to the mortgagee, the surplus to be paid to the mortgagor, his executors and administrators; if the land is sold in the mortgagor's lifetime, the surplus will be personal estate; if after his death, the equity will descend to his heirs, and the surplus will pass along with it.(4) In New York, the surplus of proceeds of sales passes to heirs and is assets.(5)

60. Upon a bill in equity, to redeem an equity of redemption sold on execution, the defendant shall account for the rents and profits, though, before suit commenced, the plaintiff tendered the amount of the purchase-money which he paid for the equity, without deducting the rents and profits.(6)

(1) *Dexter v. Arnold*, 2 Sumn. 125, 6; *Gordon v. Lewis*, Ib. 143; *Reed v. Reed*, 10 Pick. 198.

(2) *Gould v. Tancred*, 2 Atk. 534; *Gordon v. Lewis*, 2 Sumn. 143; *Tucker v. Buffum*, 16 Pick. 46; *Finch v. Brown*, 3 Beav. 70; *Jenkins v. Eldredge*, 3 Story, 325; *Paige v. Broom*, 4 Russ. 224; *McDaniels v. Lapham*, 21 Verm. 222; *Dunshee v. Parmelee*, 19 172; *Booker v. Gregory*, 7 B. Mon. 439; *Boston, &c. v. King*, 2 Cush. 400; *Bourne v. Littlefield*, 29 Maine, 302; *Aston v. Aston*, 1 Vez. 264; *Barp. 1 Pars. (Peuns.)* 453.

(3) 2 Sumn. 143.

(4) *Wright v. Rose*, 2 Sim. & St. 323.

(5) *Moses v. Murgatroyd*, 1 John. Cha. 119.

(6) *Tucker v. Buffum*, 16 Pick. 46.

(a) He is allowed for all disbursement, to which the mortgagor or his assignee, having notice of the facts, or the means of knowing them, assents. *Cazenove v. Cutler*, 4 Met. 246.

(b) Mortgage, payable in two years, with interest semi-annually. After two years, an assignee enters under a judgment and receives the rents, &c. Upon a bill to redeem, brought by the widow, held, there should be annual rests; the amount paid by defendant the first year for repairs, &c., to be deducted from the rents, and the balance considered the net rents; the interest for the first year to be added to the principal, the net rent deducted from the product, and the balance to form a new principal, and so on to the time of judgment. *Van Vronker v. Eastman*, 7 Met. 157.

61. Where such purchaser, after the tender, occupied under a lease from the mortgagee at a low rent, and afterwards purchased the mortgage, held, he should account for the fair annual value of the land, with an allowance for repairs and improvements.(1)

62. In Maine and Rhode Island, the mortgagor will be entitled to redeem, by paying or tendering the debt due, with interest and costs, or performing or tendering performance of any other condition of the mortgage, together with the amount of reasonable expenses incurred in repairs and betterments, over and above the rents and profits. And, in Maine, if the mortgagor have paid money to the mortgagee, or brought it into court, without deduction on account of the rents and profits received by the mortgagee, he shall be entitled to a restitution of the balance due him on this account. In Massachusetts, if the mortgagee, or any one under him, has had possession, he shall account for the rents and profits, and be allowed for reasonable repairs and improvements, for taxes and assessments, and other necessary expenses in the care and management of the estate. If there is a balance due him, it shall be added to the amount which the mortgagor is to tender; if there is a balance due from him, it shall go to sink the debt.(2)(a) In Georgia, a mortgagee is made liable for taxes upon the land, if the mortgagor does not pay them.(3)

CHAPTER XXXII.

MORTGAGE—ESTATE OF A MORTGAGEE—SUCCESSIVE MORTGAGES OF THE SAME LAND.

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| <ul style="list-style-type: none"> 1. Mortgage—personal estate—passes to executors, &c. 4. Devise of a mortgage. 8. American doctrine—whether an assignment of the debt passes the mortgage. 11. Assignment of mortgage is the transfer of an estate. 14. Interest of mortgagee, not liable to execution. 18. Statute of limitations, and lapse of time. 20. Insurance. | <ul style="list-style-type: none"> 21. Subsequent mortgagees—general principles. 22. Rights of, not affected by transactions between first mortgagee and mortgagor. 24. Assignment of first mortgage. 25. Mortgage to several persons by one deed. 27. Equitable interference for subsequent mortgagee. 28. Fraud on the part of the mortgagor. |
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1. A MORTGAGE, though it purport to convey a fee-simple, yet, being merely security for debt, is *personal estate*, so long as the right of redemption continues. Both in law and equity, the mortgagee has only a chattel interest, or a *chose in action*. He is not the *substantial owner*.

(1) *Tucker v. Buffum*, 16 Pick. 46.

(2) 1 Smith's St. 160-1-4; Mass. Rev. St.

636.

(3) *Prince*, 848.

(a) Bill in equity to redeem. Answer, that the tender made by the plaintiff was conditional, and that he had not been always afterwards ready to pay. Held, the defendant could not subsequently plead, that the suit was commenced more than a year after the tender, according to St. 1821, c. 86, sec. 3. *Tucker v. Buffum*, 16 Pick. 46.

His principal right is to the money, and his right to the land is only as security for the money. Hence, upon the mortgagee's death, the mortgage passes to his executors, not to his heirs; is primarily liable for debts; and may be devised without the formalities necessary to a will of real estate.^{(1)(a)}

2. Though the heir of the mortgagee be in possession after condition broken, and there be no want of assets, he shall be decreed to convey to the administrator.⁽²⁾

3. In Massachusetts, Rhode Island, Maine and Michigan, statutes provide, that the executor, &c., of a mortgagee may recover possession of the land, and hold it as assets, and be seized to the use of the heirs, widow or devisees, in Maine, and, in Massachusetts, of creditors, also, or of the same persons who might claim the money, if paid to redeem the land.^(b) In Massachusetts and Rhode Island, it may be sold for payment of debts, by license of court. In Maryland, an executor may discharge a mortgage.⁽³⁾

4. It has been held, that lands held originally under old mortgages passed by a general devise, though no release of the right of redemption was shown; and that there was no equity between the executor and the heir or devisee, requiring any change of the property from its condition at the death of the deceased owner.⁽⁴⁾

5. If the mortgagee indicate an intention to pass the mortgage as real estate, the law will so treat it.^(c) Thus, where he devises it to his daughter *and her heirs*, the husband of such daughter, upon her death, shall not hold it as personal property, but it shall go to her heirs.⁽⁵⁾ And it seems to be now settled, that a mortgage will pass by will, under general words relating to the realty, unless the expressions of the will, or the purposes and objects of the testator, call for a different construction.⁽⁶⁾

6. If the mortgagee, after a decree for foreclosure, but before an account taken, or actual foreclosure, devise the mortgage to a relation to

(1) Treat of Equ. B. 3, ch. 1, sec. 13; *Grace v. Hunt*, Cooke, 344; *Jackson v. De Lancy*, 13 John. 537; *Ballard v. Carter*, 5 Pick. 112; *Chase v. Tuckerman*, 11 G. & J. 185; *Me. Rev. St.* 555; *Cutts v. York*, &c. 6S hepl. 190 See *Silvester v. Jarman*. 10 Price, 78; *Harriett, &c., M'LeL. & Y.* 292; *Thornbrough v. Baker*, 1 Cas. in Cha. 285; *Bunyan v. Mersereau*, 11 John. 534; *Martin v. Mowlin*, 2 Burr. 978; *Dougherty v. M'Colgan*, 6 Gill & J. 275.

(2) *Ellis v. Guavas*, 2 Cha. Cas. 50.

(3) 1 Smith, 166-7; *Mass. Rev. St.* 430; *R. I. L.* 233-4; *Mich. L.* 57; *Md. L.* 2528.

See *Boylston v. Carver*, 4 Mass. 609; *Webber v. Webber*, 6 Greenl. 127; *Johnson v. Bartlett*, 17 Pick. 477; *Blair*, 13 Met. 126; *Mass. Sts.* 1849, ch. 47; 1851, ch. 288.

(4) *Att'y-Gen. v. Bower*, 5 Ves. 300. See *Pawlett v. Att'y-Gen.*, *Hardres*, 467; *Fields, &c.*, 7 Eng. L. & Equ. 260; *Priel*, *Law Rep.* June, 1850, p. 92; *Beck v. M'Gillis*, 9 Barb. 35; *Asay v. Hoover*, 5 Barr. 21; *Gay v. Minot*, 3 Cush. 352.

(5) *Noys v. Mordant*, 2 Vern. 581.

(6) *Jackson v. Delancy*, 13 John. 555; *Braybroke v. Inskip*, 8 Ves. 407.

(a) In *Johnson v. Bartlett*, 17 Pick. 484, *Hunt v. Hunt*, 14, 379-80, and *Hatch v. Dwight*, 17 Mass. 299; it is intimated, that entry for condition broken might change the character of the mortgagee's estate. So, in Rhode Island, it is said, if the mortgagee dies *without taking possession*, the mortgage passes to his executors, and the heirs need not be made parties in a bill to redeem. 1 Sumn. 109. So, in New York, the mortgagor is said to have the legal title till *foreclosure or entry*. *Van Duyne v. Thayre*, 14 Wend. 235-6. See, also, *Perkins v. Dibble*, 10 Ohio, 438; *Miami, &c. v. Bank, &c.*, *Wright*, 249.

(b) In New Hampshire, the law is the same. *Gibson v. Bailey*, 9 N. H. 168.

(c) This is not in analogy with the rule, by which a bequest of a chattel to one *and his heirs* passes it to his executors, or that by which mortgage-money, though secured to heirs, goes to executors. 2 Cha. Cas. 51.

whom he is indebted in a smaller sum, this is no satisfaction of the debt, being regarded as a devise of real estate.(1)

7. But in such cases, although, as between a deviser and devisee, the mortgage is treated as real estate; yet, for payment of debts, it is held to be personal assets, in case of deficiency.(2)

8. The general doctrine above stated, (sec. 1,) seems to have been fully recognized in New York by Mr. Justice Kent. He says, the estate in the land is the same thing as the money due on the note; is liable to debts; goes to executors; passes by a will not conformable to the statute of frauds; is transferred or extinguished by an assignment, or even a parol forgiving of the debt. The land is but appurtenant to the debt. Whoever owns the latter, is likewise owner of the former. There must be something peculiar in the case, some very special provision of the parties, to induce the court to separate the ownership of the note from that of the mortgage. In the eye of common sense and of justice, they will generally be united. Upon these grounds, Judge Kent held, that *the delivery* of a mortgage, accompanying the indorsement of a note, which it was made to secure, passed the mortgage as well as the note. Mr. Justice Radcliffe, on the other hand, held, that the legal title to the land did not pass; although the assignee acquired an equitable interest, which a court of equity would sustain: that although, as *between mortgagor and mortgagee*, the mortgage was to be regarded as personal estate, so as to pass to executors, or be extinguished by payment of the debt; yet it could not be so regarded, in reference to a transfer to third persons. In a subsequent case, Judge Kent adheres to his former doctrine, that at law, as well as in equity, the mortgage is regarded as a mere incident attached to the debt (3)(a)

(1) Garret v. Evers, 2 Cruise, 85.

(2) Ib.

(3) Johnson v. Hart, 3 John. Cas. 329;

Jackson v. Willard, 4, 43.

(a) A similar doctrine is adopted in Pennsylvania. In Maryland, a mortgage, containing a power to sell, may be assigned by indorsement in blank. In Vermont, a mortgage may be assigned by parol. Pratt v. Bank, &c., 10 Verm. 293. See Wilkins v. French, 2 Appl. 111; Johnson v. Hart, 3 John. Cas. 329-30; Ib. 326-7; Jackson v. Willard, 4 John. 43; 2 Rawle, 242; Craft v. Webster, 4, 242; Md. St. 1836, ch. 249, sec. 15; Slaughter v. Foust, 4 Blackf. 380.

In New Hampshire, the estate of a mortgagee is held to be real, so far as is necessary to perfect his security; but not so as to enable him to transfer the land without the debt, or to pass the debt by a mere deed of the land. Whether the rule is different, after possession taken, is treated as doubtful. Ellison v. Daniels, 11 N. H. 274.

Upon the distinct question, whether an assignment of the debt carries the mortgage with it; the courts have so held in New York, Pennsylvania, New Hampshire, Vermont, Kentucky, Mississippi and Alabama; while in New Jersey, Massachusetts, Maine and Illinois, the contrary has been decided—with more or less qualification of the rules on one side and the other, growing out of the peculiar circumstances of particular cases. In Indiana, a deed is necessary to pass the mortgagee's legal title; but a sale of the note passes the mortgage in equity. In Connecticut, an assignment of the mortgage, and subsequent delivery of the notes, vest the mortgage title in the assignee. Johnson v. Hart, 3 John. Cas. 329, 330; Jackson v. Willard, 4 John. 43; Ranyan v. Mersereau, 11, 534; Southerin v. Mendum, 5 N. H. 420; Rigney v. Lovejoy, 13, 247; Pratt v. Bank, &c., 10 Verm. 294; Keyes v. Wood, 21, 331; Belding v. Manly, Ib. 550; Burdett v. Clay, 8 B. Mon. 287; Waller v. Tate, 4 532; Dick v. Mawry, 9 Sm. & M. 448; Lewis v. Starke, 10, 120; Henderson v. Herrod, Ib. 631; Bank, &c. v. Tarleton, 23, 173; M'Vay v. Bloodgood, 9 Por. 547; Den v. Dimon, 5 Halst. 156; Warden v. Adams, 15 Mass. 233. See Cutler v. Haven, 8 Pick. 490. Smith v. Kelley, 27 Maine, 237; Dwinel v. Perley, 32, 197; McConnell v. Hodson, 2 Gilm. 640; Dudley v. Cadwell, 19 Conn. 218; Roberts v. Halstead, 9 Barr. 32; Donley v. Hays, 17 S. & R. 400; Givan v. Tout, 7 Blackf. 210; Clearwater v. Rose, 1, 137; Burton v. Baxter, 7, 297; Slaughter v. Foust, 4, 379; State, &c. v. Tweedy, 8, 447.

9. But in New Jersey, it has been held that the principle of treating a mortgage as a mere incident to the debt which it is designed to secure, does not dispense with the necessity of a formal assignment of the former, to a party who pays and takes up the latter, in order that he may defend against a suit for the land by the mortgagor. And where an informal assignment was first taken, another formal assignment, made after commencement of suit, will be ineffectual as a defence to the action. In such case, the mortgagee holds the mortgage *in trust* for the party who pays the debt, but the latter has no legal title.(1)

10. In New Hampshire, it is said, a mortgage passes nothing, unless it appears that the debt secured also passed, or was in the power of the mortgagee.(2)

11. Although a mortgage, in most respects, is treated as a mere security accompanying the debt; yet the assignment of a mortgage is held to be the conveyance of an estate, and not the mere transfer of a security. Hence, the assignee must bring an action, if at all, in his own name.(3)(a)

12. But if the mortgagor is disseized, the mortgagee is also disseized, and cannot convey his interest.(4)

13. Where a mortgage is given to secure several bonds, and the mortgagee assigns a part of them at different times and to different persons, and the mortgaged premises are afterwards sold upon execution in favor of the mortgagee against the mortgagor; the proceeds of sale shall be applied in payment of all the bonds *pro rata*, as well those which the mortgagee himself retains, as those which he has transferred. The principle, "*qui prior in tempore, potior est in jure*," is not applicable to this case, because it relates only to successive charges upon *the same property*, whereas the several bonds in this case are distinct things; and, if the respective dates of the transfers were open to inquiry, great uncertainty and fraud would be likely to ensue. The mortgagee himself has equal rights with the assignees, because the

(1) Den v. Dimon, 5 Halst. 156.

(2) Warden v. Adams, 15 Mass. 233; Parsons v. Welles, 17 Mass. 419; Bell v. Morse, 6 N. H. 205; Southerin v. Mendum, 5 N. H.

420. But see Cutler v. Haven, 8 Pick. 490.

(3) Gould v. Newman, 6 Mass. 239.

(4) Poignard v. Smith, 8 Pick. 272. See Converse v. Searls, 10 Verm. 578.

Where negotiable notes are secured by mortgage, and assigned without the latter, the mortgagee becomes a trustee for the assignees, and holds the mortgage for their benefit. Craie v. March, 4 Pick. 131.

In Vermont, as has been seen, an assignment of all the notes secured by mortgage passes the mortgage also. An assignment of a part of them may or may not have this effect, according to the agreement of the parties. Langdon v. Keith, 9 Verm. 299.

In Pennsylvania, a mortgage, and the claim which it secures, are so far distinct, that where a *scire facias* is brought on a bond with warrant of attorney, it is no defence that a mortgage by which the bond was secured, is not in the plaintiff's possession, or is lost, mislaid, or destroyed. Hodgdon v. Naglee, 5 Watts & S. 217.

(a) But where the mortgage is assigned as security for a smaller sum than is due upon it, the mortgagee may maintain a bill for foreclosure, especially if the assignee refuses to sue. Norton v. Warner, 3 Edw. 106. So, where he guarantees the mortgage debt to the assignee, he is a proper party to a suit for foreclosure. Bristol v. Morgan, 3 Edw. 142; Curtis v. Tyler, 9 Paige, 432; Leonard v. Morris, Ib. 90. Where a mortgage is itself mortgaged, it seems, three years' redemption will be allowed, as in case of real estate. Cutts v. York, &c., 6 Shepl. 190.

assignment involved no transfer of the mortgage, unless by implication, and no warranty express or implied.(1)(a)

14. It has been already seen, (ch. 31,) that an equity of redemption is liable to legal process for the debts of the mortgagor.

15. On the other hand, the estate of a *mortgagee*, before foreclosure, or possession taken by him, is not subject to be taken upon execution. Until foreclosure, it is a mere *chose in action*, and an incident attached to the debt, from which it cannot properly be separated. As distinct from the debt, the mortgage has no determinate value; and, if assigned, the assignee's rights must be subject to the holder of the personal security. And the debt cannot be sold with the mortgage, it being well settled that a *chose in action* is not subject to sale on execution.(2)

16. These remarks, made by Mr. Justice Kent, seem to require not merely *entry*, but *foreclosure*, by the mortgagee, to subject his interest to be taken on execution. The case finds, however, that the mortgagee had not *entered*, and the question stated for decision is, whether a sale is valid, made "before foreclosure, and while the mortgagor is suffered to retain possession." And the learned judge remarks, that *when the mortgagee has taken possession, the rents and profits* may become the subject of computation and sale.(3)

17. In Massachusetts and Connecticut, it is distinctly decided, that, before entry, the mortgagee's interest is not subject to execution; and doubted, whether it is so subject before foreclosure: because, till that event, all the inconveniences exist which are applicable in the other case. The like decision has been made in Kentucky. In New Hampshire, the interest of the mortgagee cannot be levied on, unless that of the mortgagor is also taken, and they join in appointing an appraiser, or unless there has been an entry to foreclose. A judgment for possession is not enough.(4)

18. Notwithstanding the principle, that the mortgage is merely incident to the personal security which it accompanies, the statute of limitations, applicable to the latter, will not bar a claim upon the former. On the contrary, the recital of a debt in the mortgage deed has been held to take such debt out of the operation of the statute.(5)(b)

(1) Donley v. Hays, 17 Ser. & R. 400.

(2) Jackson v. Willard, 4 John. 43-4.

(3) Ib. 41-2-4.

(4) Eaton v. Whiting, 3 Pick. 488; Huntington v. Smith, 4 Conn. 237; 1 Dana, 24-188;

Johnson v. Bartlett, 17 Pick. 477; Glass v. Ellison, 9 N. H. 69.

(5) Clark v. Bull, 2 Root, 329; Langan v. Henderson, 1 Bland, 282; Heyer v. Pruyn, 7 Paige, 465; Cheslyn v. Dalbey, 2 Y. & C. 170. See Den v. Spinning, 1 Halst. 473; ch. 33, sec. 6.

(a) This decision was made by a majority of the court in Pennsylvania. Gibson, Ch. J., dissented, on the grounds, that the assignment created a moral obligation upon the mortgagee, which equity would enforce, though not a legal one; that, the debt being the principal, and the mortgage an accessory, the assignment of a part of the debt was an assignment of the mortgage, not *pro rata*, but *pro tanto*, and the assignee, a purchaser of all the securities of the assignor, to be used by him as freely and beneficially as by the assignor himself; and that the same principles were applicable to assignees of separate parts of the same debt.

Where a vendor of land takes several notes for the price, retaining also a lien upon the land, and pressed in the assignment. Ewing v. Arthur, 1 Humpl. 537; acc. McVay v. Bloodgood, the proceeds shall be applied to all the notes *pro rata*, unless a contrary intention is expressed some of the notes, with the lien, retaining the others; upon a sale of the property, Por. 547. But where a note secured by mortgage is assigned, this is *pro tanto* an assignment of the mortgage, and if the security is insufficient for the whole debt, the assignee has a prior claim. Cullum v. Erwin, 4 Ala. (N. S.) 452. Successive assignees have priority in the order of their assignments, unless it is expressly agreed otherwise. Ib.

(b) Acc. N. H. Rev. St. 360; Thayer v. Mann, 19 Pick. 636. See Grinnell v. Baxter, 17

19. A mortgage was made in 1809, and recorded. The mortgagor transferred the estate. The mortgagee never gave notice of his mortgage to the purchaser; and, in 1821, brought a suit for the land, and recovered.(1)(a)

20. The principle, that the personal security and the accompanying mortgage are incident to each other, does not apply to any merely collateral security, obtained by the mortgagor for the benefit of the estate. Thus, the mortgagee has no claim to a policy of insurance upon the premises, to the exclusion of other creditors. It is a mere personal contract, not attached or incident to the mortgage.(2)(b)

(1) *Dick v. Balch*, 8 Pet. 30.

(2) *Columbia, &c. v. Lawrence*, 10 Pet. 507;
McDonald v. Black, 20 Ohio, 185.

Pick. 383; *Miller v. Helm*, 2 Sm. & M. 687; and *infra*, ch. 33, sec. 6. See also *Davis v. Battine*, 2 Russ & M. 76, that *commitment* of the mortgagor in a suit upon the debt is no bar to a subsequent action on the mortgage. In case of an equitable lien upon land for the unpaid purchase-money, the vendor may enforce it, though he has lost the benefit of a security for the price, by lapse of time. *Magruder v. Peter*, 11 Gill & J. 217. Where a bond was secured by mortgage, and the mortgagee held possession twenty years, no interest being paid; it was doubted whether an action on the bond would be barred by lapse of time. *White v. Hillacre*, 3 Y. & Coll. 597.

(a) Ejectment upon a mortgage, dated September 24, 1773. The suit was brought in 1814. Neither the original mortgage nor note was produced by the plaintiff, but a record copy of the former. He also proved that, in the revolutionary war, the shop of the mortgagee, where many of his papers were kept, was burned. There was no evidence of possession or a demand of possession till a few weeks before the suit was brought; nor of any demand of payment of the note. But it was proved that in 1776 the mortgagor left the State, and soon afterwards died. The defendant claimed under conveyances from the mortgagor, and by virtue of subsequent continued possession. The plaintiff sued as administrator of the mortgagee. Held, even if the original securities were produced, the action would probably be barred by lapse of time, raising a presumption of payment. The mortgagor's leaving the State did not rebut this presumption, because the note was due before he left, and the land might have been resorted to afterwards. But, moreover, the office copy was not legal evidence, the loss of the original not being sufficiently proved. *Inches v. Leonard*, 12 Mass. 379.

A gave to B, his surety on several notes, a mortgage, for security and indemnity. Some of the notes being outlawed, A became an insolvent debtor under the insolvent law of Massachusetts. Held, B might apply the property first to the valid notes, and that the rest must be distributed *pro rata* among the holders of the others, they having an equitable lien on the fund; but that he could not pay some of the outlawed notes from the property, to the exclusion of others, the latter having an equal equitable claim with the former. *Eastman v. Foster*, 8 Met. 19. Held, also, that the property was subject to this equitable lien, although the mortgage had been foreclosed; and, as against attaching creditors or grantees of B, or an assignment under the insolvent law. *Ib.*

(b) But if, by the terms of the mortgage, the mortgagor was bound to insure for the mortgagee's benefit; the latter has an equitable lien upon the insurance, to the amount of his debt. *Carter v. Rocket*, 3 Paige, 437.

So, where A, holding a mortgage, assigns it to B, covenanting that it is due and collectable, and afterwards takes a bond from C, as security; B shall, in equity, have the benefit of it, and C is properly made party to a suit for foreclosure, being liable to B, if the land proves deficient. *Curtis v. Tyler*, 9 Paige, 432. In Maine, by a late statute, where a mortgagor effects insurance, if he consents in writing, the insurer may pay the loss to the mortgagee; if he does not consent, a trustee process lies, and a payment will be available *pro tanto*. Different mortgagees have claims according to priority. Any insurance by the mortgagee will be void, if he claims under this act, unless the insurer of the mortgagor consent. *St.* 1844, 97-8. Where a life policy is assigned to the mortgagee, in trust to receive the proceeds; he cannot have a decree to sell it, but may have one for the foreclosure, and still retain the policy. *Dyson v. Morris*, 1 Hare, 413. The mortgagor and mortgagee may each insure his own interest. If the latter does it, it is merely an insurance of the debt, which ceases when the debt is paid. If a loss occurs before such payment, he may recover, to the amount of the debt, and the insurer may claim an assignment of the debt, and enforce it against the mortgagor. If the mortgagor obtains insurance, it has been held that he may recover the full amount of the policy. *Carpenter v. Providence, &c.*, 16 Pet. 495. See *King v. the*

21. It has already been stated, (ch. 31,) that a mortgagor may mortgage his equity of redemption, or, as it is commonly expressed, make a second mortgage of the land; and that a second mortgagee stands in the place of the mortgagor, as to his right of redeeming the first mortgage. And the right in equity, of redeeming any number of successive mortgages, may be mortgaged anew.(1)(a) It seems to be the universal rule in the United States, that mortgages, like other deeds, take effect *in the order of their registration*. In England, upon the same principle of *tacking*, by which it has been seen, (ch. 31,) that a mortgagee may insist upon payment of independent claims against the mortgagor, as the condition of redemption; a third mortgagee may gain priority over a second mortgage, by buying up the first mortgage and *tacking* it to his own, thereby obliging the second mortgagee to redeem both, in order to redeem one.

22. The rights of a second mortgagee cannot be impaired by any transaction, to which he is not a party, between the first mortgagee and the mortgagor; nor, on the other hand, will such transaction operate as an extinguishment of the first mortgage, unless the circumstances plainly demand this construction.

23. A mortgaged to B, afterwards to C, afterwards to D. B and C entered on the same day, for condition broken. Afterwards E, a creditor of A, attached his equity of redemption, recovered judgment in the suit against him, and subsequently purchased and took an assignment of B's mortgage. At the execution sale, E afterwards purchased A's equity of redemption, and, after the expiration of a year from such purchase, believing and representing himself to be the absolute owner in fee, conveyed with warranty to F. C, the second mortgagee, tendered to F the amount due upon B's mortgage, at the same time protesting that he considered it as extinguished, and brought a bill in equity to redeem. Held, 1. That, although, by purchasing the equity of redemption, according to the English law, E might have excluded intervening incumbrances, yet, as the doctrine of *tacking* is here unknown, he acquired no such right. 2. That the right of C to redeem B's mortgage was not reduced, by the sale on execution, from three years to one year; such abridgment of the right of redemption being wholly confined to the relation between the mortgagor and purchaser, and not affecting the claims of other mortgagees, accruing before attachment of the equity, which are not subject to be impaired by any transaction between the mortgagor and his creditors. 3. That the union of the equity of redemption and the first mortgage in the hands of E did not extinguish the latter. Decreed, that, on payment of the sum due upon

(1) 8 Mass. 555, 16 Pet. 495. See *Warburton v. Lanman*, 2 Greene, 420; *Ellsworth v. Mitchell*, 31 Maine, 247; *Barber v. Cary*, 11 Barb. 549; *State, &c. v. Campbell*, 2 Rich. Equ. 179; *Head v. Egerton*, 3 P. Wms. 280; *Hooper v. Ramsbottom*, 6 Taun. 12; *Dale v. Shirley*, 8 B. Mon. 524; *Kimmell v. Willard*, 1 Doug. 217; *Simonds v. Brown*, 18 Verm. 231; *Clarke v. Stanley*, 10 Barr, 472; *Jones v. Phelps*, 2 Barb. Cha. 440; *Holabird v. Burr*, 17 Conn. 556; *Bank, &c. v. Peter*, 13 Pet. 123; *Hall v. Bell*, 6 Met. 431.

State, &c., 7 Cush; *Thomas v. Von Kapff*, 6 G. & John. 372; *Vernon v. Smith*, 5 B. & A. 1; *Kittredge v. Rockingham, &c.*, (N. H.) Law Rep. (Dec. 1849,) 412; *King v. State, &c.*, (Mass.) Ib. (June, 1851,) 88; *Felton v. Brooks*, 4 Cush. 203; *Larrabee v. Lambert*, 32 Maine, 97.

(a) So, land subject to the lien of an execution may be mortgaged; and the mortgagor cannot interfere with the mortgagee's title, by ordering a sale of more than enough to satisfy the execution. *Addison v. Crow*, 5 Dana, 279.

the first mortgage, F should surrender the land, and convey and release his right as the assignee of E.(1)(a)

24. An assignment of the prior mortgage to a subsequent mortgagee does not necessarily operate as an extinguishment of the first mortgage. Thus, where a mortgagee leased the land, and a subsequent mortgagee undertook to discharge the first mortgage, paid the debt, and took an assignment of the first mortgage and the lease, for the purpose of collecting the rent; this was held no extinguishment.(2)

25. Where a mortgage is made to several persons, to secure debts due to them severally, but giving a partial priority to some over others; they are not to be regarded as prior and subsequent mortgagees, in reference to their respective claims upon the property, but as parties to one deed, with full notice of its terms. Thus, to secure pre-existing debts, a debtor mortgaged to three creditors, A, B and C, who were absent, and ignorant of the transaction. The sum secured was \$8,000, to be paid in the proportion of \$2,000 to the mortgagee last named, and to the first and second \$3,000 each. At the date of the mortgage, the second and third had advanced the amount of their respective claims, but the first had not. He had since, however, made up the deficiency by further advances. The property being sold on execution under the mortgage, and the proceeds insufficient to pay the whole sum secured; held, they should be distributed according to the sums expressed in the mortgage; that C did not stand as a subsequent mortgagee, but the owner of an interest in common with the others, and under the same title; that he had neither done any act nor relinquished any right, in consequence of the mortgage, to his own prejudice; and that, having affirmed the instrument in part, he was bound by it in the whole.(3)(b)

26. A second mortgagee succeeds to all the rights of the mortgagor, arising out of any special contract which the latter has made with the first mortgagee, in relation to the land. Thus, if the first mortgagee, having taken a lease of the mortgagor, covenanting to pay rent, refuse to pay the rent to a subsequent mortgagee, when demanded, not having paid it to the mortgagor; the subsequent mortgagee, when he redeems, may compel the first mortgagee to account for the profits, as received towards the payment of his prior mortgage.(4)

27. Where one creditor has two funds, from which he may satisfy his debt, and another has a subsequent lien on only one of the funds, the former creditor will be compelled in equity to resort to his exclu-

(1) *Thompson v. Chandler*, 7 Greenl. 377.
(See ch. 33, sec. 34)

(2) *Willard v. Harvey*, 5 N. H. 252.

(3) *Irwin v. Tabb*, 17 S. & R. 419.

(4) *Newall v. Wright*, 3 Mass. 138.

(a) A junior mortgagee must be made party to a bill for foreclosure by a senior one—else he is not bound thereby. *Cooper v. Martin*, 1 Dana, 25. But, in New Hampshire, if a mortgagee bring an action at law against the mortgagor, recover judgment, enter and remain in possession a year; the foreclosure binds a subsequent mortgagee, though not notified of such entry. *Downer v. Clement*, 11 N. H. 40.

(b) Where a trustee, holding two sums of money, one belonging to A, the other to B, loaned both to C, taking distinct mortgages at the same time, and not intending any priority, but one mortgage was recorded a short time before the other; held, they should be paid rateably, according to their respective amounts. *Rhoades v. Canfield*, 8 Paige, 545. Where one owning an undivided share of a township makes a mortgage, covering but a portion of his interest, the mortgagee takes a proportional share, as tenant in common. *Randell v. Mallett*, 2 Shepl. 51.

sive fund, provided it can be done without injury to himself or the debtor. Thus, if A mortgages two estates to B, and then mortgages only one of them to C, the court will order B to take satisfaction from the estate which is not included in C's mortgage, if sufficient for the purpose. But, where there exists any doubt of the sufficiency of this estate, or where the first mortgagee is unwilling to run the hazard of obtaining payment from it, equity cannot take from him any part of his security, till he is fully satisfied.(1)

28. In Georgia and South Carolina, a mortgagor who makes a second mortgage, without disclosing, in writing, the existence of the first to the second mortgagee, shall not be allowed to redeem the second mortgage. But the second mortgagee (whose deed is on record, in Georgia), may redeem the first mortgage. In South Carolina, if a person suffer a judgment, or enter into a statute or recognizance, binding his land, and afterwards mortgage it, without giving notice, in writing, of the prior incumbrance, unless, within six months from a written demand, he clear off such incumbrance, he shall not be suffered to redeem.(2)(a)

(1) *Evertson v. Booth*, 19 John. 486-93; *Pettibone v. Stevens*, 15 Conn. 19; *Ayres v. Husted*, 15 Conn. 516; *Bank v. Mitchell*, Rice, (Equ.) 389. See *Sober v. Kemp*, 6 Hare, 155; *Ferris v. Crawford*, 2 Denio, 595; *Lanoy v. Duke, &c.*, 2 Atk. 444; *Miami, &c. v. Bank, &c.*, Wright, 249; *Barnes v. Baxter*, 1 Y. & Coll. 401; *Kellogg v. Rockwell*, 19 Conn. 446.

(2) *Prince*, 161; 1 Brev. 166-7-8.

(a) In connection with the subject of *successive mortgages*, may be briefly stated the well established rule of equity, that, where a mortgage is given for a debt which is also secured by the obligation of a *surety*; the surety is entitled to be subrogated or substituted to all the rights and remedies of the creditor whose debt he is compelled to pay, in relation to the mortgaged estate; and that the mortgagee cannot relinquish the estate, without thereby also discharging the surety. *Mathews v. Aikin*, 1 Comst. 599; *Root v. Bancroft*, 10 Met. 46; *Copis v. Middleton*, 1 Tur. & R. 231; *Hodgson v. Shaw*, 3 My. & K. 195; *Williams v. Owen*, 13 Sim. 597; *Hays v. Ward*, 4 John Ch. 130; *Bowker v. Bull*, 1 Sim. (N.) 34; *Norton v. Coons*, 3 Denio, 130; *Higgins v. Frankis*, 10 Jur. 323; *Gossin v. Brown*, 1 Jones (Pen.) 527; *McDermott v. Bank, &c.*, 9 Humph. 123; *Root v. Stow*, 13 Met. 5; *Capel v. Butler*, 2 Sim. & St. 457; *Becket v. Snow*, 1 Cush. 510; *Orvis v. Newell*, 17 Conn. 97; *Brewer v. Staples*, 3 Sandf. Cha. 579; *McLean v. Towle*, 3 Sandf. 117; *King v. McVickar*, 3 Sandf. Cha. 192.

Where a mortgage is made to a *surety*, for the purpose of indemnifying him for his liability on account of the mortgagor, similar equitable rules are applied, as in the case above referred to, of a mortgage accompanied by other security to the mortgagee. It is held, that such a mortgage is in reality a security for the debt itself; to the benefit of which the creditor is entitled. But he cannot make a claim upon it till the indorser's liability is fixed, and, if the latter is discharged by his *laches*, he loses all title to the property. *Holabird v. Burr*, 17 Conn. 556; *Reinhard v. Bank, &c.*, 6 B. Mon. 252; *Miller v. Musselman*, 6 Whart. 354; *Lewis v. DeForest*, 20 Conn. 427; *Stockard v. Stockard*, 7 Humph. 303; *Moore v. Moberly*, 7 B. Mon. 299; *Davis v. Mills*, 18 Pick. 394; *Goodhue v. Berrien*, 2 Sandf. Cha. 630; *Tilford v. James*, 7 B. Mon. 336; *Shepard v. Shepard*, 6 Conn. 37; *Curtis v. Tyler*, 9 Paige, 432; *Eastman v. Foster*, 8 Met. 19; *Yelverton v. Shelden*, 2 Sandf. Cha. 481; *Irwin's, &c. v. Longworth*, 20 Ohio, 581; *Knox v. Moatz*, 3 Harr. 74; *Stewart v. Preston*, 1 Branch, 10; *Kramer v. Bank, &c.*, 15 Ohio, 253.

Somewhat analogous to the case of *successive mortgages*, is that of a conveyance by the mortgagor of a portion of the mortgaged land, retaining the remainder; or the conveyance of different portions, included in one mortgage, to successive purchasers, and the apportionment of the mortgage debt upon such parcels, respectively. The general rule upon this subject is, that, if the mortgagor conveys a part of the land, retaining the rest, the part retained is primarily liable, and the portions conveyed are liable in the *inverse* order of their alienation. And the latter branch of the rule applies, where the whole land is successively conveyed. *Ferguson v. Kimball*, 3 Barb. Cha. 616; *Cushing v. Ayer*, 25 Maine, 383; *Kellogg v. Rand*, 11 Paige, 59; *Cumming v. Cumming*, 3 Kelly, 460; *Knickerbacker v. Boutwell*, 2 Sandf. Cha. 319; *Henkle v. Allstadt*, 4 Gratt. 284; *Skeel v. Spraker*, 8 Paige, 182; *Schryver v. Teller*, 9 Paige, 173; *Shepherd v. Adams*, 32 Maine, 63; *Morris v. Oakford*, 9 Barr, 499; *Champlin v. Williams*, Ib. 341; *Blyer v. Monholland*, 2 Sandf. Ch. 478;

CHAPTER XXXIII.

MORTGAGE—ASSIGNMENT, PAYMENT, RELEASE, ETC., OF MORTGAGES,
AND TRANSFERS OF EQUITIES OF REDEMPTION.

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| <ol style="list-style-type: none"> 1. Mortgage cannot be assigned without the debt. 2. Assignment cannot prejudice the mortgagor—notice, &c. 6. Mortgage an incident to the debt—principle considered—and whether payment revests the estate in the mortgagor. 15. Discharging mortgage upon the record. 18. Release of equity—whether a payment. 21. Release of mortgage—release in part. 23. <i>Deposit</i> of money with mortgagee—no payment. 24. Death of mortgagor does not turn a mortgage into payment—practice in case of insolvency. | <ol style="list-style-type: none"> 25. Discharge of execution—not conclusive of discharge of mortgage. 26. Payment on mortgage, cannot be applied to other debts. 28. Substituting of one security for another, &c.—in general, no payment of mortgage. 34. Assignment and discharge of mortgage—when a transfer will be construed as an assignment, and when as a discharge. 54. Satisfied mortgage—whether a stranger may set it up. 56. Sale by mortgagor with mortgagee's consent. 58. Joint release to mortgagee and mortgagor. |
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1. It is said, a mortgagee cannot transfer his estate, separate from the debt, either absolutely or for security; especially, before it becomes absolute, or there has been a foreclosure.(1)

2. If the mortgagee assign his mortgage, the assignee can claim only what really remains due upon it when assigned; not what appears to be due. For this reason, in England, it is usual to make the mortgagor a party to such assignment.(2)

3. Any payment to the mortgagee, after assignment, but before notice of it, will be effectual against the assignee; and it is held, that registration is not sufficient notice of an assignment as against the mortgagor, though sufficient to bind subsequent purchasers.(3)

4. Hence it appears, that all dealings with the mortgagee, even in his character of mortgagee, before notice of the assignment, are valid.(4)

5. *A fortiori* is this rule applicable, where the mortgagee has assumed

(1) *Aymar v. Bill*, 5 John. Cha. 570. But see ch. 32, secs. 11–13.

(2) *Matthews v. Wallwyn*, 4 Ves. 118.

(3) *Williams v. Sorrell*, 18. 389; *James v. Johnson*, 6 John. Cha. 428. In New York, this is expressly provided by statute. 1 N. Y. Rev. St. 763; acc. *Napier v. Elam*, 6 Yerg. 108; *Hodgden v. Naglee*, 5 Watts & S. 217.

(4) 4 Ves. 427. See *Glidden v. Hunt*, 24 Pick. 221; *Clark v. Flint*, 22, 231; *Chambers v. Goldwin*, 1 Smith, 252; *Williams v.*

Stevens, 1 Halst. Ch. 119; *Wolcott v. Sullivan*, 1 Edw. 399; *Palmer v. Yates*, 3 Sandf. 137; *Bree v. Holbech*, Dougl. 655; *Hammond v. Washington*, 1 How. 14; *Moore's, &c.*, 7 W. & S. 298; *Bowes v. Seeger*, 8 W. & S. 222; *Mott v. Clark*, 9 Barr. 399; *Farmers, &c. v. Douglass*, 11 S. & M. 469; *Peabody v. Fenton*, 3 Barb. Cha. 451; *Williams v. Birbeck*, 1 Hoffm. Ch. R. 359; *Noys v. Clark*, 7 Paige, 179; *Van Hook v. Somerville, &c.* 1 Halst. Ch. 633; *Deming v. Comings*, 11 N. H. 474.

Cushing v. Ayer, 25 Maine, 383; *Johnson v. White*, 11 Barb. 194; *Howard, &c. v. Halsey*, 4 Sandf. 565. As to the effect of a *release* by the mortgagee of a part of the land mortgaged, see *Shepherd v. Adams*, 32 Maine, 63; *McLean v. Lafayette, &c.*, 3 McL. 587; *Paxton v. Harrier*, 1 Jones, 312; *Holman v. Bank, &c.*, 12 Ala. 369; *Howard, &c. v. Halsey*, 4 Sandf. 565; *Patty v. Pease*, 8 Paige, 277; *Stuyvesant v. Hall*, 2 Barb. Cha. 151; *Engle v. Haines*, 1 Halst. Cha. 186; *Ross v. Haines*, Ib. 632; *Meney*, 4 Barr. 80; *Wheelwright v. Loomer*, 4 Edw. Cha. 232.

See, also, somewhat qualifying the general rule, *Beall v. Barclay*, 10 B. Mon. 261.

to be absolute owner of the land, by having purchased the equity of redemption. Hence, if, after such purchase, he assign the mortgage as a subsisting incumbrance, and then convey the whole estate to a third person, equity will not allow the assignee of the mortgage to do what the assignor could not have done, by interposing a dormant mortgage to the prejudice of an ignorant purchaser; to do that indirectly, by a secret assignment, which he could not do directly.(1)

6. In conformity with the principles stated in the last chapter, it is said, by Lord Mansfield, that, where a debt is secured by mortgage, the assignment of the debt, or forgiving it, will draw the land after it, though the debt were forgiven only by parol; that whatever would give the money, will carry the estate in the land along with it to every purpose, and that the estate in the land is the same thing as the money due upon it. Upon a similar principle, a simple contract debt has been held not to acquire the character of a specialty, in consequence of being secured by mortgage.(2)

7. These remarks, however, are to be considered as rather illustrative of the general qualities of a mortgagee's estate, than as literally true under all circumstances.(a) It seems to be only where the condition of a mortgage is performed strictly *at the time*, or *before the time*,(b) that the title will *ipso facto* revert in the mortgagor. If the debt be paid *after the day*, the mortgagee becomes a trustee in equity, and may be compelled by a bill to reconvey; the necessity for which, however, shows that the legal title is in him. So, a *term* becomes absolute, and must be surrendered or assigned.(c)

8. The mortgagor cannot maintain an action of trespass against the mortgagee or any one holding under him, though the debt have been paid.(3)

9. In case of ancient mortgages, a reconveyance may be presumed.(4)

10. Upon the point, however, whether mere payment of the debt will revert the estate in the mortgagor, there seems to be a conflict of the American authorities.(5)

11. In Maine and Massachusetts, after payment of the mortgage debt, the mortgagee cannot maintain a writ of entry for the land, for the reason, that in such case he could not recover the *conditional judgment* pro-

(1) 6 John. Cha. 427.

(2) *Martin v. Mowlin*, 2 Burr. 978. See 1 Halst. 473. Also, ch. 32, sec. 15; *Grinnell v. Baxter*, 17 Pick. 383.

(3) *Howe v. Lewis*, 14 Pick. 329.

(4) 2 Cruise, 86.

(5) *Jackson v. Davis*, 18 John. 7; *Wentz v. Dehaven*, 1 S. & R. 312; 1 Halst. 471; *Morgan v. Davis*, 2 Har. & McH. 17; *Perkins*

v. Dibble, 10 Ohio, 433. See *Upham v. Brooks*, 2 W. & M. 407; *Cutler v. Lincoln*, 3 Cush. 128; *Doton v. Russell*, 17 Conn. 146; *Post v. Arnot*, 2 Denio, 344; *Wolfe v. Dowell*, 13 Sm. & M. 103; *Hadlock v. Bulfinch*, 31 Maine 246; *Webb v. Flanders*, 32, 175; *Williams v. Thurlow*, 31, 392; *Jennings, &c. v. Wood*, 20 Ohio, 261; *Bassett v. Mason*, 18 Conn. 131.

(a) See Mr. Justice Wilde's criticism upon them. *Parsons v. Welles*, 17 Mass. 424.

(b) Mortgage from A to B, to secure several notes, payable at different times, and afterwards from A to C. Subsequently, and before maturity of either of the above notes, A gave B a warranty deed of the land, in full satisfaction and discharge of them and of another note. All the notes were surrendered to A, but the mortgage was not discharged. C brings a bill in equity to redeem against B. Held, B's title under his mortgage was defeated; if C's mortgage was valid, he had by writ of entry a complete and adequate remedy at law against B; and, therefore, the bill could not be sustained. *Holman v. Bailey*, 3 Met. 55.

(c) An acknowledgment, written on the back of a mortgage, under hand and seal, of payment and fulfilment of the condition, is a good discharge. *Allard v. Lane*, 6 Shepl. 9.

vided by statute. But, on the other hand, in these States, and also in Connecticut, the mortgagor cannot maintain this action against the mortgagee, the latter being in possession. His only remedy is by a bill in equity. These points will be further considered hereafter. (See ch. 37, s. 3.)

12. In New Hampshire, New York and Maryland, a tender, even after condition broken, revests the estate in the mortgagor. The statute, in New Hampshire, provides for a redemption, within one year after entry for condition broken, and that the mortgage shall become "utterly void."^(a) Nor is this construction controlled by other provisions, that the mortgagee shall release upon the record, and that money tendered shall be paid into Court; because, these apply equally to a tender before breach of condition, and are designed merely to *perpetuate the evidence of payment* in favor of the mortgagor.⁽¹⁾

13; Mere possession of the obligation which a mortgage is given to secure, by a party claiming the land, will not be a sufficient ground of defence against a suit by the holder of the mortgage. Thus, in a suit by the assignee of a mortgage against a stranger in possession, the latter produced the notes secured by such mortgage, but no discharge; and the evidence strongly tended to prove, that the notes could not have been paid to any lawful holder or assignee of the mortgage. Held, a discharge of the mortgage should not be presumed.⁽²⁾

14. Entry of satisfaction on the back of a mortgage discharges it.⁽³⁾

15. Chancery will decree satisfaction of a mortgage which has been paid, so that it may be cancelled on the record.⁽⁴⁾

16. In the States of Massachusetts, Maine, New Hampshire, (where, after payment or tender, the court may decree a discharge, and a copy of the decree shall be recorded,) Vermont, Rhode Island, Pennsylvania, Delaware, South Carolina, Alabama, Indiana, Illinois,^(b) Missouri, Arkansas, Michigan, (upon certificate from the mortgagee, acknowledged, &c., like deeds,) statutory provision is made, for discharging mortgages upon the margin of the public record.⁽⁵⁾ In Pennsylvania, Illinois, Missouri and Alabama, the mortgagee shall enter such discharge in three months from demand, (or, in Missouri, give a release,) under penalty of forfeiting a sum not exceeding the whole debt. In South Carolina, in three months from demand of any party interested in the estate, under penalty of one-half the debt. In Arkansas, within sixty days; in Rhode Island, Vermont and New Hampshire, in ten days

(1) *Wade v. Howard*, 11 Pick. 297; 2 Har. & McH. 17; *Vose v. Handy*, 2 Greenl. 322; *Parsons v. Welles*, 17 Mass. 419; *Gray v. Jenks*, 3 Mass. 520; *Smith v. Vincent*, 15 Conn. 1; *Swett v. Horn*, 1 N. H. 332; *Farmers', &c. v. Edwards*, 26 Wend. 541.

(2) *Crocker v. Thompson*, 3 Met. 224.

(3) *Allard v. Lane*, 18 Maine, 9.

(4) *Kellogg v. Wood*, 4 Paige, 578. See *Barnes v. Camark*, 1 Barb. 392.

(5) *Purd. Dig.* 196; *Mass. Rev. Stat.* 408;

1 *Verm. L.* 194, 195; (*See Ib.* 1337, 6.) *Aik. Dig.* 94; *S. C. St. Dec.* 1817, p. 26; *Ind. Rev. L.* 272; *Illin. Rev. J.* 510; *R. I. L.* 205, 206; *Dela. Rev. L.* 1829, 92; *Misso. St.* 409, 410; *Mich. St.* 1839, 219; *N. H. Rev. St.* 245, 246; *Verm. Ib.* 316; *Verm. L.* 1837, 6, 7. See *King v. McVickar*, 3 *Sandf. Ch.* 192; *McLean v. Lafayette, &c.*, 3 *McLean*, 587, *Haskell v. Haskell*, 3 *Cush.* 540; *Patch v. King*, 29 *Maine*, 448.

(a) By the Revised Statutes it becomes void, on performance of condition, with payment of damages, &c., arising from breach, or a tender thereof. *Rev. St.* 245.

(b) In this State, a release by deed, attested by one witness, and acknowledged like other conveyances, is also provided by statute. *St.* 1838-9, 197.

from demand; in Massachusetts, seven days; in Delaware, sixty days, under penalty of paying all damage; or, in Delaware, a fixed sum, with treble costs in Rhode Island. And the same provision is made in the latter State, in case of a refusal to execute a release of the mortgage. The statute, however, is not to impair the effect of any other legal discharge, payment, satisfaction or release, in Rhode Island. In Vermont, the mortgagor may have a discharge, witnessed, upon the deed itself, to be recorded in the margin of the records.

17. In Indiana, the register of deeds may discharge a mortgage, on the exhibition of a certificate of payment or satisfaction, signed by the mortgagor, (*qu. mortgagee?*) or his representative, and attached to the mortgage, which shall be recorded. A similar provision in New York.(1)

18. Where a mortgagor releases his equity of redemption to the mortgagee by warranty deed, made for full consideration, this is presumed to be a payment of the mortgage debt, unless there be clear proof to the contrary; and the presumption is strengthened by the lapse of more than six years from the purchase.(2)(a)

19. It has been suggested as a questionable point, whether, by a purchase of the equity of redemption in a part of the land, the mortgage is not extinguished as to the whole; upon the principle that a contract cannot be apportioned, and in analogy with the well settled rule, as to a purchase of part of the land from which a rent-charge issues.(3) (See ch. 17, sec. 32.)

20. It has been said, in Vermont, that a release of the equity of redemption to the mortgagee, does not strengthen his legal title. But, in South Carolina, although the mortgagor is expressly declared to be legal owner of the land, a release to the mortgagee will give him the whole estate.(4)

21. A formal release, by the mortgagee, of a part of the land from the mortgage, does not discharge the rest of the land.(5)(b) And, where the same party holds two mortgages, embracing the same land, and executes a partial release of each; if other transactions and instruments between the parties show such to be the intent, the releases will operate to transpose and substitute, but not to discharge the respective securities.

22. A conveyed to B an undivided moiety of certain land, taking back a mortgage for the price, and afterwards covenanted, upon request,

(1) 1 N. Y. Rev. St. 761; Ind. St. 1836, 64.

(2) *Burnet v. Denniston*, 5 John. Cha. 35; *Miles v. Comstock*, Ib. 214. See *Shelton v. Hampton*, 6 Ired. 216; *Klock v. Kronkhite*, 1 Hill, 107; *Brewer v. Staples*, 3 Sandf. Cha.

579; *White v. Todd*, 10 Mis. 189; *Longstreet v. Shipman*, 1 Halst. Ch. 43.

(3) *James v. Johnson*, 6 John. Cha. 426.

(4) *Elithorp v. Dewing*, 1 Chip. 141; 1 Brev. 177; *Taylor v. Stockdale*, 3 M'Cord, 302.

(5) *Culp v. Fisher*, 1 Watts, 494.

(a) But where a mortgagor, by deed of sale and quit-claim, for valuable consideration therein expressed, conveyed the land to the mortgagee; held, no intention being shown to pay, by such conveyance, the notes secured by the mortgage, they might still, if outstanding, be collected or negotiated. *Van Deusen v. Frink*, 15 Pick. 449. See *Cullum v. Emanuel*, 1 Alab. (N. S.) 23.

(b) A parol consent of the mortgagee to a sale of a part will operate as a release. *Laughlin v. Ferguson*, 6 Dana, 120. See *Proctor v. Thrall*, 22 Verm. 262.

to execute all conveyances requisite for a partition. He subsequently conveyed the other moiety to C, taking back a mortgage for the price. B and C then exchanged deeds of partition, in aid of which, A released the divided moiety of each grantee from the other's mortgage. Held, such releases did not extinguish the mortgages as to one-half of each divided moiety, but the whole divided moiety of each grantee became subject to his mortgage, as his undivided moiety was before.(1)(a)

23. The *depositing* of money with the mortgagee, accompanied with the note of a third person, upon payment of which the money is to be restored, does not constitute payment. Thus, a mortgagor sold the land, receiving in payment the purchaser's note, and agreeing to extinguish the mortgage. He delivered the note to the mortgagee, with an agreement that, if paid, the proceeds should pay the mortgage; and he also left the sum due, with the agreement that it should not be *applied*, but merely to stop the interest. The mortgagee receipted for the money. The note was not paid. Held, these facts did not constitute a payment of the mortgage.(2)

24. The death of a mortgagor does not have the effect of turning the mortgage into payment of the debt, wholly or *pro tanto*. Hence, in New Hampshire and Connecticut, where a mortgagor dies insolvent, the course is to have the whole debt allowed by the commissioners of insolvency, and, after receiving his dividend, the mortgagee shall hold the land for the balance. Nor will the fact, that the mortgagee has pur-

(1) *Bradley v. Fuller*, 23 Pick. 1.

(2) *Howe v. Lewis*, 14 Pick. 329. But see *Toll v. Hiller*, 11 Paige, 228.

(a) A, holding land subject to mortgage, conveyed a part of it to B, afterwards received the price, and then conveyed the remainder for its full value to C, under an agreement that the whole price should go to pay the mortgage, and C's portion be released therefrom, which was accordingly done by the mortgagee. Held, the mortgage still remained a lien upon B's part of the land. *Patty v. Pease*, 8 Paige, 277.

A, having an undivided share of a township, made a mortgage of it to B, and it was afterwards divided by process of partition. Held, B should hold A's portion of the land. *Randell v. Mallett*, 2 Shepl. 51. In Equity, as has been seen, (p. 337, n.) it is an established rule, that where a creditor has a lien on several parcels of land, some of which belong to the party equitably liable for the debt, and others have been sold by him; such debt shall be first charged upon the portion unsold, and then upon the others in the inverse order of the respective transfers. *Skeel v. Spraker*, 8 Paige, 182. This rule applies to different mortgages of different dates. *Schrymer v. Teller*, 9 Paige, 173. See *Torrey v. Bank, &c.*, *Ib.* 649.

Where A, owning land subject to mortgage, sells a part of it to B, who assumes the whole debt; and the owner of the remaining portion is compelled to pay it; he may claim an assignment of the mortgage to reimburse him. *Halsey v. Reed*, 9 Paige, 446. In such case, under the revised statutes, (in New York,) upon a suit for foreclosure, chancery may make a decree over against B, for any deficiency in the mortgage debt. *Ib.* See *Rathbone v. Clark*, 9 Paige, 648.

Where two tenants in common mortgage for their joint debt, and afterwards make partition; the part set off to each shall be sold to pay one half the debt, in the inverse order of alienations, made subsequent to the partition. *Ib.* In South Carolina, the right to compel a resort to one particular fund among several, is not applied in favor of subsequent incumbrancers or general creditors. *Bank v. Mitchell*, Rice, 389. In Connecticut, the law does not sanction any *marshalling* of securities, in case of successive mortgages on the same property. The claim of the first mortgagee is paid in full. *Mix v. Hotchkiss*, 14 Conn. 32; *Butler v. Elliott*, 15, 187. But where a mortgagee holds other securities upon a bill for foreclosure brought by him, other mortgagees may require that he make use of such securities towards the discharge of his debt. *Pettibone v. Stephens*, 15, 19. In the same State, it is held, that, where there are two funds for payment, one creditor can compel another to resort to one of those funds, in exclusion of the other, only where there is but one debtor, and the claims against the funds of one. *Ayres v. Husted*, *Ib.* 504. See also *Stamford v. Benedict*, *Ib.* 437; *Chester v. Wheelwright*, *Ib.* 562.

chased the equity of redemption, make any difference. But in Massachusetts the practice is, to allow the mortgagee only the excess of the debt over the value of the mortgage.^(a) This is in analogy with the English practice in cases of bankruptcy. And, in England, the mortgagee will be allowed to prove against the estate of the deceased mortgagor only what remains due after a sale of the land.⁽¹⁾

25. Where a mortgagee recovers judgment upon the debt secured by the mortgage, and gives a receipt, acknowledging full satisfaction, upon the execution issued on such judgment; this is not conclusive evidence of a payment and discharge of the mortgage. Thus, where the judgment-debtor, on the day previous to giving such receipt, conveyed his equity of redemption to a third person, who, on the same day the receipt was given, conveyed it to the mortgagee; held, the payment of the judgment must be construed only as an intended confirmation of the mortgagee's title; because the supposition of the payment of money would involve the absurdity, that either the mortgagor or his assignee released all his interest, at the very moment when the money to redeem the land was paid to the person taking the release.⁽²⁾

26. Where money is paid by one person interested in an equity of redemption, to obtain a partial release of the mortgage, such payment shall be applied to the benefit of others interested in the equity, and not to independent claims held by the mortgagee.

27. A mortgaged to B two distinct parcels of land, and afterwards conveyed one of them to C, and the other to D. B released to D, for a certain sum, the land transferred to him. C afterwards tendered to B a sum which, with the amount paid by D, was equal to the whole debt due; but B claimed the right to apply the sum paid by D to an independent debt, which he held against the mortgagor. Held, C might redeem the estate.⁽³⁾

28. A mortgage being given as security for a debt, and not merely for any particular evidence of debt, the general rule is, that nothing but actual payment of the debt or an express release will operate as a discharge of the mortgage. Thus, where the mortgage is given to secure a note, which is afterwards cancelled, and a new one substituted, the mortgage will stand as security for the new note.⁽⁴⁾

29. In Massachusetts, where a note is held to be *prima facie* payment

(1) *Amory v. Francis*, 16 Mass. 308; *Greenwood v. Taylor*, 1 Russ. & M. 185; *Doe v. McLoskey*, 1 Alab. (N. S.) 708; *Rowe v. Young*, 4 Y. & Coll. 204. See *Graften, &c. v. Doe*, 19 Verm. 463; *Findlay v. Hosmer*, 2 Conn. 350; *Farnum v. Boutelle*, 13 Met. 159.

(2) *Perkins v. Pitts*, 11 Mass. 125.

(3) *Hicks v. Bingham*, 11 Mass. 300.

(4) *Elliot v. Sleeper*, 2 N. H. 525; *Crosby v. Chase*, 5 Shepl. 369; *Davis v. Maynard*, 9 Mass. 247; *Williams v. Little*, 12 N. H. 29. See *Grurgeon v. Gerard*, 4 Y. & Coll. 119; *Teed v. Carruthers*, 2 Y. & Coll. Cha. 31; *Morse v. Clayton*, 13 Sm. & M. 373; *Burdett v. Clay*,

8 B. Mon. 287; *Bank, &c. v. Finch*, 3 Barb. Cha. 293; *Hadlock v. Bulfinch*, 31 Maine, 246; *Buswell v. Davis*, 10 N. H. 424; *Euston v. Friday*, 2 Rich. S. C. 427 n.; *Hardy v. Commercial, &c.*, 10 B. Mon. 98; *Flanders v. Barstow*, 6 Shepl. 357; *Huginin v. Starkweather*, 5 Gilm. 492; *McCormick v. Digley*, 8 Blackf. 99; *New Hampshire, &c. v. Willard*, 10 N. H. 210. But see *Holman v. Bailey*, 3 Met. 55; *Bonham v. Galloway*, 13 Illin. 68; *Purser v. Anderson*, 4 Edw. Cha. 17; *McGiven v. Wheelock*, 7 Barb. 22; *Boston, &c. v. King*, 2 Cush. 400.

(a) If personal property is pledged, with a power of sale, the property must be sold, or its value legally ascertained, before the claim can be allowed against the estate. *Middlesex, &c. v. Minot*, 4 Met. 325.

of a debt, a new note, substituted for an old one which was secured by mortgage, though given to an assignee of the mortgage, will be subject to the same security, if not intended as payment; as between the mortgagee and mortgagor, or parties claiming under them. Whether in relation to purchasers from the mortgagor, *qu.*(1)

30. A mortgaged land to B, to secure *the amount* of a certain note, which he afterwards took up, and gave a new one. C purchased the land *bona fide* from A, who delivered to him the original note, which he had taken up. C brought a bill in equity against B, for a conveyance free from his mortgage; but the bill was dismissed.(2)(a)

31. A mortgaged to B. C, a creditor of B, afterwards summoned A in a trustee process against B, recovered judgment against A, and committed him upon execution, but afterwards gave him a release of the judgment. B brings ejectment upon the mortgage. Held, these facts constituted no defence to the action.(3)

32. Nor will the giving of new security for the mortgage debt operate to discharge the mortgage, though it be of a higher nature than the original security; as a *recognizance*, for a simple contract.(4)

33. But, it seems, where a judgment has been recovered upon the debt, a release of the judgment will discharge the mortgage.(5)

34. It is a question of very frequent occurrence, whether, under the particular circumstances of a case, the transfer of a mortgage shall be considered *an assignment*, by which the mortgage is preserved as a lien or incumbrance upon the land; or as a *discharge or extinguishment*, which relieves the land from incumbrance, and lets in other, and previously posterior claims.

35. Upon the principle, that an equitable title merges in the legal title, where both become vested in the same person; if the holder of an equity of redemption pay, and take an assignment of the mortgage, the latter is extinguished, unless he has some beneficial interest in keeping it alive. A court of equity will keep an incumbrance alive or consider it extinguished, as will best serve the purposes of justice, and

(1) *Watkins v. Hill*, 8 Pick. 522.
(2) *Bolles v. Chauncey*, 8 Conn. 390.
(3) *Cary v. Prentiss*, 7 Mass. 63.

(4) *Davis v. Maynard*, 9 Mass. 247.
(5) *Perkins v. Pitts*, 11 Mass. 125.

(a) A note, given to a *feme sole*, and secured by mortgage, was, after her marriage, given up to the mortgagor, and a new one taken by the husband for the amount then due. Held, the mortgage was not discharged as against a purchaser from the mortgagor. *Pomroy v. Rice*, 16 Pick. 22. Mortgage by A to B, conditioned to pay B the contents of a note, payable on demand, signed by A as principal and B as surety, or indemnify B against his liability thereupon. The note was afterwards taken up, by the substitution of a new one, signed by A and other sureties; and, subsequently, B assigned the mortgage. Held, the condition was performed, and nothing passed by such assignment. *Abbott v. Upton*, 19 Pick. 434.

A gave a mortgage to B, to secure a note payable by instalments. The first being due, B demanded payment, saying that if it were paid he could sell the securities; whereupon A gave a negotiable note for the amount, payable in four months, which B proposed to have discounted at a bank. At the same time, this indorsement was made upon the first note: "Received the first instalment on the within, of \$402 78." B having afterwards assigned this note with the mortgage; held, the transaction was not a mere change of security for the same debt, but a payment, and a discharge *pro tanto* of the mortgage. *Fowler v. Bush*, 21 Pick. 230.

the actual and just intention of the party.(1)(a) It will sometimes hold a charge extinguished, where it would subsist at law; and sometimes preserve it, where at law it would be merged. With reference to the party himself, it is said, it is of no sort of use to have a charge on his own estate; and, where this is the case, it will be held to sink, unless something shall have been done by him to keep it on foot. In the case of an *infant*, entitled to the estate and also to a charge upon it, the court will keep the rights distinct, if it be deemed most beneficial for the infant. But equity will not recognize as a beneficial purpose, the enabling a mortgagee, after he has purchased the equity of redemption, at some future time to assign the mortgage, lying dead in his possession, to a creditor, instead of giving a new mortgage. On the contrary, this purpose is pregnant with fraud and imposition.(2)

36. Upon the 20th of August, 1800, A mortgaged to B, to secure payment of \$2,500 in one year. In 1801, C, a creditor of A, caused his equity of redemption to be sold on execution, and became himself the purchaser. In December, 1806, C paid and took an assignment of B's bond and mortgage, and in January, 1811, conveyed the whole estate to D for \$7,000, with warranty against incumbrances, &c. In March, 1810, C assigned the bond and mortgage to E, to secure \$35. The assignment was *acknowledged* after the deed to D, and D in his answer, (probably to a bill for foreclosure,) stated his belief, that it was *made* after the deed to him. Held, it was the intention of C to *extinguish* the mortgage, inasmuch as he could have no object in keeping alive, and the bill was dismissed.(3)

37. On the other hand, when the transfer to the mortgagor is expressly designed to effect another object, it will not operate as an extinguishment.

38. A mortgaged to B and to C. D afterwards extended an execution upon the equity of redemption. B and C entered into an agreement with A, that the land should be sold, and the proceeds applied, first to their mortgages, then to the execution of D. The land was sold accordingly to E, who paid the mortgage debts, and the balance of the proceeds to D. D was privy to the arrangement. B acknow-

(1) *Starr v. Ellis*, 6 John. Cha. 395; *Bailey v. Willard*, 8 N. H. 429; *Cooper v. Whitney*, 3 Hill, 95; *Moore v. Harrisburg, &c.*, 8 Watts, 138; *Poole v. Hathaway*, 9 Shepl. 85; *Hill v. Smith*, 2 M'L. 446; *Hatch v. Kimball*, 4. 146; *Bank, &c. v. Tarleton*, 23 Miss. 173; *Frye v. Bank, &c.*, 11 Illin. 367; *Robinson v. Leavitt*, 7 N. H. 100; *Campbell v. Knights*, 11 Shepl. 332; *Helmholt v. Man*, 4 Whart.

410; *Slocum v. Catlin*, 22 Verm. 137; *McGiven v. Wheelock*, 7 Barb. 29; *Loud v. Lane*, 8 Met 517; *Brown v. Lapham*, 3 Cush. 554; *Kinley v. Hill*, 4 W. & S. 426.

(2) *Forbes v. Moffatt*, 18 Ves. jr. 384; *Compton v. Oxenden*, 2 Ves. jr. 261; *James v. Johnson*, 6 John. Cha. 425.

(3) *Gardner v. Astor*, 3 John. Cha. 53.

(a) Where an estate and the charge upon it become united in one person, a merger is presumed. A transfer to a trustee is held to be evidence against such presumption, but not conclusive. *Hood v. Phillips*, 3 Beav. 513.

Where there is no direct proof of the intention, it may be inferred from circumstances, one of which is the interest of the party. But this may be rebutted by others. The party may intend to merge, upon a mistaken view of his interest. He may judge erroneously, knowing all the facts. But if the intent is clear, a merger will take place, though he expected advantages which he does not realize. *Loomer v. Wheelright*, 3 Sandf. Ch. 157.

A mortgage is said to be extinguished by *payment from the debtor's funds*. *Kinley v. Hill*, 4 W. & S. 426. Thus, where a mortgage debt is discharged by a bond of the heirs, who are also assignees of the mortgage, to prevent a sale of the land, the mortgage is also discharged. *Robinson v. Leavitt*, 7 N. H. 73. See *Hadley v. Chapin*, 11 Paige, 245.

ledged upon the records satisfaction of his mortgage, and C released to A all his right in the land. On the same day, A conveyed with warranty to E. Held, without reference to D's knowledge of the transaction, the effect of it was to make E substantially the assignee of B and C, A being a mere instrument for effecting the assignment; and that D was not entitled to the land, without paying the mortgages to E.(1)

39. A, being a first mortgagee, made a lease of the land to B. C, a subsequent mortgagee, undertook to discharge the first mortgage, paid the debt, and took an assignment of the mortgage and lease, for the purpose of enabling him to collect the rent. Held, no extinguishment of the mortgage.(2)(a)

40. But it has been held, that where a purchaser of the equity of redemption takes an assignment of the debt for which the mortgage was given as security, the effect is the same as if the mortgagor himself had done it, and the debt is to be considered as paid.

41. A gives to B a note and mortgage, and then conveys the land to C. C pays B the amount due him, takes an assignment of the securities, and then brings a suit against A, in the name of B, upon the note. Held, the action would not lie.(3)

42. Where a prior incumbrancer contracts for a purchase of the land in discharge of his debt, and assumes the payment of a subsequent mortgage as a part of the consideration, such purchase will operate as an extinguishment of his mortgage, and give priority to the subsequent mortgagee.

43. A mortgaged to B, then to C, and then charged the land with another debt to B. A and C afterwards entered into an indenture, which set forth that C had agreed for an absolute purchase of the land for a certain sum, being the amount of all the debts, out of which he was to pay a certain part to the first mortgagee, and retain the balance in satisfaction of his debt. In consideration of the sum named, being the amount of B's two claims, the payment of which C assumed, and of C's own debt, A conveyed the equity of redemption, subject to the mortgage and charge of B, to C, and C covenanted to pay B. Held, C's debt was hereby extinguished, and that B might maintain a bill for foreclosure upon both his mortgages, without paying it.(4)(b)

(1) *Marsh v. Rice*, 1 N. H. 167.

(2) *Willard v. Harvey*, 5 N. H. 252.

(3) *Eaton v. George*, 2 N. H. 300.

(4) *Lrown v. Stead*, 5 Sim. 535.

(a) If a second mortgagee purchases the equity of redemption, and pays the notes secured by the first mortgage, no action lies upon the notes against the original debtor or his sureties. *Viles v. Moulton*, 11 Verm. 470.

If a mortgagee assign his mortgage as security, take back a deed of the land, and agree to pay the assignee; this is no merger of the mortgage. *Patty v. Pease*, 8 Paige, 182. So if a mortgagor applies to a third person for money to pay the mortgage, agreeing to give him the same security which the mortgagee had, and on receiving the money pays it to the mortgagee, and takes an assignment to the lender; this is no discharge of the mortgage. *White v. Knapp*, 8 Paige, 173. A, a mortgagee, took a deed of the land from B, the mortgagor, professing to be designed to cancel the mortgage. The mortgage and notes remained with the mortgagee, upon the agreement to abide the event of an attachment, to which the land was then subject. An execution being afterwards levied upon it; held, the mortgage was not discharged, but still had precedence of the attachment. *Crosby v. Chase*, 5 Shepl. 369.

(b) An estate, subject to two charges, was devised to A, who held the first one. Upon her marriage, a settlement was made, to which B, the holder of the second charge, was no party, whereby it was agreed that the first charge should not be raised. Held, B should hold, clear of the first charge. *Farrow v. Rees*, 4 Beav. 18.

44. Another general principle on this subject has been thus stated. When he who has the right to redeem pays the mortgage-money, the mortgage is discharged, because he becomes absolutely seized—he pays his own debt on his own account. The mortgage is extinguished, because the debt is paid *by the real debtor to the creditor*. But, where one owns only *part of the land*, as he might pay the whole and call for contribution, so he may buy in the mortgage.(1)

45. If a mortgagor is appointed executor of the mortgagee, such appointment, and a subsequent conveyance of the land by the former, will operate as an extinguishment of the mortgage.

46. A mortgaged land to B, his father, as security for a bond. B died before condition broken, having appointed A his executor. A mortgaged the land to C, with the usual covenants of warranty, and C assigned the mortgage to D. Afterwards, A, as executor, assigned his own mortgage, given to B in his lifetime, and the accompanying bond, to E; and E, in a suit upon the mortgage against A in his natural capacity, recovered possession of the land. D brings a suit for the land against E. Held, whether the mortgage given by A was extinguished by his appointment as executor or not, it was extinguished by his conveyance to C.(2)(a)

47. A deed of quit-claim, given by the mortgagee to a purchaser of the equity of redemption, in which he covenants only against the acts of those claiming under himself, may operate as an assignment of the mortgage.(3)

48. After attachment of land under mortgage, the mortgagee, upon payment of his debt by a third person, and with the mortgagor's consent, gave to such third person a quit-claim deed of the land. Held, this operated as an assignment, not an extinguishment, of the mortgage, and a levy upon the land by the attaching creditor did not give him a legal title. It seems, such levy passed to him the equity of redemption, and he might bring a bill in equity to redeem.(4)(b)

49. It has been held in Massachusetts, that where a wife joined her husband in a mortgage, and a purchaser of the equity of redemption, from the administrator of the mortgagor, paid the sum due, and the mortgage was discharged upon the record; the widow was not thereby let

(1) Taylor v. Bassett, 3 N. H. 298.

(2) Ritchie v. Williams, 11 Mass. 50; Ipswich, &c. v. Story, 5 Met. 310.

(3) Hunt v. Hunt, 14 Pick. 374.

(4) Freeman v. M'Gaw, 15 Pick. 82. See Wilson v. Troup, 2 Cow. 195; Olmsted v. Elder, 2 Sandf. 325; Crooker v. Jewell, 31 Maine, 306.

(a) So, where the mortgagor was appointed administrator of the mortgagee, and returned an inventory, including the mortgage debt, and an account, charging himself with the personal estate, whereupon there was a decree of distribution; held, this was a payment, and the administrator could not afterwards assign the mortgage. *Richie v. Williams*, 11 Mass. 50. But where certain land having been twice mortgaged, the mortgagor, after condition broken, was appointed administrator of the second mortgagee, and returned an inventory, including the debt due from himself; held, such appointment was not, in respect to an assignee of the first mortgage, who had purchased the mortgagor's right of redemption, a payment of the second mortgagor's debt, and an extinguishment of the mortgage, but that the administrator might redeem as against such assignee. *Kinney v. Ensign*, 18 Pick. 232. See *Hough v. De Forest*, 13 Conn. 472; *Miller v. Donaldson*, 17 Ohio, 264.

(b) A quit-claim deed from the mortgagor to the mortgagee, after assignment of the mortgage, is no merger. *Pratt v. Bank, &c.*, 10 Verm. 293. Where the assignee of a mortgage takes a quit-claim deed of one-half of the land; this is at most an extinguishment of only a part of the debt. *Klock v. Cronkhite*, 1 Hill, 107.

in to her dower, the discharge having the effect to pass *the legal interest* to the holder of the equity, and thus vesting the whole estate in him.(1) But this doctrine has been since overruled, and such a discharge, made by the mortgagee to an execution purchaser of the equity, held an extinguishment of the mortgage, which let in the widow to her dower.(2)

50. The purchaser of an equity of redemption at an execution sale, who afterwards takes an assignment of the mortgage, may recover possession of the land, by a suit commenced before expiration of the year, within which the mortgagor has a right to redeem, although neither such purchaser nor the mortgagee ever entered on the land. There is no merger of the mortgage.(3)

51. A and B, tenants in common, mortgaged to C and D to secure \$400. Afterwards, their equity of redemption was sold to E, upon an execution in favor of another creditor. C and D recovered a judgment for possession of the land; and afterwards C conveyed all his interest in the land to E, and E conveyed one-half of the right in equity of A and B, which he had purchased at the execution sale, to F. Subsequently, the execution in the suit of C and D was served, by delivering possession of the land to the parties entitled. Afterwards, E conveyed to D all his interest in the land, thereby uniting in D the titles of mortgagor and mortgagee of half the land. This conveyance, F treated as payment of one-half of the debt; and, having tendered the amount of the other half, he brought a bill in equity against D to redeem. Held, as D purchased only a moiety of the equity of redemption, only a moiety of the mortgage could be held as extinguished; that the recovery of a judgment upon the mortgage by C and D, being previous to D's acquiring any interest in the equity, was no indication of his intention, as to an extinguishment or otherwise; and, as there was nothing to show that D would in any way gain by keeping alive a moiety of the mortgage, it should be held extinguished.(4)(a)

52. Where a mortgagor executes a release of the equity of redemption to the mortgagee, and receives from him the note secured; this does not extinguish the mortgagee's title under the mortgage, or his right to recover damages, for breach of the covenants of warranty contained therein. The fact that the mortgage deed contains such covenants, while the deed of release does not, constitutes a sufficient ground for keeping the mortgage alive.(5)

53. If, after a conveyance to a wife of an equity of redemption, she and the husband take possession, and the husband takes an assignment

(1) *Popkin v. Bumstead*, 8 Mass. 491.

(2) *Eaton v. Simonds*, 14 Pick. 98.

(3) *Tuttle v. Brown*, 14 Pick. 514. See *West, &c v. Chester*, 1 Jones, 282; *Berger v. Hiester*, 6 Whart. 210; *Moore v. Shultz*, 1

Harris, 96; *Waddle v. Cureton*, 2 Speers, 53.

(4) *Freeman v. Paul*, 3 Greenl. 260.

(5) *Lockwood v. Sturdevant*, 6 Conn. 374; *Baldwin v. Norton*, 2 Conn. 161; *Marshall v. Wood*, 5 Verm. 250; * *Van Deusen v. Frink*, 15 Pick. 453.

* The marginal note states that the release of the equity was by a *warranty* deed; but the case does not so find.

(a) Where the purchaser of an equity of redemption, under two distinct mortgages, takes an assignment of the first, this is no merger, nor will it give the second mortgagee a priority in the proceeds of a sale. *Millsbaugh v. McBride*, 7 Paige, 509.

of the mortgage, there is no merger, but she holds under the mortgagor, and he under the mortgagee.(1)

54. It is the general rule, that a court of law will not permit an outstanding satisfied mortgage to be set up against the mortgagor. But, as the legal title is not technically released by receiving the money, this rule must be founded on an equitable control by courts of law over parties in ejectment; and is therefore subject to exceptions, where equity so demands.

55. Land was sold by trustees, for payment of the debts of one deceased. The land was mortgaged by him before his death, and the mortgagee brings ejectment upon the mortgage, against the trustees, and the heirs of the mortgagor. The purchaser had received no deed from the trustees, and therefore gained no legal title, but he had paid most of the purchase-money. The mortgagee having obtained a decree for foreclosure and sale, the purchaser, with the consent and in presence of one of the trustees, paid the whole amount due upon the mortgage; the sum being considered as part of the purchase-money due under the sale made by the trustees. The mortgagee gave the purchaser a receipt, and an order to enter the suit "settled," which was done. In an action of ejectment by the heirs of the mortgagor against the purchaser, held, although a stranger could not set up a mortgage, satisfied by the mortgagor, to defeat his title, yet he might thus use a mortgage bought in by himself; that, in this case, the purchaser owning the equitable estate, and having paid off the mortgage on his own account, the incumbrance belonged to him, and the *mortgagor* could not have demanded a reconveyance from the mortgagee; and that the action would not lie.(2)

56. Where a third person purchases mortgaged property, nominally as from the mortgagor, but really from the mortgagee, or with his concurrence and by his request; the latter will not be allowed to set up a title under his mortgage.

57. A mortgages to B, to secure the purchase-money of property bought from B. Afterwards, A being unable to pay the purchase-money, application was made to C, with the knowledge and by the desire of B, who himself wrote to C on the subject, to buy a portion of the property at an advanced price. C accordingly bought it, and paid the price; but the receipts were expressed to be on account of A's debt to B. Before the purchase was completed, B expressed to C his perfect confidence in his fulfilling his engagements. Most of the property was delivered to C with B's consent, and a part of it by B himself. The portion remaining in B's hands having been sold at a reduced price, and his debt against A being, therefore, unsatisfied; B claimed to hold the part conveyed to C, under his mortgage from A. C files a bill for a perpetual injunction against this claim. Held, B was a party to the contract between A and C, and the portion of the property sold to C was discharged from the mortgage.(3)

58. Where a release of a mortgage is made to distinct parties, it will take effect according to their respective interests in the land, independent of such mortgage.

(1) *Cooper v. Whitney*, 3 Hill, 95.

(2) *Peltz v. Clarke*, 5 Pet. 481.

(3) *Skirving v. Neufville*, 2 Des. 194.

59. A mortgaged land to B. Afterwards, A and B joined in mortgaging to C. C entered for condition broken, but, before the three years requisite for foreclosure had elapsed, according to a previous agreement, tendered a release of his mortgage, which they refused to receive, until five years had passed from C's entry. Held, the release reinstated A and B in their former relation of mortgagor and mortgagee, as if the mortgage to C had never been made.(1)

CHAPTER XXXIV.

MORTGAGE—FROM WHAT FUND TO BE PAID.

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| <ol style="list-style-type: none"> 1. Debt paid from the fund benefited—executor and heir. 2. Mortgage by father and son. 3. Devised lands. 6. Personalestate may be expressly exempted. | <ol style="list-style-type: none"> 8. Exceptions to the rule of applying the personal estate. 9. Rule in New York. 10. In Pennsylvania. 11. Recapitulation of cases. 41. Application of payments in equity. |
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1. It is a rule in equity, that where a person dies, leaving a variety of funds, one of which must be charged with a debt; it shall be paid out of that fund which received the benefit. Hence the personal estate, in the hands of the executor, shall be applied to discharge a mortgage upon the real estate, in the hands of the heir; because the money borrowed went to increase the personal estate. And it is immaterial, whether there is any personal obligation for payment of the money or not; because there was a debt contracted by the borrowing.(2)(u)

2. If a father and son join in a mortgage of the father's land, without covenant, the father receiving the money, and the son conveying for a nominal consideration; the real assets of the father will not be charged in the hands of the son, an heir not being bound even by an express obligation, unless specially named; nor the real or personal assets of the son, who had received no part of the money borrowed.(3)

3. The principle above stated, (sec. 1,) requires the discharge of a mortgage, upon lands devised, as well as those descended, out of the personal estate of the testator.(4)

4. The personal estate is liable to payment of a mortgage debt, though the land is devised *subject to the incumbrance*, or the personal estate bequeathed, or the land expressly charged with payment of debts, or the

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| <ol style="list-style-type: none"> (1) Baylies v. Bussey, 5 Greenl. 153. (2) 2 Cruise, 146, 147. See Halsey v. Reed, 9 Paige, 446; Goodhue v. Barnwell, | <ol style="list-style-type: none"> Rice, 198; Quennell v. Turner, 4 Eng. L. & Equ. 84. (3) 2 Cruise, 146, 147. (4) 2 Cruise, 147. |
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(a) Upon a sale by the mortgagee, for the purpose of foreclosing; if in the lifetime of the mortgagor, the surplus, after satisfying incumbrances, is personal estate; if after his death, it belongs, with the equity of redemption, to the heir. Wright v. Rose, 2 Sim. & Stu. 323. In New Hampshire, an administrator must redeem a mortgage, unless licensed to sell subject thereto. Rev. St. 318.

real estate limited in trust, either in fee or for a term, for payment of debts.(1)

5. If the personal estate is deficient, a mortgage shall be discharged from the proceeds of land devised for payment of debts.(2)

And where a mortgaged estate is devised, and another estate descends to the heir, the latter shall be applied in payment of the mortgage.(3)(a)

6. A testator may, however, exempt the personal estate from payment of the mortgage debt, by substituting the real estate in its stead. And this may be done, either by expressed words, or by a manifest intent appearing upon the will.(4)

7. So, the specific bequest of a chattel will exempt it from liability for a mortgage debt.(5)

8. The rule above stated, being founded on the consideration that the debt was originally a personal one, and the charge on the land merely collateral, is not applicable where the mortgage debt was contracted by one person, and the land descends to another.(6) Thus, if a grandfather mortgage, with a covenant to pay the money, and the land descend to his son, who dies without paying the mortgage, leaving personal estate and a son; the father's personal estate shall not be applied in payment of the mortgage. So, a covenant by one person to pay the debt of another, which is secured by mortgage, will not subject the personal estate of the former, primarily, to the payment of the debt. And even though a person expressly charge his real and personal estate with his debts, this will not render the personal estate liable to the payment of a mortgage made by another. Upon the same principle, where one purchases an equity of redemption, his personal estate will not be applied to payment of the mortgage-money, even though he have expressly covenanted to pay it, unless it appears to have been his intention to make the debt his own. So, in case of a deed given, subject to a mortgage, the land is the primary fund for payment. Equity effects a *subrogation* in favor of the mortgagor. So also, as against a second purchaser from the first grantee, though the second deed does not mention the mortgage. So, in case of sale of the equity of redemption on execution, the land, in equity, is the primary fund; and, if a suit is brought upon the bond, and judgment given for the defendant, this is no bar to a subsequent bill for foreclosure. If a wife joins her husband in a mortgage of her own estate, and the money goes to his benefit, his personal estate will be first applied in payment of it. But, where money is borrowed on the wife's estate, partly to pay her debts, and partly for the husband's use, the latter is not bound to indemnify the wife's estate against any part of it. And, if it appear not to have been the wife's intention to stand as a creditor for the mortgage-money, the husband's personal estate will not be liable.(7)

9. In New York, the heir or devisee of a mortgaged estate shall

(1) 2 Cruise, 148.

(2) Ibid. 149.

(3) Ibid. 152.

(4) Ibid. 152-60; 2 Atk. 424.

(5) Ibid. 161, 162.

(6) 2 Cruise. 163.

(7) 2 Cruise, 164-5-6-8-70-73-5; Jumel v. Jumel, 7 Paige, 591; Hayer v. Pruett, Ib. 465. See Cox v. Wheeler, Ib. 248; Skeel v. Spraker, 8, 182.

(a) This point was settled by Lord Hardwicke, upon reconsideration of a decree to the contrary, in regard to which he remarked, that, "not to confess an error, is much worse than to err."

not call upon the executor to redeem it, unless the will expressly so direct.(1)(a)

10. In Pennsylvania, A mortgaged to the plaintiff one lot of land, and then devised all his estate, comprising many other lots, to B. B died, having devised the mortgaged tract to C, and the rest of her estate to her executors. The plaintiff having recovered judgment upon the bond which accompanied the mortgage, a motion was made that the sum due should be levied upon the land mortgaged, and the rest of the estate discharged. Held, that all the lands which had belonged to A should contribute, according to their respective values; that there was nothing in the will of B, showing an intention that C should take the estate *cum onere*, and therefore it should share equally with the other lands in payment of the mortgage debt; and that to charge C with the whole debt, she being a specific devisee, would plainly defeat the intention of B, while to charge the lands held by the residuary legatees would not have that effect.(2)

11. As between heir and executor, the rules above stated are of comparatively little consequence in the United States; because, in general, real and personal estates, at the death of the owner, pass to the same heirs. As between devisee and executor, they may be important; but very few cases have been decided. There is, however, one opinion of extraordinary ability and value; being that delivered by Chancellor Kent in *Cumberland v. Codrington*,(3) in which case he presents at length the English doctrine and decisions upon this subject, as follows.

12. As between the representatives of the real and personal estate of the deceased purchaser of a mortgage, the land is the primary fund to pay off the mortgage.

13. In *Shafto v. Shafto*,(4) decided by Lord Thurlow in 1786, the devisee of land, mortgaged by the testator, covenanted with the holder of the mortgage, that the estate should remain as security for the debt and interest, with an additional one per cent. of interest. The question was, whether the personal estate of the devisee, who had died in the meantime, should not pay the debt and interest, or at least the arrears of interest, with the additional one per cent. Held, the land was the primary fund to discharge the mortgage, that the interest must follow the nature of the principal, and that the contract for additional interest was also in the nature of a real charge.

14. In *Tankerville v. Fawcett*,(5) Lord Kenyon declared, that, where an estate descends or comes to one, subject to a mortgage, although the mortgage is afterwards assigned, and the party covenants to pay the

(1) 1 N. Y. Rev. St. 749; *Halsey v. Reed*, 9 Paige, 446.

(2) *Morris v. McConaughy*, 2 Dall. 189.

(3) 3 John. Cha. 252.

(4) 2 P. Wms. 664, n. 1.

(5) 2 Bro. 57.

(a) In 1824, A gave a bond, secured by mortgage. B purchased the land, subject to payment of the mortgage, and conveyed to a trustee for the benefit of A's wife. After A's death, the *cestui que trust*, being legal owner, under the Revised Statutes, administered upon the estate. Held, in equity, the land was the primary fund for payment of the mortgage, and the administratrix, owing subject thereto, was not allowed for a payment of the mortgage. *Jumel v. Jumel*, 7 Paige, 591. In Missouri, the court may order redemption with the personal assets, if the will makes no provision therefor, and it will be beneficial to the estate, and not injurious to creditors. Otherwise, the court may order a sale of the equity. *Misso. St.* 51.

money, his personal estate will not be bound. The devisee of land having voluntarily charged a simple contract debt of the testator upon the land devised, and died; held, the debt was not the proper debt of the devisee, and his personal estate was not liable.

15. In *Tweddell v. Tweddell*,⁽¹⁾ A purchased the equity of redemption of a mortgaged estate, and agreed with the mortgagor to pay, in part consideration of the purchase, the mortgage debt to the son and heir of the mortgagee, and the rest of the purchase-money to the mortgagor. He also covenanted with the mortgagor, that he would thus pay the mortgage debt, and indemnify the mortgagor from the mortgage. A died, having devised the estate. Upon a bill by the devisee, to have the mortgage discharged from the personal estate; held, the personal estate was not thus liable; that the personal estate is never charged in equity, where it is not at law; that A took the land subject to the charge, but the debt, as to him, was a real, not a personal one; and that his contract with the mortgagor was a mere contract of indemnity, which would have been implied, if not expressly made.

16. In *Billinghurst v. Walker*,⁽²⁾ an estate was held by a lease for lives, subject to a charge of £2,200 to A. It was conveyed by the holder to B, subject to this charge, and subject to a charge of £900 to C; and B, in the indenture of conveyance to which A was party, covenanted to pay both charges. B paid the debt to C, and afterwards gave bond to pay A the interest of her claim for life, and the principal at his death. The lease having been repeatedly renewed, B died, having devised the estate to two of the defendants, and appointed two others of the defendants his executors. The charge being called in, and paid to a legatee of A, by the executors of B, the defendants were called on by the plaintiffs, pecuniary legatees of B, who were unpaid, to have £2,200 replaced by the devisees of the land, and paid over to them. Held, notwithstanding the covenant by B to pay the debt, contained in an instrument to which A, the holder of the debt, was a party, and the subsequent bond, altering and extending the original time of payment; the nature of the charge was not varied, but it remained primarily a debt upon the land; that though B incurred a personal liability to the creditor, this did not subject his personal estate, because such intention did not appear; and the defendants were decreed to pay over the money.

17. Hence, it seems, to charge the personal estate, the assumption of the debt must be accompanied with evidence of an intention to assume it, as a *personal* debt, detached, as it were, from the land.⁽³⁾

18. In *Mattheson v. Hardwicke*,⁽⁴⁾ the testator devised land to A and B in fee, charged with the payment of debts and legacies. A paid all of them but one legacy, for which he gave his note, and died. It was admitted that he had paid off the other incumbrances, in order to relieve the land from them entirely. Held, the note was merely collateral security, and the land the primary fund for payment of the legacy.

19. The question in the latter cases seems to be, not whether the party acquiring the mortgaged or charged estate has made himself personally liable for the debt, but whether the land or the personal estate shall be treated as the primary fund for payment. The distinc-

(1) 2 Bro. 101, 152.

(2) 2 Bro. 604.

(3) 3 John Cha. 256.

(4) 2 P. Wms. 664, n.

tion is this: that where one mortgages land as security for his own debt, the debt is the principal, and the mortgage merely collateral. But, on the other hand, where one acquires an estate already mortgaged, even though he personally assume the debt, and covenant to pay it, he is understood to become a debtor only in respect to the land, and his promise to be made on account of the land, which therefore is the primary fund for payment. The cases establishing each of these propositions are said to be equally numerous and decisive.(1)

20. In *Woods v. Huntingford*,(2) A had mortgaged land to raise money for his son, B. The land was afterwards conveyed, subject to the mortgage, to the use of B, who joined with his father in a covenant for payment of the money. The land was next reconveyed to A, who covenanted to discharge the mortgage, and afterwards borrowed a further sum from the mortgagee, and made a new mortgage for the whole debt. The question was between the heir and personal representative of A, which should pay the debt. Lord Alvanley, M. R., held, that though the debt belonged primarily to B in equity, and to A and B together at law, A had made it his own; and that it was as strong a case as could exist, without express declaration. He was careful not to contradict in any degree the principle established in *Tweddell v. Tweddell*, which was a very governing case. In that case, there was no communication with the mortgagee, but only a covenant of indemnity; and the purchaser did not thereby personally assume the debt.(3)

21. In *Butler v. Butler*,(4) the purchaser of an equity of redemption agreed with the vendor, to pay the mortgage debt of £2,000, and also £1,000 to the vendor; but there was no communication with the mortgagee. The authority of *Tweddell v. Tweddell* was recognized, as showing that the land was primarily chargeable with the debt, which did not become the debt of the purchaser, as a personal liability. Lord Alvanley collected from the decisions, that the purchaser of land, charged with a debt, by a mere covenant to indemnify the vendor, does not make the debt his own, *except in respect to the estate*; and the estate, not his personal property, must bear it. The purchaser might be circuitously liable to the vendor for his indemnity, but the decree would have been, in such case, for a sale of the land.(5)

22. In *Waring v. Ward*,(6) the testator, having purchased a mortgaged estate, borrowed a further sum, and gave a new bond and mortgage for it. Held, the debt should be paid from the personal estate, because the personal contract was primary, and the real contract only secondary. Lord Eldon, in giving judgment, remarked, that in general the personal estate was primarily liable, because the contract was primarily a personal contract, and the land bound only *in aid* of the personal obligation. That Lord Thurlow carried the doctrine so far as to hold, that if the purchaser of an equity of redemption covenants to pay the mortgage debt, and also to raise the interest from four to five per cent.; yet, as between his real and personal representatives, even the additional interest is not primarily a charge upon the personal estate, being incident to the charge. That, even without any express

(1) 3 John. Cha. 256-7.

(2) 3 Ves. 128.

(3) 3 John. Cha. 258.

(4) 5 Ves. 534.

(5) 3 John. Cha. 258.

(6) 5 Ves. 670; 7, 332.

covenant, the purchaser of an equity is bound to indemnify the vendor against any personal obligation, and pay a debt charged upon the land. That the case of *Tweddell v. Tweddell* proceeded upon the ground, that the debt due the mortgagee was never a debt *directly* from the purchaser. That if Lord Thurlow was right upon the fact, the case was a clear authority, that the purchase of an equity will not make the mortgage debt the debt of the purchaser. That in his hands it is the debt of *the estate*, and a mortgage interest, as between his representatives.

23. In the *Earl of Oxford v. Lady Rodney*,⁽¹⁾ the testator purchased a mortgaged estate, paid the consideration remaining for the vendor beyond the mortgage, and then covenanted with the mortgagee to pay him the mortgage debt. After his death, upon the question whether the personal estate should go to pay the debt, Sir William Grant, M. R., remarked, that it was not very easy to reconcile the case of *Tweddell v. Tweddell*, with the decision in *Parsons v. Freeman*, by Lord Hardwicke, that where the mortgage-money is taken as part of the price, the charge becomes a debt from the purchaser. But he admits that Lord Thurlow's principle was right, in a case where the contract of the purchaser gives to the mortgagee no *direct and immediate* right against himself, but is a mere contract of indemnity.

24. Chancellor Kent remarks upon these observations,⁽²⁾ that the mortgage debt is always *part of the price*, unless the vendor agrees to remove the incumbrance. By covenanting to indemnify the vendor, the purchaser takes the land *cum onere*, and the value of the incumbrance is of course deducted from the value of the land. This was the fact in many of the cases already cited.

25. From this series of cases, Chancellor Kent deduces the general principle,⁽³⁾ that a covenant by the purchaser of an equity of redemption, to indemnify the vendor against the mortgage, does not make the debt his own, so as to render it primarily chargeable upon his personal assets. To produce this effect, there must be a *direct* communication and contract with the mortgagee, and moreover some decided evidence of an intention to charge primarily the personal estate; as where the original contract is essentially changed, and lost or merged in the new and distinct engagement with the mortgagee; and the party shows that he meant to take upon himself the debt, absolutely and at all events, as a personal debt of his own.

26. Chancellor Kent then proceeds to a consideration of the older cases upon this subject, and concludes that they establish the same doctrine.⁽⁴⁾

27. In *Pockley v. Pockley*,⁽⁵⁾ the testator had purchased an annuity out of mortgaged lands, and taken an assignment of the mortgage to protect his purchase. By his will, he directed that the mortgage debt should be paid from his personal estate. Lord Chancellor Nottingham decreed, that it should be thus paid, in consequence of this express direction.

28. Chancellor Kent remarks,⁽⁶⁾ that this case shows, that the purchase of land mortgaged did not at that day make the debt a personal

(1) 14 Ves. 417.

(2) 3 John. Cha. 260, 261.

(3) 3 John. Cha. 261, 262.

(4) Ibid. 263, 264.

(5) 1 Vern. 36.

(6) Ibid. 264.

one, but an express direction by will was required to have this effect. This view is confirmed by the observation of the counsel in the case, that the purchaser of an equity of redemption must hold the land subject to the debt, but was not personally liable, as for his own proper debt.

29. In *Coventry v. Coventry*,⁽¹⁾ A had a life estate, with power to settle a jointure upon his wife. He covenanted to settle lands accordingly, but died before doing it. The plaintiffs brought a bill against the heir for a specific execution. Held, the assets of A should not be applied to relieve the settled estate, because, wherever assets were thus applied, the debt originally charged the personalty. The covenant remained as a real lien on the settled estate, and the personal estate could not be applied, since there was no debt from which this estate was to be relieved.

30. In *Bagot v. Oughton*,⁽²⁾ the ancestor mortgaged his estate, and died. His daughter and heir married; and the husband settled the estate by fine on himself and his wife, joined in an assignment of the mortgage, and covenanted to pay the money, and died. Lord Chancellor Cowper held, that the mortgage was not to be paid from the personal estate of the husband, the covenant being only an additional security to the lender, and not designed to change the nature of the debt.

31. In *Evelyn v. Evelyn*,⁽³⁾ A mortgaged his land, and his son B afterwards covenanted with an assignee of the mortgage to pay the debt. Upon the death of A, B came to the estate by settlement, and died intestate. Held, B's personal estate should not be applied to the debt, for it was still A's debt, and B's covenant was merely a surety for the land.

32. In *Ancaster v. Mayer*,⁽⁴⁾ Lord Thurlow was inclined to think, that, in the preceding case, B, by his covenant, had assumed the debt; and he supposed the idea of the court was, that the covenant was by way of accommodating the charge, and not of making the debt his own. But Chancellor Kent considers the decision as conformable to those in other cases.⁽⁵⁾

33. In *Leman v. Newnham*,⁽⁶⁾ the same point was settled, where a son, inheriting a mortgaged estate, covenanted with the mortgagee to pay the debt.

34. In *Parsons v. Freeman*,⁽⁷⁾ Lord Hardwicke remarked that where an ancestor has not charged himself personally with a mortgage debt, the heir shall take *cum onere*. So, if one purchase the equity of redemption, with usual covenants to pay the mortgage, he knew of no decision to that effect, but was inclined to think the heir could not claim to have the land relieved. But where, as in that case, the purchaser agreed with the vendor to pay a part of the price to him, and the rest to the mortgagee, this made the debt his own, and the personal estate should be first applied to pay it.

35. Chancellor Kent supposes,⁽⁸⁾ that this case is imperfectly reported, no facts being given, and a very brief note of the opinion. He remarks

(1) 9 Mod. 12; 2 P. Wms. 222; Str. 596.

(2) 1 P. Wms. 347.

(3) 2 P. Wms. 659.

(4) 1 Bro. 454.

(5) 3 John. Cha. 266.

(6) 1 Ves. 57.

(7) Ambl. 115; 2 P. Wms. 664 n.

(8) Ib. 266, 267.

that, as it stands, it is repugnant to most of the cases which preceded and followed it; and that Lord Hardwicke himself soon afterwards made a contrary decision. Thus, in *Lewis v. Nangle*,⁽¹⁾ a mortgaged estate came to a married woman. The husband borrowed money by bond and mortgage of the land, the wife joining, and the money being applied partly for his use and partly to pay her debts. The husband gave a bond, and covenanted to pay the whole mortgage debt. Lord Hardwicke held, according to the presumed intention of the parties, that the land was still the primary fund for payment, and that the husband was not bound to relieve it.

36. In *Forrester v. Leigh*,⁽²⁾ a testator purchased several mortgaged estates, and covenanted to pay the debt due upon one of them. He purchased only a part of another of the estates, and he and his co-purchaser covenanted to pay their several shares, and to indemnify each other. Held, by Lord Hardwicke, as between legatees and devisees of the testator, the debts should be paid from the land.

37. In the case of the *Earl of Belvedere v. Rochford*,⁽³⁾ A mortgaged to B, and afterwards sold to C. In the covenant of warranty in the latter deed, the mortgage was excepted, and the deed stated, that the mortgage debt was to be paid by C out of the purchase-money. An indorsement also acknowledged payment of a part of the price *on perfection of the deed*, and the rest *allowed on account of the mortgage*. C, by his will, gave a large personal estate to his wife, and also devised to her the mortgaged land for life, then to his oldest son George in fee, subject to debts and legacies, declaring that his wife should hold, free from incumbrance, and that George should pay the interest of the mortgage debt from other lands devised to him. After some legacies, he bequeathed the rest of his personal estate, after payment of all his just debts, and all his real estate, to George, whom he appointed his executor. George paid the interest, but not the principal, of the mortgage debt. His mother also released her interest in the land to him. He made a will, giving small annuities to his younger sons; the mortgaged land, according to his estate therein, to his youngest son William; and the principal part of his estate, being very large, to his eldest son Robert. After the death of George, Robert refused to pay the principal or interest of the mortgage debt, and, William being unable to pay it, the mortgage was sold, and afterwards the estate also, under a decree. William then filed a bill against the executors of the father (of whom Robert was one) and of the grandfather, to have the mortgage debt paid from the personal assets, in relief of the land. Lord Chancellor Lifford decreed, that the mortgage debt was the debt of the grandfather at his death; and that his personal estate, which came first to the son and afterwards to the grandson, should be applied to pay it. The decree was affirmed in the House of Lords.

38. Chancellor Kent⁽⁴⁾ questions the authority of this case as a precedent, although a different decision would have operated with extreme hardship under the circumstances. "But hard cases often make bad precedents." He remarks, that it has been disregarded or rejected by Lord Thurlow, Lord Alvanley, Lord Eldon, and Sir William Grant; and also that no precise account is given of the reasons upon which the

(1) Amb. 150; 2 P. Wms. 664, n.

(2) Amb. 171; 2 P. Wms. 664, n.

(3) 6 Bro. Parl. 520.

(4) 3 John. Cha. 270, 271, 272.

decision was founded, and it may perhaps be considered as turning upon the construction of a will, and its very special provisions.

39. The result of the cases, as stated by Chancellor Kent, is⁽¹⁾ that as to wills, the testator may charge an incumbrance upon his personal assets, by express directions, or by disposition and language equivalent to such directions—as where a charge upon the land would oppose or defeat other provisions in the will. And, in order to charge the personal assets by acts done in his lifetime, he must become directly liable to the creditor, and also indicate in some way an intention to make the debt his own.^(a)

40. Although an heir is entitled to the aid of the personal property of the mortgagor in paying off mortgages, yet, if he disposes of the mortgaged estate, he cannot afterwards come upon the personal estate for assistance. And there seems to be no authority, requiring an administrator to redeem mortgaged estates in foreign countries; inasmuch as he would have no power to do any act, as administrator, in those countries⁽²⁾

41. In connection with the subject of this chapter, may properly be stated the rules of law regulating the application of moneys paid by a party who is indebted upon mortgage, and also upon other securities, to the same creditor; and likewise the appropriation of payments, with reference to the conflicting interests of successive mortgagees.

42. Where a creditor, holding several debts, some of which are secured by mortgage and others not, joins them in one suit, and recovers judgment, and the execution is satisfied only in part; a court of equity will first apply the moneys received, to extinguish those parts of the claim which are not secured by the mortgage. And whenever the mortgage is enforced in a suit for foreclosure, upon the hearing in equity to ascertain the amount due, every consideration, as to the application of payments and partial satisfaction, will arise, which could be entertained in the ordinary course of a bill in equity. The case is one, not of voluntary payment, but of a satisfaction *pro tanto in invitum*, and the plaintiff may well be presumed to make the application, in the manner most beneficial to himself.⁽³⁾

43. Bill in equity brought by A against B and C, to foreclose a mortgage, made by B to A, January 1, 1817, to secure a note for \$1,116. C was a purchaser of B's right of redemption. C filed a cross bill, in which he alleged, that the mortgaged premises consisted of two distinct parcels of land, one of which was of much greater value than the other; that lot No. 1, being the less valuable parcel, had been sold to him in November, 1821, upon an execution against B and himself, as B's security, for \$175; and he prayed that the mortgage debt, due to A, might

(1) 3 John. Cha. 272.

(2) *Haven v. Foster*, 9 Pick. 133-4. See *Jennison v. Hapgood*, 10 Pick. 77; 1 Lit. 318.

(3) *Williams v. Reed*, 3 Mas. 423-4; See *Norton v. Soule*, 2 Greenl. 341.

(a) A mortgagor by his will ordered payment of his debts, and devised his residuary lands, including the land mortgaged, and all his residuary personal property, to his oldest son, who was the executor. The son dies intestate, the mortgage not being paid. The father and son leave sufficient personal property to pay the mortgage. Held, as between the heir and administrator of the son, the mortgaged estate was the primary fund for payment. *Clarendon v. Barham*, 1 Y. & Coll. Cha. 688.

be apportioned upon No. 1 and No. 2, according to their respective value, and the former discharged from the mortgage, upon payment of the amount thus charged upon it; or that A might be decreed to accept his debt from C, and assign the mortgage to him. It appeared that in July, 1821, B sold No. 2, the purchaser having received a verbal promise from A to release his claim to it under the mortgage. In February, 1822, after C's purchase of No. 1, A, without consideration, accordingly made a release. Held, this was not a case, where C, as a party interested in one of two mortgaged estates, might, by the aid of equity, throw the burden upon the other, because A's interest would be thereby injured; but that C was entitled to relief, either by paying A his debt, and taking a conveyance of all the property still incumbered by the mortgage; or by paying such proportion of the debt, as the value of C's purchase bore to that of all the estate holden in security; that the court were bound to regard the *equitable* situation of the property at the time of C's purchase, taking into view A's parol obligation to release a part of it, as any other course would be punishing him for the benevolent act of relinquishing a part of his security; and that C, not being a mere speculator or volunteer, but having purchased in consequence of his being bail for B, was entitled to the privilege, which A would otherwise have had, of electing between the two modes of relief above named.(1)

44. A mortgaged two estates to B, then one to C, then both to B, for the former, and also another debt; then both to D, with notice of the prior incumbrances. The property was not sufficient to pay all the claims, but No. 32 was sufficient to pay B. Held, as between C and D, the court would not require B to satisfy his whole claim from No. 32, so as to give C a prior lien upon the other land, but B's claim might be charged, rateably, upon both estates.(2)(a)

CHAPTER XXXV.

SALE OF EQUITIES OF REDEMPTION ON EXECUTION.

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| <ol style="list-style-type: none"> 1. Estate of mortgagor—universally liable to execution. 2. Effect of sale—mortgagor's right after sale. 7. Levy upon two executions. 8. Levy in case of disseizin. 9. No ouster of mortgagee. 10. Purchaser becomes seized. | <ol style="list-style-type: none"> 12. Attachment of equity—mortgage discharged before sale. 15–21. Redemption from purchaser—when, and on what terms. 16. Fraudulent mortgage; sale of equity void. 18. Right to redeem subsequent mortgages. |
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1. THE right of a mortgagor to redeem his estate is almost universally liable, in the United States, to be taken upon execution by his

(1) *Chittenden v. Barney*, 1 Verm. 28.

(2) *Barnes v. Raester*, 1 Y. & Coll. Cha. 401.

(a) See further, as to the subject of this chapter, *Halliwell v. Tanner*, 1 Russ. & My. 633; *Goodburn v. Stevens*, 1 Md. Ch. 420; *Symons v. James*, 2 Y. & Coll. (N. S.) 301; *Mansell, &c.*, 1 Pars. 371; *Mason, &c.*, 1 Pars. 132; *Jones v. Bruce*, 11 Sim. 221; *Ouseley v. Anstruther*, 10 Beav. 453; *Ibbetson v. Ibbetson*, 12 Sim. 206; *Blount v. Hipkins*, 7, 43.

creditors.(a) This liability seems to be a necessary incident or consequence of the principle, already considered at length, that the mortgagor, until foreclosure, and as to third persons, remains *the owner of the land*, while the mortgagee has a mere *lien*, which is not subject to legal process. The mortgagor's actual possession is unnecessary to such liability.(1) The provisions of law in the several States, relating to the seizure and sale of equities of redemption upon execution, will be particularly stated hereafter. (Vol. II.) A few general principles on the subject are stated in this chapter.

2 In Massachusetts, by Statute 1783, c. 57, an equity of redemption might be *set off*, as land subject to incumbrance, to the judgment creditor, and the debtor might redeem the right in equity by paying the debt. By a later statute, (1798, c. 77,) a right in equity might be *sold*, and the proceeds applied to payment of the debt; and the debtor was allowed three years to redeem. The provisions of *the Revised Statutes* upon the subject will be stated hereafter. The former statutory rules are stated by the court,(2) as above mentioned; and are referred to in this place, not because now in force, but merely as introductory to other observations of the court in the same case, which seem to be of permanent applicability, and probably are adopted, in substance, in all the States.

3. Where an equity of redemption is taken on execution, the whole estate of the debtor is taken from him. A mortgagor is considered as the *owner*, against all but the mortgagee. But a debtor, after such levy, has not, strictly speaking, any estate or interest in the land. He is not a freeholder. He has only a *possibility*, or right to an estate, on payment of a certain sum of money. The law presumes that he has received the full value of his estate; and the right of redemption, still reserved to him, is a mere personal privilege to keep his own land, if he does not wish to part with it at its full value. He is under no obligation to redeem. There is no reciprocity between him and the

(1) *Watkins v. Gregory*, 6 Blackf. 113. | (2) *Kelly v. Beers*, 12 Mass. 388-9.

(a) In New Hampshire, equities of redemption have always been held liable to execution, and the Statute of July 3, 1822, merely has the effect to change the mode of levy, from an extent to a sale. *Pritchard v. Brown*, 4 N. H. 402. So in Maryland, Kentucky, North Carolina and New York. *Waters v. Stuart*, 1 Caines in Er. 47; 1 Ky. Rev. L. 653; *Pratt v. Lane*, 9 Cranch, 456; 1 N. C. Rev. Stat. 266. Whether in Indiana, *quære*. *Lasselle v. Barnett*, 1 Black. 153.

In Mississippi, it has been held that an equity of redemption is not subject to sale on execution, unless the whole debt has been paid. *Boarman v. Catlett*, 13 Sm. & M. 149; *Thornhill v. Gilmer*, 4, 153. See *Wolfe v. Dowell*, 13, 103; *Henry v. Fullerton*, *ib.* 631; *Farmers', &c. v. Commercial, &c.*, 10 Ohio, 71; *Hunter v. Hunter*, Walker, 194; *State v. Lawson*, 1 Eng. 269; *Morris v. Way*, 16 Ohio, 469; *Whitaker v. Sumner*, 7 Pick. 551; *Pomeroy v. Winship*, 12 Mass. 514; *Atkins v. Sawyer*, 1 Pick. 351; *Thayer v. Felt*, 4 Pick. 354; *Commissioners, &c. v. Hart*, 1 Brev. 492; *State v. Laval*, 4 McC. 336; *Punderson v. Brown*, 1 Day, 93; *Hinman v. Leavenworth*, 2 Conn. 244; *Scripture v. Johnson*, 3, 211; *Kelly v. Burnham*, 9 N. H. 20; *Swift v. Dean*, 11 Verm. 323; *Naples v. Minier*, 3 Penns. 475; *Roberts v. Williams*, 5 Whart. 170; *Tower's, &c.*, 9 W. & S. 103; *Kimball v. Smith*, 21 Verm. 449; *Jones v. Thomas*, 4 Ired. 12; *Allen v. Parish*, 3 Ham. 526; *Dougherty v. Lithicum*, 8 Dana, 194; *Trudear v. McVicar*, 1 La. Ann. R. 426; *Governor v. Powell*, 9 Ala. 83; *Steward v. Allen*, 5 Greenl. 103; *Warren v. Childs*, 11 Mass. 222; *White v. Bond*, 16 Mass. 400; *Jenks v. Ward*, 4 Met. 404; *Brown v. Worcester, &c.*, 8, 47; *Slocum v. Catlin*, 22 Verm. 137; *Franklin, &c. v. Blossom*, 10 Shepl. 546; *Swift v. Dean*, 11 Verm. 323; *Kimball v. Smith*, 21 Verm. 449; *Houghton v. Bartholomew*, 10 Met. 138; *Phelps v. Butler*, 2 Ohio, 331; *Ely v. McGuire*, *ib.* 330; *Davis v. Evans*, 5 Ired. 525.

creditor. The creditor cannot demand the money, but is merely bound to convey the land, on receiving payment in a certain time.

4. Upon these grounds, the right in question was held not liable to be again taken upon execution. (a) The court, in their opinion, remark that the legislature might have made it thus liable; but have not done so, probably because it was considered of no value. *Real estate mortgaged* is made subject to execution; because land is usually mortgaged for less than its value, and the right of redemption, therefore, is a valuable interest. Nor can it be said that the debtor, after such sale, still owns his former right of redemption, but subject to a new lien by the purchaser. This is not the language of the statutes. His whole estate is taken from him. His remaining right is like a right of *pre-emption*, as if the purchaser had covenanted to convey to him at a certain price, paid in a certain time. (1)

5. The following case further illustrates the same general principle.

6. A made a mortgage of certain land. August 8, 1811, his equity of redemption was sold on execution to B. Afterwards, on the same day, another deputy sheriff undertook to sell the same right, upon another execution, to C, and gave him a deed of it. August 13, the same right was sold and conveyed upon a third execution to D. D brings a real action for the land against A. Held, no title had vested in D. (2)

7. But where the same equity of redemption is simultaneously attached by two creditors, both executions may be levied upon it, and each creditor will be entitled to a moiety of the proceeds, without reference to the relative amount of the debts. They hold, not in shares or proportion, but *per mie et per tout*. But as the attachment constitutes merely a lien in security of a debt, if the moiety which either can hold is more than sufficient to satisfy his debt, the surplus will go to the other. (3) (b)

(1) 1 Mass. 389-90.

(2) Kelly v. Beers, 12 Mass. 387.

(3) Sigourney v. Eaton, 14 Pick. 414.

(a) But, if mortgaged anew, the new equity of redemption may be taken. Reed v. Bigelow, 5 Pick. 281. In Kentucky, the debtor may validly convey his interest, after an execution sale of his equity of redemption. Hibbet v. Spurrier, 3 B. Monr. 470. In Maine, such interest is liable to be taken on execution. Me. Rev. St. 390.

(b) In levying executions, where simultaneous attachments have been made, an officer may seize the whole estate, but should only return a moiety, in case of two such executions, upon either of the executions. Perry v. Adams, (Mass.) Law Rep. Jan. 1842, p. 354. Where land is simultaneously attached upon two writs, and one of the attaching creditors levies upon the whole land by metes and bounds, the other may levy upon an undivided moiety or an undivided share, not exceeding such moiety, sufficient to satisfy his execution. Durant v. Johnson, 19 Pick. 544. Two executions were simultaneously levied: one upon the whole land by metes and bounds, the other upon fourteen-fifteenths of one undivided half of it. Held, the latter made the execution creditor a tenant in common with the former creditor of the whole, and not a moiety only, of the fourteen-fifteenths of an undivided half. Perry v. Adams, 3 Met. 51.

It has been held, that where an equity of redemption is *successively* attached by different creditors, a sale on execution by the second, before the first has recovered judgment, is void against all the others; and the third acquires the rights of the second. Pease v. Bancroft, 5 Met. 90. (But see Mass. Rev. Sts. ch. 99, secs. 34, 35.) An officer may legally seize an equity of redemption on two executions, sell it on one, satisfy this one with a part of the proceeds, and apply the balance to the other. Bacon v. Leonard, 4 Pick. 277. If an equity is taken by different officers, and the proceeds are more than sufficient to satisfy the executions in the hands of the officer selling, he is bound to pay the surplus to the other officers. Denny v. Hamilton, 16 Mass. 402. See Forbush v. Willard, 16 Pick. 42; Littlefield v. Kimball, 5 Shepl. 313; Wade v. Merwin, 11 Pick. 280.

8. It has been held, that a right in equity to redeem, being a mere *incorporeal hereditament*, will pass by sale on execution, though the land have been long in the possession of a disseizor.(1) In an earlier case, however, or a previous hearing of the same case, it was remarked, that an execution purchaser might maintain a real action for the land against a stranger, *unless the latter had disseized the mortgagor* before the sale.(2) The true principle upon this subject, and one which seems to reconcile the apparent contradiction between the former cases, has been settled in a case long subsequent to both of them.(3) It is here held, that if the mortgagor is seized, at the time of the sale on execution, the sheriff's deed conveys to the purchaser the mortgagor's *actual seizin*, precisely as a deed by the mortgagor himself would have done; but if the mortgagor is not seized, then the sheriff's deed passes not a seizin, but a *right of entry*. In the latter case, it seems, the deed of the sheriff is not invalid, on account of an adverse possession by a stranger; (a) because, if this were the case, creditors would have no power to take an equity of redemption for their debts, where the mortgagor is disseized. The entry of the sheriff could not purge the disseizin, no entry being necessary to a sale. The judgment creditor could not enter, having no right before the levy; and the purchaser has no interest till after the sale. The mortgagor could not be expected to enter for the purpose of having the land taken from him by execution. Hence, the sheriff's deed must pass a *seizin in law*. The purchaser may enter, and then bring a writ of entry upon his own seizin; or, perhaps, before entry, he might bring an action, founded upon the seizin of the mortgagor, to whose rights he has succeeded.

9. The sale on execution, of a right in equity to redeem, will not operate as an *ouster* of the mortgagee, who has previously entered under his mortgage. Such sale is effectual in passing to the purchaser all the rights of the mortgagor; and an entry for the purpose of seizing and levying upon such right is no trespass. It is consistent with the rights of the mortgagee. But, for any subsequent entry, the mortgagee may maintain trespass against the purchaser, without a re-entry.(4)(b)

10. The Statute of 1798, c. 76, provided, that the sheriff's deed of a right in equity should pass the title, in the same manner as a deed executed by the debtor himself. Hence such purchaser becomes seized except as against the mortgagee, and may maintain an action for the land, without actual entry.(5)

11. So, where the purchaser of an equity, sold upon execution, had tendered to the holder of the mortgage the amount due upon it; held, he had acquired a seizin, sufficient to sustain an action for the land against the mortgagor.(6)

12. The form, in which executions are to be levied in the several

(1) Willington v. Gale, 13 Mass. 483.

(2) Willington v. Gale, 7 Mass. 139.

(3) Poignard v. Smith, 6 Pick. 172. See secs. 10, 11.

(4) Shepard v. Pratt, 15 Pick. 32.

(5) Willington v. Gale, 7 Mass. 138.

(6) Porter v. Millett, 9 Mass. 101. (See sec. 8.)

(a) See Mass. Rev. St. 463.

(b) It has been held in Kentucky, that an equity of redemption cannot legally be sold, pending a suit to foreclose the mortgage, and if sold, though upon an execution prior to such suit, the mortgagee's title has priority. Addison v. Crow, 5 Dana, 279.

States upon equities of redemption, will be particularly stated in another part of this work. Equities being subject to *attachment* as well as execution, in those States where this method of securing debts is adopted, the question has arisen, how an execution is to be levied, where a mortgage is discharged after attachment, and before sale.^(a)

13. A mortgaged to B on the 15th of December, 1806, to secure \$500, and on the 29th of April, 1807, mortgaged the same land to B, to secure \$300. On the 18th of July, 1807, A conveyed the land to C, subject to the mortgages. On the 23d of July, 1807, C mortgaged the land to B, to secure the sums of \$1,500 and \$837. On the 24th of July, 1807, B discharged A's mortgages, acknowledging full satisfaction. The sums secured by A's mortgages made a part of those secured by C's mortgage. On the 18th of May, 1807, D, a creditor of A, caused A's estate in the land mortgaged to be attached; and, in December, 1807, levied his execution upon A's equity of redemption, which was sold by the officer to E. Neither D nor the officer knew the fact, that B had discharged the mortgages made to him by A. E brings an action against B to recover the land. Held, if at the time of the sale on execution, there was no subsisting incumbrance except the mortgage by C, which arose after the attachment, then the levy was void, being made in the form prescribed in relation to equities of redemption; and if B's mortgage was still in force, then the purchaser's proper remedy was by a bill in equity to redeem. B either still continued the mortgagee, notwithstanding the discharge, or the assignee of C, for whose benefit the mortgages were still to be considered in force. And E could not be held to gain an equitable title by his purchase, and at the same time treat the mortgages as extinguished, without any expense to him. Upon the possible supposition, that the mortgage had been redeemed by A, E could make no title except upon the ground that the incumbrances still subsisted for A's benefit, and to secure to him the money paid for E's use. E came in the right of A, and could not claim against the mortgages to B, who, if E had any title, was a mortgagee in possession, or the assignee of a subsisting mortgage, originally made to himself; and, as to E, claimed under mortgages not redeemed or discharged, and subject to which his title was acquired. As a general rule, it may perhaps be said, that the purchaser of an equity of redemption can aver no seizin or title against any other person than the execution debtor, or his immediate tenants or assigns. Hence, though E might recover against C, he could not recover against B, having no legal seizin or title, till B's mortgage was redeemed.⁽¹⁾

14. In this case it is laid down, that the mode of levying the execution upon the interest of a mortgagor, is to be determined by the situation of his estate at the time of *attachment*; and, if at that time the mortgage was extinguished, though before the levy a new mortgage was made, a levy as upon an equity of redemption is void. From this decision, it would seem to be a necessary inference, that the converse of the proposition must also be true; and, if the land is subject

(1) *Forster v. Mellen*, 10 Mass. 421.

(a) In Maine, where an equity of redemption is attached, the creditor may require the mortgagee to state an account of his claim. Me. Rev. St. 584.

to mortgage at the time of attachment, but the mortgage is extinguished before the sale, that the levy cannot be made by metes and bounds, as upon a legal estate, but only by the sale of an equity of redemption. But, in a later case, a contrary doctrine seems to be advanced. It is said, that the attachment merely fixes a *lien* on the premises, without transferring the title or affecting the nature of the estate. The mode of levy, the act by which a title is to be transferred, it would seem, must be determined by the nature of the debtor's title at the time of the levy, and not at the time of the attachment. The equity of redemption is in fact gone, and it would seem to be absurd to pursue a mode solely applicable to a subsisting equitable estate, when such estate no longer exists. These remarks are made, without reference to any statutory provision, but the court consider the case as provided for by an express statute.(1)(a)

15. The lien, created by the attachment of an equity of redemption, may extend beyond the amount of the judgment recovered in the suit, and cover the whole amount for which the equity is sold upon execution. Thus, where the mortgagor, after such attachment, conveys his right in equity to a third person, and the equity is afterwards sold on execution, for a much larger sum than the amount of the execution; as the surplus belonged to the mortgagor, not to the purchaser from him, the latter cannot redeem, without paying the whole purchase-money paid to the sheriff(2)

16. A mortgage, made to defraud creditors, is as to them void, and creates no equity of redemption, liable to be taken on execution.

17. A mortgaged land to defraud his creditors. B, one of the creditors, attached A's equity of redemption. Pending this attachment, C, another creditor, extended an execution upon the land, treating it as unincumbered property. Afterwards, A's equity of redemption was sold on execution, and in completion of the attachment, to an innocent purchaser, D. In an action to recover the land, brought by C against D; held, the sheriff's sale was void, no equity of redemption having been created by the mortgage, and that C had a good title to the land. If D had claimed by a direct purchase from A himself, he would have taken the land free of incumbrance, as an innocent purchaser. But, claiming by a *statute title*, he was bound to prove everything necessary to constitute such title. In authorizing the sale of an equity of redemption, the legislature contemplate the existence of a *valid* mortgage. Moreover, a creditor may levy upon the land of his debtor, and thereby acquire *as good title as the latter had therein*; and, *in regard to his creditors*, a fraudulent grantor has a perfect title. Nor can one creditor, by attaching an equity of redemption, and thereby

(1) Freeman v. McGaw, 15 Pick. 83-4. (See Mass. Rev. St. 550; Litchfield v. Cudworth, 15 Pick. 23; Mechanics', &c. v. Williams, 17, 438; N. H. Rev. St. 369.) Pillsbury v. Smith, 25 Maine, 427; Goodall v. Rowell, 15 N. H. 572; Abbott v. Sturtevant, 30 Maine, 40; Dougherty v. Smithicum, 8 Dana, 194.

(2) Gilbert v. Merrill, 8 Greenl. 295.

(a) Where an equity of redemption is seized on execution, and the mortgage debt is then paid before sale, there may still be a sale of the equity, the proceedings having relation to the seizure. Bagley v. Bailey, 4 Shepl. 151.

recognizing the mortgage as valid, deprive others of the right to treat it as void, by seizing the land itself.(1)(a)

18. The right of redeeming subsequent mortgages may be taken in execution.

19. The creditor of a mortgagor having attached an equity of redemption, the debtor made another mortgage, after which all his interest in the land was attached by another creditor. The equity first attached was then sold on execution, which was satisfied by a part of the proceeds; and, before the officer had paid over the surplus, the execution of the second creditor was delivered to him. Held, the surplus belonged to the second mortgagee; and the second creditor might levy on the right of redeeming the second mortgage.(2)

20. In Massachusetts, if the mortgagor does not within a year redeem his equity of redemption, sold on execution, his whole interest is lost, and he cannot redeem the mortgage, though the purchaser does not redeem.(3)(b)

21. Where rights in equity, of redeeming distinct parcels of land from several mortgages, are sold upon one execution, they ought to be sold separately, and not for a gross sum; for the debtor has a right to redeem one without redeeming others. But a third person cannot object to a joint sale.(4)(c)

(1) Bullard v. Hinkley, 6 Greenl. 289. See ch. 36, sec. 14.

(2) Clark v. Austin, 2 Pick. 528.

(3) Ingersoll v. Sawyer, 2 Pick. 276.

(4) Fletcher v. Stone, 3 Pick. 250.

(a) An execution purchaser of an equity of redemption, who receives a deed from the officer for the benefit of the creditor, cannot dispute the mortgage as fraudulent, and on that ground claim the land as unincumbered. Russell v. Dudley, 3 Met. 147.

The court remark, it was at the option of the creditor to treat the mortgage as invalid, and set off the estate by appraisement; or to treat it as valid, and sell the right of redemption. But he could not treat the mortgage as subsisting, so as to warrant a sale, and then, when he had taken his deed, treat the mortgage as a nullity, and claim the estate in fee. The creditor, by treating it as a subsisting mortgage, is afterwards estopped to deny its existence; and the demandant, purchasing with notice for his use, is also estopped. And even if he had purchased without notice, having purchased the premises as an equity of redemption, which could not exist without a subsisting mortgage, he would be as much estopped to contest the mortgage as if it had been recited in his deed. Ib.

But where A, a second mortgagee, took an assignment of the first mortgage, and a release of the equity of redemption from B, the mortgagor, and afterwards a creditor of B levied an execution upon his equity and purchased it himself; held, in support of his title, such creditor might show that A obtained his mortgage and release by fraud upon B, though B had not attempted to avoid them. Van Deusen v. Frink, 15 Pick. 449.

(b) Under the Revised Statutes, ch. 73, secs. 44, 46, if the purchaser refuse to release the equity, upon a tender by the debtor or his assignee of the sum due him therefor, a writ of entry lies to recover the equity. Hooker v. Hudson, 19 Pick. 467.

A subsequent demand for the money, made by the purchaser, but *after dark*, is unseasonable, and does not avoid the tender. Tucker v. Buffum, 16 Pick. 46. In Maine, where the execution purchaser redeems the mortgage, and within the year the mortgagor redeems the equity, the latter may redeem the mortgage from the former as he might from the mortgagee. Me. Rev. St. 557.

(c) The right to redeem an equity of redemption, sold on execution, is validly assigned in equity by a common quit-claim deed, which remises, releases and quit-claims the party's right and interest in and to the mortgaged premises, *habendum* to the grantee, his heirs and assigns. Tucker v. Buffum, 16 Pick. 46. Where an equity is sold on execution, the purchaser takes the place of the debtor, and holds subject to all incumbrances. Crow v. Tinsley, 6 Dana, 402.

CHAPTER XXXVI.

MORTGAGE, WHEN VOID OR VOIDABLE.

1. General remarks.
2. Usury.
11. Infancy.

13. Eviction.
14. Fraud.

1. IN many respects, a mortgage is not distinguishable, with reference to the circumstances which render it void or voidable, from an absolute deed. The extensive title of *Deed* will be considered hereafter, (see Vol. II.,) and therefore the subject will be very briefly noticed in the present connection.

2. It has been held, in the Supreme Court of the United States, that, upon a bill for foreclosure, the mortgage may be declared void for *usury*.⁽¹⁾

3. The doctrine is laid down in New York, that if a lender seeks to enforce his securities in equity against the mortgagor or his assignee, usury is a defence, and, if it be made out, the court will order that the securities be delivered up and cancelled.^(a) But where a mortgage contains a *power of sale*, under which the mortgagee is proceeding to foreclose, without the aid of a court of equity, and the borrower files a bill for relief; he has been held to pay so much as is lawfully due, before relief will be granted.⁽²⁾ A vendee under such power has the better equity, and will acquire a good title, though the mortgage is usurious.⁽³⁾ But if the mortgagee himself purchase through an agent,

(1) *De Butts v. Bacon*, 6 Cranch, 252. See *Dyer v. Lincoln*, 11 Verm. 300; *Pearsall v. Kingsland*, 3 Edw. 195; *Hodgkinson v. Wyatt*, 4 Ad. & Ell. (N. S.) 749; *Blackburn v. Warwick*, 2 Y. & Coll. 92; *Morris v. Way*, 16 Ohio, 469; *N. Y., &c. v. American, &c.*, 3 Sandf. Ch. 215; *Mumford v. American, &c.*, 4 Comst. 463; *Mitchell v. Preston*, 5 Day, 100; *Tyson v. Rickard*, 3 Harr. & J. 109; *Morgan v. Tipton*, 3 McL. 339; *Lane v. Losee*, 2 Barb. 56; *Miller v. Hull*, 4 Denio, 104; *Robertson v. Campbell*, 2 Call, 354; *Thomes v. Cleaves*, 7 Mass. 361; *Jackson v. Packard*, 6 Wend. 415; *Hodgkinson v. Wyatt*, 4 Ad. & Ell. (N. S.) 749; *Bush v. Livingston*, 2 Caines' Cases in Error, 66; *De Butts v. Bacon*, 6 Cranch, 252; *Nichols v. Cosset*, 1 Root, 294; *Sherman v. Gassett*, 4 Gilm. 521; *Righter v. Statt*, 3 Sandf. Cha. 608; *Cotheal v. Blydenburgh*, 1 Halst. Cha. 17, 631; *Gambriel v. Rose*, 8 Blackf. 140; *Brooks v. Avery*, 4 Comst. 225; *Fox v. Lipe*, 24 Wend. 164; *Stoney v. American, &c.*, 11 Paige, 655; *Neefus v. Vanderveer*, 3 Sandf. Ch. 268; *Jackson v. Colden*, 4 Cow. 266; *Warner v. Gouverneur*, 1 Barb. 36.

(2) *Fanning v. Dunham*, 5 John. Cha. 122; *Wilson v. Hardesty*, 1 Md. Ch. 66.

(3) *Jackson v. Henry*, 10 John. 185.

(a) If a borrower of money upon usurious interest seeks to have the aid of a court of equity in cancelling or procuring the instrument to be delivered up, the court will not interfere in his favor, unless upon the terms that he will pay the lender what is really and *bona fide* due to him. But if the lender comes into equity, to assert and enforce his own claim, under the instrument, there the borrower may show the invalidity of the instrument, and have a decree in his favor and a dismissal of the bill, without paying the lender anything; for the court will never assist a wrong-doer in effectuating his wrongful and illegal purpose. 1 Story on Equ. (3d ed. 77. *Contra*, *Cunningham v. Davis*, 7 Ired. Equ. 5. But see *Bal-linger v. Edwards*, 4 Wend. Equ. 449. It is held, that parol evidence is admissible, to prove a deed absolute in form to have been given as security for usurious interest. *Stapp v. Phelps*, 7 Dana, 300; *Coo v. Colyer*, 2 B. Mon. 72. But see 13 Mass. 443; 6 Greenl. 303.

In Massachusetts, it has been lately suggested as a doubtful point whether, in a bill to redeem, the plaintiff can deduct penalties for usury from the mortgage debt. *Robinson v. Guild*, 12 M. t. 328.

the mortgagor may recover the land. Usury between the mortgagee and his assignee is no defence for the mortgagor.(1)

4. It has been doubted by high authority, whether the purchaser of an equity of redemption can object, that the mortgage was made upon usurious consideration, or, as plaintiff, can have any relief in equity, without offering to pay the amount due.(2)(a)

5. Where a mortgage is assigned for the amount due upon it, and the mortgagor agrees to repay the assignee a sum exceeding this amount and legal interest, he cannot avoid the mortgage upon this ground, but will be required to pay only the lawful sum due.(3)

6. A mortgage, made upon usurious consideration, is void only as against the mortgagor, and those lawfully holding under him. Thus, it is good in the hands of a lessee of the assignee of the mortgage, A subsequent mortgagee cannot impeach it; nor a purchaser of the equity of redemption, subject to payment of the mortgage. But a purchaser from the mortgagor may make this defence against an assignee of the mortgage. So, a judgment creditor of the mortgagor.(4)

7. If a judgment has been recovered upon a usurious contract secured by mortgage, and a new mortgage given, the mortgagor cannot resist a suit on the latter, upon the ground of usury.(5)

8. So, where a mortgagee sues upon a mortgage, and the mortgagor defends upon the ground of usury, but fails, and afterwards conveys his right in the land; the assignee cannot maintain ejectment against the mortgagee upon this ground, being estopped by the former judgment.(6)

9. It is said, that after foreclosure by entry and continued possession, the mortgagee has a perfect title to the land, though the mortgage debt was usurious.(7) But a mortgagor shall always be allowed to avail himself of the defence of usury, unless he has been guilty of *laches*. Thus, where an equity of redemption was sold on execution, and after a year the purchaser took an assignment of the mortgage, the mortgagor having always retained possession; held, the latter might set up usury as a defence to an action of ejectment for the land.(8)

10. In Pennsylvania, a usurious contract is not absolutely void. Hence, a mortgagee, in such case, may recover the amount loaned, with legal interest.(9)(b)

11. The mortgage of *an infant* is *voidable* only, not void. Hence, where an infant mortgaged his land, and, after coming of age, made a

(1) Jackson v. Dominick, 14 John. 435.

(2) Gordon v. Hobart, 2 Sumn. 401.

(3) Bush v. Livingston, 2 Caines' Cas. in E. 66.

(4) Green v. Kemp, 13 Mass. 515; Bridge v. Hubbard, 15, 103; Jackson v. Bowen, 7 Cow. 13; Mechanics, &c. v. Edwards, 1 Barb. 27; Morris v. Floyd, 5 Barb. 130; Thomas-ton, &c. v. Stimpson, 8 Shepl. 195; Doub v. Barnes, 1 Md. Ch. 127; Brooks v. Avery, 4 Comst. 225; Helfield v. Newton, 3 Sandf.

Ch. 564; Briggs v. Sholes, 15 N. H. 52; Post v. Dart, 8 Paige, 639.

(5) Thacher v. Gammon, 12 Mass. 268; Mumford v. American, &c., 4 Comst. 463.

(6) Adams v. Barnes, 17 Mass. 365. See Grow v. Albee, 19 Verm. 540.

(7) Flint v. Sheldon, 13 Mass. 450. See Bard v. Fort, 3 Barb. Ch. 632.

(8) Richardson v. Field, 6 Greenl. 35. See Hyland v. Stafford, 10 Barb. 558.

(9) Turner v. Calvert, 12 Ser. & R. 46; Wycoff v. Longhead, 2 Dall. 92.

(a) In North Carolina, usury cannot be set up as against a *bona fide* purchaser of land. N. C. St. 1842-43, 107.

(b) In Massachusetts, mortgages made for a *gambling* consideration are void; and, when declared void, the lands pass to the heirs of the mortgagor. Rev. St. 387.

deed of the land, recognizing and subject to the mortgage; the latter deed was held to be a confirmation of the former one, and the mortgagee recovered judgment against the second grantee.(1)

12. So, where A conveyed land to B, an infant, at the same time taking back a mortgage for the purchase-money; and B occupied after coming of age, and conveyed with warranty to C; held, both the occupancy and the conveyance amounted to a confirmation of the mortgage.(2)

13. To an action of ejectment by a mortgagee against the mortgagor, it is a good defence, that the latter has been *evicted* from the land by a paramount title; notwithstanding he has become a purchaser under such title, and continues to occupy the land.(3)(a)

14. It will be seen hereafter, that all deeds made to defraud creditors are void. There is no difference, in this respect, between mortgages and absolute deeds. But a distinction has been taken, with respect to this ground of avoiding a mortgage, between a suit at law and a bill in equity.

15. In New York, it is held, that, where a mortgage is made to one as trustee, upon a bill for foreclosure, the mortgagor is estopped to question the validity of the trust.(4) So, in Connecticut,(5) upon a bill for foreclosure, it is held that the *title* of the mortgagee cannot be inquired into. Hence, where, after production of the note and mortgage, certain attaching creditors of the mortgagor set up as a defence to such bill, that the mortgage was fraudulent and void against creditors; it was held that such evidence was admissible. The court remarked, that if the title to land *might* be brought in question in this process, then it must be local; whereas, by the established law, a bill for fore-

(1) *President, &c. v. Chamberlin*, 15 Mass. 220; *Robbins v. Eaton*, 10 N. H. 561; *Richardson v. Boright*, 9 Verm. 368. See *Hillyer v. Bennett*, 3 Edw. 222; *Story v. Johnson*, 2 Y. & Coll. 586; *Loomer v. Wheelwright*, 3 Sandf. Ch. 135; *Barnard v. Eaton*, 2 Cush. 294.

(2) *Hubbard v. Cummings*, 1 Greenl. 11; acc. 10 N. H. 561.

(3) *Jackson v. Marsh*, 5 Wend. 44; *Poyntnell v. Spencer*, 6 Barr, 254.

(4) *Schenck v. Ellingwood*, 3 Edw. 175; *Bailey v. Lincoln, &c.*, 12 Miss. 174.

(5) *Palmer v. Mead*, 7 Conn. 149.

(a) Mortgage, in consideration of land purchased by the mortgagor, the title to a part of which fails, but without fraud on the part of the grantor. The mortgagor having entered, and the conveyance containing covenants of warranty; held, the facts furnished no defence to a bill for foreclosure. *Edwards v. Bodine*, 26 Wend. 109; *Withers v. Morrell*, 3 Edw. 560; *Bumpus v. Platner*, 1 John. Cha. 213; *Davison v. De Freest*, 2 Sandf. Cha. 456; *Van Waggoner v. M'Ewen*, 1 Green Cha. 412; *Jaques v. Elsler*, 3, 462; *Natchez v. Minor*, 9 S. & M. 544; *Banks v. Walker*, 2 Sandf. Ch. 344; *Johnson v. Gene*, 2 John. Cha. 546; *Bradford v. Potts*, 9 Barr, 37. But see *Van Riper v. Williams*, 1 Green Ch. 407.

It has been held, that want of consideration for the note secured by a mortgage, is a good defence to a suit for foreclosure, brought by the mortgagee's administrator, even though the mortgage was given to defraud creditors. So, where the consideration is less than the amount of the mortgage, the decree shall be rendered only for the real amount of such consideration. And the fact may be proved by admissions of the mortgagee. *Wease v. Pierce*, 24 Pick. 141; *Abbe v. Newton*, 19 Conn. 20; *Mackey v. Brownfield*, 13 S. & R. 239; *Rood v. Winslow*, 1 Dougl. (Mich.) 68. See *Gilleland v. Failing*, 5 Denio, 308.

Fraud upon a mortgagor avoids the mortgage, and a bill in equity lies to set aside a fraudulent mortgage, though the plaintiff is in possession, and might maintain it against the mortgagee at law. But the fraud must be committed by the mortgagee or his agents, or with his knowledge at the time. *Marston v. Brackett*, 9 N. H. 337; *Briggs v. French*, 1 Sumn. 505; *Wooden v. Haviland*, 18 Conn. 101; *Burns v. Hobbs*, 29 Maine, 273; *Aikin v. Morris*, 2 Barb. Ch. 140. As to mortgages obtained by threats or duress, see *James v. Roberts*, 18 Ohio, 548; *N. J. Rev. Sts.* 324.

closure need not be brought in the county where the land lies. In such bill, it is sufficient to aver, that the defendant executed *a deed on condition*; and of course any circumstances, showing the instrument to be *no deed*—such as forgery, want of witnesses, duress, fraud, coverture, &c.—may be shown in defence; but not circumstances merely *impairing its effect*. (Two justices dissented.)(a)

16. Where one mortgages land, to defeat the dower of his wife, and without consideration, the mortgage is void as to the widow and as to his creditors, but valid against himself and his administrator. A court of chancery, in such case, will enjoin the mortgagee from proceeding to a judgment and sale of the whole mortgaged premises, but will suffer him to sell, subject to the widow's dower. And, in Pennsylvania, where a sale on mortgage defeats the right of dower, the court, upon a *scire facias* by the mortgagee against the administrator to foreclose, will let in the widow to defend; and, if there is a real debt, there shall be a verdict and judgment, giving to the mortgagee a lien on the whole interest as to the real debt, and for the whole amount subject to the widow's thirds; or, if the mortgage was fraudulently given, without consideration, and for the purpose of defeating the wife, a verdict and judgment for the plaintiff, subject to the widow's dower. But the same principle does not apply to the provision made for the widow in that State by the intestate acts, in lieu of dower. This is a *contingent* right, with none of the common law privileges of dower, and subject to be defeated by the husband's acts. Therefore, in the case supposed, the mortgage cannot be *wholly* avoided, merely upon the ground that the widow *might*, in case the intestate died without kindred, have been entitled to the whole estate.(1)

17. Upon a bill to redeem, brought by a subsequent, against a prior mortgagee, the latter cannot defend, upon the ground that the second mortgage is fraudulent as against creditors; but, as showing the intention of certain acts, and in connection with a want of delivery of the deed, the evidence is admissible.(2)(b)

(1) Killinger v. Reidenhauer, 6 Ser. & R. 511. | Howard v. Howard, 3 Met. 548; Sprague v. Graham, 29 Maine, 160.

(2) Powers v. Russell, 13 Pick. 69. See

(a) In New Hampshire, it is held, that a bill in equity lies to set aside a fraudulent mortgage, though the plaintiff is in possession, and might make a defence at law to a suit for the land. Marston v. Brackett, 9 N. H. 336.

(b) A promise by a mortgagee to creditors of the mortgagor, to surrender his title, if they will take another mortgage from the mortgagor, and give him time of payment, is *prima facie* evidence that the first mortgage was not *bona fide*. Parker v. Barker, 2 Met. 423.

A conveyance from A to B is sufficient consideration for a mortgage of the land from B to C; and the payment by C of debts due to A, and of other sums, at the request of one having an interest in the land, is a good consideration on the part of C to sustain the mortgage to the extent of such payments, in the absence of fraud. And though the consideration named in the mortgage much exceeds the sum paid, this is only evidence of fraud, and may be rebutted: *Ib.*

A mortgage to secure another's debt, is not *per se* fraudulent, for want of consideration. Marden v. Babcock, 2 Met. 99. Where a mortgage was given, on the eve of bankruptcy, for a very old debt, the circumstances were deemed so suspicious, that the court would not interfere for a sale, upon the mortgagee's petition. Dawdney, 2 Mont. & Ayr. 72. See Williams v. Kelsey, 6 Geo. 365; Prior v. White, 12 Illin. 261; Kennaird v. Adams, 11 B. Mon. 102; Robinson v. Collier, 11 B. Mon. 332.

18. Another species of fraud, which will avoid a mortgage, *as against third persons*, is a misrepresentation or concealment, on the part of the mortgagee, with respect to his incumbrance upon the land, whereby other parties are induced to purchase or advance money upon it, supposing the title to be clear. This kind of fraud is chiefly cognizable in equity, though even courts of law will often take notice of it. In many cases, equity and law have concurrent jurisdiction. The principle of equity is, that where one seeks by misrepresentation or even improper concealment of facts, in the course of a transaction, to mislead the judgment of another to his prejudice, the court will generally interfere. Mere concealment, or *looking on*, has the same effect as using express words of inducement. But, in general, it must appear, that the acts would not have been done, and that the party must have conceived they would not have been done, except upon such encouragement; though, in some cases, even the ignorance of the party misleading has been held to make no difference. In a case of this kind, Chancery will not only refuse its aid to enforce the mortgage, but, upon a bill by the party injured, to *quiet his title*, will decree a perpetual injunction against enforcing the mortgage, declare it void, or order a release or reconveyance.(1)(a)

19. A, having a mortgage of a leasehold estate, the mortgagor, B, borrowed the original lease of him, with the intention of obtaining another loan upon the land. Held, if A was privy to B's intention of taking up more money, A's mortgage should be postponed.(2)

20. The purchaser of mortgaged land, who had no notice of the mortgage, brings a bill in equity against the mortgagee, charging that the mortgagee *fraudulently* stood by, and witnessed the making of valuable improvements by the purchaser, and did not disclose his lien, or

(1) Jeremy on Eq. Juris. 385, 7, 8; 1 Story on Eq. 375, 377, *et seq.* See Briggs v. French, 1 Sumn. 504; Bettes v. Dana, 2 Ib. 383; Foster v. Briggs, 3 Mass. 313; Barnard v. Pope, 14, 437; Spear v. Hubbard, 4 Pick. 143; Stone v. Lincoln, Middlesex, Oct. T., 1835; Evans v. Bicknell, 6 Ves. 182; Storrs v. Barker, 6 John. Cha. 166; Wendell v. Van Rensselaer, 1 Ib. 344; Lee v. Munroe, 7 Cranch, 368; 2 John. R. 573; Hobbs v. Norton, 1 Vern. 136; 2 Ib. 725; Dewey v. Field, 4 Met. 381; Whittaker v. Williams, 20 Conn. 98; Dyer v. Cady, Ib. 563; Pennell v. Hinman, 7 Barb. 644; Lamb v. Goodwin, 10 Ired. 320; Grace v. Mercer, 10 B. Mon. 157; Brace v. Barclay, Ib. 261; Martin v. Angell, 7 Barb. 407.

(2) Peter v. Russell, 2 Verm. 726.

(a) Equity will relieve against a fraud of this nature, notwithstanding the constructive notice arising from registration of the prior incumbrance. Napier v. Elam, 6 Yerg. 108. The same principle renders void an *attachment* of land, as against a subsequent incumbrancer, who has discharged a prior security by the advice of the attaching creditor, and takes a new mortgage after the attachment. Buswell v. Davis, 10 N. H. 413. The principle of estoppel, arising from notice, does not apply to a feme covert, whose lands her husband undertakes to convey. Rangeley v. Spring, 8 Shepl. 130. See Pickard v. Sears, 6 Ad. & Ell. 469; Gregg v. Wells, 10 Ib. 90. Nor does it preclude one from asserting a title to land, who has merely aided in effecting a valuation and division of it. Wade v. Green, 3 Humph. 547. See further Jones v. Smith, 1 Hare, 43; Meux v. Bell, Ib. 73; Felch v. Hooper, 2 Appl. 159. If a mortgagee consents to the sale of the premises under an administration suit, he may still claim priority, in the distribution of the proceeds. Hepworth v. Heslop, 3 Hare, 485. See Buchannon v. Upshaw, 1 How. 56. A and B, tenants in common, conveyed to C, with warranty, A at the time holding a mortgage on B's share. Held, he was estopped to claim under the mortgage. Durham v. Alden, 2 Apple. 228. But where a mortgagee knew of a purchase of the land, stood by and saw improvements, but the mortgage was on record, and it did not appear that he knew the purchaser was ignorant of it; held, he was not estopped. Marston v. Brackett, 9 (N. H.) 336.

intimate that he had any interest in the property. Held, the charge of fraud required *an answer*, and a *demurrer* to the bill was overruled.(1)

21. A held a mortgage upon certain land. B, proposing to take another mortgage, consulted with A, who informed him that his (A's) mortgage was satisfied, and that B might safely take a mortgage. Held, neither A nor his assignee, with notice, could set up a prior mortgage against B.(2)

22. A mortgagee promised by a writing not under seal to extend the time of payment; and a third person in consequence bought the estate from the mortgagor. Held, the mortgagee was bound by his promise.(3)

23. An attorney at law, holding a mortgage upon land, drew a conveyance of part of it to A, who had no notice of the mortgage, the attorney knowing that A paid a full price for the land. Held, neither the mortgagee nor his assignee could set up the mortgage against A.(4)

CHAPTER XXXVII.

MORTGAGE—REMEDIES OF MORTGAGEE AND MORTGAGOR AT LAW.

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| <ol style="list-style-type: none"> 1. Distinction between a mortgage and trust as to remedy. 2. Action at law by mortgagor, after payment. 4. Action at law by mortgagee, after payment. 5. Concurrent remedies. 6. Form of judgment for mortgagee. 8. Possession under a judgment, no payment. | <ol style="list-style-type: none"> 9. Title of mortgagee under a third person, no payment. 11. No action at law by mortgagee in New York and South Carolina. 13. Tender in court by mortgagor. 14. Suit by execution purchaser. 15. Assumpsit by mortgagor. 16. Remedy by <i>scire facias</i>, &c. 21. Commitment of mortgagor. |
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1. It has already been remarked (ch. 31, sec. 1) that a mortgagee is often called a *trustee* for the mortgagor; that in some respects he is such, while, in others, the relation which he sustains is very different from that of a trust. One striking point of difference may be properly noticed here. A mortgagee may enforce his right by adverse suit, *in invitum*, against the mortgagor—which can never take place between trustee and *cestui que trust*. They have always an identity and unity of interest, and are never opposed in contest to each other. In general, a trustee is not allowed to deprive his *cestui que trust* of the possession; but a court of equity never interferes to prevent the mortgagee from assuming possession, because the mortgagor and mortgagee do not, in this instance, stand in the relation of trustee and *cestui*. The mortgagee, when he takes the possession, is not acting as a trustee for the mortgagor, but independently and adversely, for his own use and benefit. A trustee is stopped in equity from dispossessing his *cestui*, because

(1) *Cater v. Longworth*, 4 Ohio, 385.

(2) *Lasselle v. Barnett*, 1 Black. 153.

(3) *Hoffman v. Lee*, 3 Watts, 352.

(4) *L'Amoureux v. Van Denburgh*, 7 Paige, 316.

such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of his right. So the mortgagee is not prevented but assisted in equity, when he proceeds, not only to obtain possession, but absolute title by foreclosure.(1)

2. Some remarks have already been made (ch. 33, sec. 6, *et seq.*) upon the point, whether payment of the mortgage debt, after condition broken, *ipso facto*, revests the estate in the mortgagor.(a) With this question is of course connected the further inquiry, what is the proper remedy for a mortgagor, after such payment, to regain possession of the land. If, by payment, the legal estate is revested in him, he is of course entitled to maintain an action at law upon his legal title; but if otherwise, his only remedy is a bill in equity.

3. In Massachusetts, it was early held, that the only remedy of the mortgagor in the case supposed, is a bill in equity. And this doctrine has been adhered to in subsequent cases. It is placed upon the grounds, that the statute law provides for the discharge of a mortgage, after payment, upon the record, thereby implying that the legal estate remains in the mortgagee; and chiefly, that the bill in equity is an adequate and convenient remedy, and well adapted to the doing of impartial justice to all parties; on the one hand moderating the rigor of the common law for the benefit of the mortgagor, and on the other compelling him to do justice to the mortgagee. It is as beneficial to the mortgagor as a suit at law, and may sometimes be more so; for, if the evidence of payment be doubtful, the mortgagee may be compelled to answer under oath to the fact. It is certainly more beneficial to the mortgagee. If the mortgagor brought ejectment, the mortgagee could obtain no allowance for repairs; such allowance depending either upon the statute, or the rules of equity. It is unknown to the common law, which considers the mortgagee as absolute owner.(2)

4. In the case from which these remarks are taken, the court proceeded to notice the objection, that, upon this principle, the mortgagee, after payment, might recover the land from the mortgagor, thereby working manifest injustice; and *the fact*, that he might so recover it, seemed to be admitted. But in a later case, it is said, that this admission was inadvertently made; and distinctly decided, that if the mortgagor, after condition broken, have paid the debt, the mortgagee cannot recover possession of the land, because *the conditional judgment*, provided by statute, which authorizes a writ of possession, *unless the defendant, within a certain time, pay the debt, &c.*, cannot, in such case, consistently be rendered.(3)

5. In New Jersey, it is said, a bond and a mortgage given to secure it, are to be considered, for some purposes, as separate obligations for the same debt. The creditor in enforcing payment may consider them as

(1) 2 Story on Eq. 278, n. 3; Cholmondeley v. Clinton, 2 Jac & Walk. 182 to 189, &c.

v. Welles, 17 Mass. 419; Sherman v. Abbot, 18 Pick. 451.

(3) Wade v. Howard, 11 Pick. 297.

(2) Hill v. Payson, 3 Mass. 560; Parsons

(a) See Breckenridge v. Ormsby, 1 Mar. 53; Paxon v. Paul, 3 H. & McHen. 399, that it does, in Kentucky and Maryland; and Phelps v. Sage, 2 Day, 151, *contra*, in Connecticut.

distinct. He may proceed singly upon the obligation; or he may proceed singly upon the mortgage, either by ejectment to recover possession, or by bill in Chancery to foreclose; or he may proceed upon both securities at the same time. (a) If the mortgagee proceeds by ejectment, he will recover possession of the land, and retain it only till the debt is paid. He gains no title, but is a trustee for the mortgagor, being accountable for the rents and profits. If he proceed simply to sue on his bond, the execution may be levied indiscriminately on all the defendant's property, whether included in the mortgage or not. If the mortgaged premises are sold, the estate conveyed by the sheriff to the purchaser, is in no manner affected by the circumstance that a mortgage had been previously given. The mortgagee may be considered as a party to the proceedings, and it would be questionable, at least, whether, having treated the property as the estate of the mortgagor, he should not be estopped from ever after setting up a claim under the mortgage. This is the general understanding of the country; the purchaser bids as if there were no mortgage; all parties are considered as joining in the sale; and, in case of any deficiency, the estate is considered as discharged of the claim. (1)

6. A statute in Massachusetts provides, that, in suits upon mortgages after condition broken, the court shall render judgment for the plaintiff, to recover so much as is due according to equity and good conscience.

7. A and B, tenants in common, mortgaged to C, to secure a joint and several bond. Afterwards, A mortgaged an undivided half of the farm to D. D assigned the latter mortgage to C, who took possession of the land thereupon for condition broken. C then brings a writ of entry against B, for an undivided half of the land, upon the first mortgage. Held, if the suit had been brought for the whole land against both A and B, B might have redeemed, by paying the whole debt, and

(1) *Harrison v. Eldridge*, 2 Halst. 408-9.

(a) This is undoubtedly the general rule. So an entry for condition broken, though the land be worth more than the note, will be no bar to a suit upon the note. *Portland, &c. v. Fox*, 1 Appl. 99. In Vermont, a suit to foreclose the mortgage is regarded as a suit for the money due thereupon, and a tender is valid as in other cases. *Powers v. Powers*, 11 Verm. 262. In Maryland, the mortgagee cannot sue on the bond and obtain a foreclosure at the same time. *Andrews v. Scotton*, 2 Bland, 665. In Kentucky, the mortgagee may elect between three remedies; taking possession and receiving the profits; a suit at law; and a bill for foreclosure and sale. *Caufman v. Sayre*, 2 B. Monr. 205. In Indiana, one holding a bond, secured by mortgage, after proceeding upon the latter, cannot resort to any other action. But he may, in the first instance, commence a suit on the bond, sell the land mortgaged upon execution, and thus abandon his right under the mortgage. *Youse v. McCreary*, 2 Blackf. 245. The purchaser, in such case, will take a clear title. *Ib.* Or, in a suit upon the bond, the mortgagee may resort to any other property of the mortgagor, and still retain his mortgage lien. *Markle v. Rapp*, 2 Blackf. 268 & n. Upon a mortgage given as security for a note, a decree of foreclosure and sale was rendered, and a writ of error brought by the defendant to reverse such decree. Pending this writ, a suit was brought on the note. Held, these facts were no defence. *Brown v. Wernwag*, 4, 1; (acc. *Russell v. Hamilton*, 2 Scam. 57.) So, in Illinois and Alabama, the mortgagee may bring an action of ejectment, a suit to foreclose, and a suit on the bond, all at the same time. *Delahay v. Clement*, 3 Scam. 203; *Doe v. M'Loskey*, 1 Alab. (N. S.) 708. In New Hampshire, the mortgagee, pending an action at law upon the mortgage, may bring a bill in equity against the same defendant, as claiming under a fraudulent title. *Tappan v. Evans*, 11 N. H. 311; acc. *Burnell v. Martin*, Doug. 417; *Hale v. Rider*, 5 Cush. 231; *Hughes v. Edwards*, 9 Wheat. 489; *Willis v. Levett*, 1 De Gex & Sm. 392; *Copperthwait v. Dummer*, 3 Harr. 258; *Att'y, &c. v. Winstanley*, 5 Bligh, 144; *Brainn v. Stewart*, 1 Sandf. Cha. 87.

would then have stood, in equity, as assignee of the mortgage, not only as against A to compel contribution, but as against any subsequent mortgagee—otherwise, by means of a second mortgage from A, B might be deprived of all security; and that, instead of compelling B to adopt this course, and afterwards bring an action or bill against C, claiming under the second mortgage, to enforce his rights under the first, more especially as C had entered to foreclose for a debt voluntarily created after the first mortgage; the court would exercise its equitable powers in this suit, and render judgment only for the amount equitably due in relation to the land, which was *one moiety* of the debt, a moiety of the land having been taken by C to secure another debt from A alone. Judgment for possession, unless the defendant within two months pay half the money due on the bond. It was remarked that such judgment would be no bar to a suit against B, upon the bond, for the balance due, because the facts upon which the judgment was founded were specially set forth. If A had been a mere surety for B, the whole amount being *equitably* due from B, a different rule would be adopted.(1)

8. Entry and possession, under a judgment upon mortgage, cannot be construed a payment of the mortgage debt. The whole is but a *process to compel* payment, and is only equivalent to an entry to foreclose, without a judgment. To consider it payment, would be to compel the mortgagee to become a purchaser, when he might choose to hold the land as security. But, after foreclosure, the estate may be valued, and he may be deemed to have received payment *pro tanto*.(2)

9. Where a second mortgagee takes a conveyance of the land, from another person, holding a first and third mortgage, after the latter has entered and foreclosed the first and third mortgages; to a suit by the second mortgagee upon his note, it is no defence, that the land and the rents and profits thereof, are of greater value than the aggregate of the amounts secured by all the mortgages; because the plaintiff has acquired an absolute title to the land, wholly independent of his own mortgage.(3)(a)

10. In Massachusetts, Maine, New Hampshire(b) and Rhode Island,(4) in all real actions upon mortgage, after condition broken, the judgment shall or may be a conditional one, that if the mortgagor, &c.

(1) Sargent v. McFarland, 8 Pick. 500.

(2) West v. Chamberlin, 8 Pick. 336; Hedge v. Holmes, 10 Pick. 381; Ewer v. Hobbs, 5 Met. 1. (See ch. 38, sec. 31.)

(3) Hedge v. Holmes, 10 Pick. 380.

(4) Mass Rev. St. 634; 1 Smith's St. 163—

4; N. H. L. 63; R. I. L. 210; Me. Rev. St. 555; York, &c. v. Cutts, 6 Shepl. 204. In Maine, unless the mortgage is set forth in the writ, the judgment will be absolute, if the defendant does not claim a right to redeem. Rackleff v. Norton, 1 Appl. 274.

(a) Where husband and wife mortgage her land, and remain in possession till breach of condition, a suit to foreclose is properly brought against them both. Swan v. Wiswall, 15 Pick. 126.

Where A and B, holding distinct claims against C, take one mortgage to secure them, the mortgage is not joint, but several; each may enforce his claim by the appropriate remedy; and therefore, upon the death of A, B cannot maintain an action upon the mortgage, to enforce payment of A's debt. Burnett v. Pratt, 22 Pick. 556.

(b) Where a mortgage is given to secure several notes, and an action brought for non-payment of one, and possession taken; the mortgagor cannot redeem, without paying such other notes as fall due while he remains in possession, within one year from the time they are payable. The same rule holds, in case of taking possession without suit. Deming v. Comings, 11 N. H. 474.

pay to the mortgagee, &c., the sum adjudged due, within two months, no writ of possession shall issue—otherwise such writ shall issue. In Massachusetts, such judgment must be moved for by one of the parties; (a) and, in that State and in Maine, cannot be claimed by a defendant who is not the mortgagor, and does not claim under him. In Vermont, (1) judgment, in such case, is rendered in common form, but the court, on application of the defendant, stay execution; and order that, if he pay the amount due in a time not exceeding one year, the judgment shall be vacated. Payment is to be made to the clerk, who shall give a certificate thereof, to be recorded, and also take a receipt from the plaintiff. No redemption is allowed after a writ of possession.

11. In New York, the action of ejectment cannot be brought upon a mortgage. Nor can a mortgagee at the same time maintain suits upon his bond and mortgage, on the ground that the mortgaged premises have been partially consumed by fire. (2)

12. In South Carolina, (3) mortgagees are expressly prohibited from bringing any possessory action for the land; the mortgagor being deemed owner of the land, even after condition broken, and the mortgagee owner of the debt. Upon the recovery of judgment on the personal security, the judges of the court may order a sale of the land, giving, if they see fit, a reasonable extension of time, not exceeding six months; and allowing a credit of not more than twelve months. This proceeding is to operate as a perfect foreclosure. But, at any time before sale, the mortgagor may prevent it, and entitle himself to an entry of satisfaction on the mortgage, by paying the debt and costs.

13. In New Jersey, where a mortgagee brings a suit either upon the mortgage or the bond secured thereby, if no suit in equity is pending at the time, and if the defendant bring into court the amount of debt and costs, the court will discharge him from the mortgage, and order a reconveyance of the premises, and a delivery to the mortgagor of all evidences of title. (4)

14. Where lands have been sold on execution, and the purchaser brings ejectment against the judgment debtor, the defendant cannot set up in defence an outstanding mortgage given by himself, before the judgment lien attached to the land. (5)

15. In New Hampshire, it has been held, that a mortgagor cannot have assumpsit against the mortgagee for the profits of the land, received by the latter between the time of entry to foreclose, and the time when the land was redeemed. (6)

16. In Pennsylvania, after twelve months from the day of payment of the debt, or performance of the condition, named in the mortgage, a *scire facias* may be issued against the mortgagor, and, upon execution issued thereon, the land may be sold as upon other executions, or, for want of purchasers, delivered to the mortgagee, not subject to redemption. (7) If the mortgagee have released a part of the land, he

(1) 1 Verm. L. 84; Rev. St. 215.

(2) 2 N. Y. Rev. St. 312; Engle v. Underhill, 3 Edw. 249. See Van Slyke v. Sheldon, 9 Barb. 278.

(3) 1 Brev. Dig. 174-5.

(4) 1 N. J. L. 162; Den v. Spinning, 1 Halst. 471.

(5) Lessee, &c. v. Butler, 2 Ohio, 225.

(6) Robinson v. Robinson, 1 N. H. 161.

(7) Purd. Dig. 194; St. 1842, 66.

may proceed against the remainder, but the mortgagor may plead, that the sum claimed is greater than ought proportionably to be charged upon the land.(1) No sale or delivery of the mortgaged premises shall give any further term or estate in the land, than the land is mortgaged for.(2) A sale upon a mortgage shall not affect the prior lien of any other mortgagee. (The latter provision is made by an act passed April 6, 1830.) It had been previously held, that a sale on execution discharged all liens, prior and subsequent.(3)(a)

17. In Delaware, a mortgagee may have a writ of *scire facias*, after twelve months from breach of condition. The land is sold, as upon other executions. But the sale passes only the interest owned by the mortgagee.(4)

18. In Illinois, the same remedy by *scire facias* may be had upon a mortgage. If the debt is payable by instalments, the last must be due. The land is sold, and subject to the same right of redemption, as upon execution.(5)

19. In Indiana, the mortgagee files a bill *according to the course of the common law*, upon which the court may render *an equitable decree*, and may order a sale of the land at auction. The statute provides, that the purchaser shall take the land free from incumbrances, and not subject to redemption, and that, in *all sales on execution*, the surplus proceeds shall be paid over to the debtor; but it further provides, (p. 245,) that no sale of property on the execution, by virtue of sec. 25, shall create any further term or estate in vendees, mortgagees or creditors, to whom it is sold or delivered, than the estate was mortgaged for.(6)

20. In Ohio, for the purpose of foreclosure, the land is appraised as for sale upon execution, and, if two-thirds of the valuation exceed the debt and interest, sold at auction, and the surplus proceeds paid over to the mortgagor; if not, the absolute title is transferred to the mortgagee, with no right of redemption. In the latter case, he may still recover the balance of his debt.(7)

21. In Missouri, where the debt exceeds fifty dollars, the mortgagee may file a petition against the mortgagor and the tenant, to which any person interested may be a party. Judgment is rendered for the debt, &c., and an order passed for the sale of the property. If this is insufficient, execution may issue against other property. If payment is made to the officer, he gives a certificate, which is recorded.(8)

(1) Purd. Dig. 204.

(2) Ib. 292.

(3) Ib. 297.

(4) Del. St. 1829, 205-6-7.

(5) Illin. Rev. L. 376; St. 1841, 171. See *Aldrich v. Sharp*, 3 Scam. 263; *Belingall v. Gear*, 3 Scam. 575; *Marshall v. Maury*, 1, 231; *State, &c. v. Wilson*, 4 Gilm. 57; *Delahay v. Clement*, 3 Scam. 203; *M'Cumber v. Gilman*, 13 Illin. 542; *Coates v. Woodworth*,

Ib. 654.

(6) Ind. Rev. L. 244. See *Shaw v. Hoadley*, 8 Blackf. 165; *Grimes v. Doe*, Ib. 371; *Morgan v. Woodward*, 1 Smith, 321; *Hough v. Doyle*, 8 Blackf. 300.

(7) Walk. 303; 1 Ohio R. 235, 3, 187; *Heighway v. Pendleton*, 15, 735; *Frische v. Kramer*, 16, 141.

(8) Misso. St. 409-10. See *Ayres v. Shannon*, 5 Mis. 282.

(a) The purchaser holds the land discharged from the lien of the mortgage, under which the sale occurs. *Pierce v. Potter*, 7 Watts, 475; *Berger v. Hiester*, 6 Whart. 210. In case of ejectment on mortgage, the plaintiff acquires a mere *possession* of the land, and his right ceases upon payment of the debt. *Colwell v. Hamilton*, 10 Watts, 417. See Penns. Sts. 1845, 489; 1849, 621, 681.

22. It has been held in England, that, after a mortgagee has proceeded to commitment of the mortgagor in a suit upon the debt, he may still have a remedy upon the mortgage.(1)(a)

CHAPTER XXXVIII.

MORTGAGE—REMEDIES—IN EQUITY—FORECLOSURE AND REDEMPTION.

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| <p>1-14. Lapse of time.
2. General principles of foreclosure.
5-24. Massachusetts.
9-30. Maine.
11. New Hampshire.
13. Rhode Island.
16. Vermont and Connecticut.
17. New York.
19. New Jersey.
20. Georgia.
21. North Carolina.</p> | <p>22. Ohio and Tennessee.
31. Foreclosure: whether payment of debt, &c.
40. Right of redemption may be revived.
44. Mortgage cancelled by mistake.
46. Equity will not relieve, where there is a legal right.
47. Fraud.
48. Payment into court.
49. Mortgagor cannot redeem on payment by a third person.</p> |
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1. It has been already stated, (ch. 31, s. 38,) that a mortgagor may be barred of his right of redemption by lapse of time, and undisturbed possession of the land by the mortgagee. In addition to this general limitation, the law has provided more specific modes of barring or foreclosing an equity of redemption.

2. Chancellor Kent says, a mortgagor's right of redemption may be barred or foreclosed by the mortgagee, after giving due notice to redeem. The ancient practice was, by bill in Chancery to procure a decree for strict foreclosure, which had the effect of giving an absolute

(1) *Davis v. Battine*, 2 Russ. & M. 76; acc. *Tappan v. Evans*, 11 N. H. 311.

(a) It is said, that, as a mortgage creates a contract concerning a debt, as well as a conveyance of an estate, the means of coercing the debtor by a suit upon it ought not to be trammelled by the nice technical rules which govern real actions in general. *Penniman v. Hollis*, 13 Mass. 430; *Wearse v. Pierce*, 21 Pick. 143; *Peck v. Hapgood*, 10 Met. 173; *Keith v. Swan*, 11 Mass. 216; *Miner v. Stevens*, 1 Cush. 482; *Blanchard v. Kimball*, 13 Met. 300; *Goodtitle v. Bailey*, Cowp. 597; *Smith v. Edminster*, 13 N. H. 410; *Amidown v. Peck*, 11 Met. 467.

Upon this principle, it is no defence to a suit for foreclosure, as it is to other real actions, that the defendant is not tenant of the freehold, or that he is a mere reversioner. *Ib.*

But where, in a writ of entry on a mortgage, it appeared that the mortgagors were blind, and the defendant, their father, lived on the land with them, cultivated and improved it, as the sole manager and efficient agent; held, he was not a *tenant*, nor liable to the action. *Churchill v. Loring*, 19 Pick. 465. See, also, *Wheelwright v. Freeman*, 12 Met. 154; *Raynham v. Snow*, *Ib.* 157 n.; *Root v. Bancroft*, 10 Met. 44; *Bradley v. Fuller*, 23 Pick. 1; *Lowell v. Daniels*, 2 Cush. 234.

In Maine, a mortgagee may maintain a writ of entry against the owner of the equity, though, both at the time of the mortgage and the suit, a stranger was in possession, by title paramount to both plaintiff and defendant. *Whittier v. Dow*, 2 Shepl. 298.

If an action for foreclosure of a mortgage is brought against a tenant in possession, more especially where he is the mortgagor himself, such tenant cannot prevent a judgment for the plaintiff by transferring the whole or a part of the land, but his grantee will be bound by the judgment, and possession taken under it. *Hunt v. Hunt*, 17 Pick. 118. See *Sigourney v. Stockwell*, 4 Met. 518.

title to the mortgagee. This still continues to be the usual English practice; though, in some cases, the mortgagee obtains a decree for a sale of the land, under the direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances according to priority.^(a) The latter practice is adopted in New York, Mary-

(a) To a bill for foreclosure, all incumbrancers should be made parties, in order to prevent a multiplicity of suits, effect proper distribution of the proceeds, and give security and stability to the purchaser's title. So, all persons interested in the mortgage or the property should be made parties; including the heir, or devisee, or assignee, and personal representatives of the mortgagor; tenants for life and remainder-men; for they may all be interested in the right of redemption, or in taking the accounts. 4 Kent, 184; *Slaughter v. Foust*, 4 Blackf. 381; *Wilkins v. Wilkins*, 4 Port, 245; *Hall v. Cushman*, 14 N. H. 171; *Champlin v. Foster*, 7 B. Mon. 104; *Smack v. Duncan*, 4 Sandf. Ch. 621; *Weed v. Beebe*, 21 Verm. 495; *Yelverton v. Shelden*, 2 Sandf. Ch. 481; *Williamson v. Field*, Ib. 533; *Goodrich v. Staples*, 2 Cush. 258; *Calverley v. Phelps*, 6 Madd. 232; *Miller v. M'Galligan*, 1 Greene, 527; *Brindernagle v. German, &c.*, 1 Barb. Ch. 15; *Osbourne v. Fallows*, 1 Russ. & My. 741; *Hunter v. Macklew*, 5 Hare, 238; *Smeathman v. Bray*, 8 Eng. L. & Equ. 46; *Burgess v. Sturgis*, Ib. 271; *Rafferty v. King*, 1 Keen, 618.

So, in general, the mortgagor must make all persons interested in the mortgage parties to his bill for redemption. In case of *trust*, it has been a matter of somewhat conflicting decision, whether the legal owner alone is to be made a party, or whether those equitably interested are to be joined. The latter course is recommended as necessary or desirable, unless the *cestui que trusts* are too numerous to be made parties, or the trust is a general one, for creditors. *Williamson v. Field*, 2 Sandf. Ch. 533; *King v. M'Vickar*, 3, 192; *Tylee v. Webb*, 6 Beav. 557; *Wood v. Williams*, 4 Madd. 186; *Coote*, 575, 534, 588, 589.

So, it is held in England, that subsequent judgment creditors of the mortgagor must be made parties to a bill for foreclosure. *Adams v. Paynter*, 1 Coll. 530. But a different doctrine has been adopted in this country. *Felder v. Murphy*, 2 Rich. Equ. 58; *Mims v. Mims*, 1 Humph. 425.

So, it is said, if two estates are embraced in one mortgage, and the equities of redemption devolve on different parties, the equitable owner of one cannot redeem without making the other owner a party. *Coote*, 602. So, several mortgagees, joint tenants, must be parties to a foreclosure. *Lowe v. Morgan*, 1 Bro. 368. So, if the estates of two persons are mortgaged together, both must be included in a bill to foreclose. *Coote*, 577. So, where a bill to foreclose was brought by one of two mortgagees, each having but a certain sum; held, there could be no foreclosure or redemption, unless both mortgagees were before the court. *Palmer v. Carlisle*, 1 Sim. & St. 423. So, where a joint mortgage is made to two, to secure several debts; they may file a joint bill for foreclosure. *Shirkey v. Hanna*, 3 Blackf. 403. But each creditor may foreclose alone; nor can he join the other as defendant. *Thayer v. Campbell*, 9 Mis. 280. Nor can parties to the mortgage note, who did not join in the mortgage, be joined as defendants. *Wilkerson v. Daniels*, 1 Iowa, 179.

As to the proper parties where a mortgage has been assigned, see *Coote*, 354, 577; *Christie v. Herrick*, 1 Barb. Ch. 254; *Hobart v. Abbot*, 2 P. Wms. 643; *M'Guffey v. Finley*, 20 Ohio, 474; *Borst v. Boyd*, 3 Sandf. Ch. 501; *Whitbeck v. Edgar*, 4 Sandf. Ch. 427; *Platt v. Squire*, 12 Met 494; *Browning v. Clymer*, 1 Smith, 298; *Cushing v. Ayer*, 25 Maine, 383; *Lane v. Erskine*, 13 Illin. 501; *Gray v. Schenck*, 4 Comst. 460; *Shackleford v. Stockton*, 6 B. Mon. 390; *Glidden v. Andrews*, 10 Ala. 166; *Frische v. Kramer*, 16 Ohio, 125; *Conley v. Hendricks*, 8 Blackf. 189; *Watson v. Spence*, 20 Wend. 260; *Mann v. Cooper*, 1 Barb. Ch. 185; *Jones v. Steinbergh*, Ib. 250.

As to the proper parties in case of the death of mortgagee or mortgagor, see *Van Horn v. Duckworth*, 7 Ired. Equ. 261; *Greenwood v. Rothwell*, 7 Beav. 280; *Lane v. Erskine*, 13 Illin. 501; *Slaw v. McNish*, 1 Barb. Ch. 326; *McIver v. Cherry*, 8 Humph. 713; *Guthrie v. Sorrell*, 6 Ired. Equ. 13; *Martin v. Harrison*, 2 Texas, 456; *Smith v. Webb*, 1 Barb. 230; *Batchelor v. Middleton*, 6 Hare, 75.

Whether the widow or wife of a party to a mortgage is to be made party to a suit by mortgagor or mortgagee, see *Mims v. Mims*, 1 Humph. 425; *Lewis v. Smith*, 11 Barb. 152; *Bard v. Fort*, 3 Barb. Ch. 632; *Carwardine v. Wislade*, 6 Eng. L. & Equ. 103; *Deuniston v. Potts*, 11 S. & M. 36; *Wood v. Mann*, 3 Sumn. 318.

As to the proper party in case of guardianship, see *Pardee v. Van Arken*, 3 Barb. 534. In case of *insolvency*, *Collins v. Shirley*, 1 R. & My. 638; *Singleton v. Cox*, 4 Hare, 326; *Kerrick v. Saffery*, 7 Sim. 317; *Steele v. Maunder*, 1 Coll. 535.

In a bill for foreclosure, one claiming adversely to the mortgagor, and by title prior to the mortgage, cannot be made a party defendant, for the purpose of trying his title. *Holcomb v. Holcomb*, 2 Barb. 20; *Jones v. St. John*, 4 Sandf. Ch. 208; *Lewis v. Smith*, 11 Barb. 152.

Where a second mortgagee brings a bill in equity for sale or foreclosure of the premises, whether the first must be a party; see *Mims v. Mims*, 1 Humph. 425; *Judson v. Emanuel*,

land,^(a) Virginia, the Carolinas, Tennessee, Kentucky, Indiana, Michigan,^(b) and Alabama.⁽¹⁾

3. It is said, "if a freehold estate be held by way of mortgage for a debt, it may be laid down as an invariable rule, that (in order to a sale) the creditor must first obtain a decree for a sale under a bill of foreclosure. There never was an instance, where a creditor, holding, and in pledge, was allowed to sell at his own will and pleasure. It would open a door to the most shameful imposition and abuse."^{(2)(c)}

4. Where the practice prevails, of foreclosure without sale, its severity is mitigated, by enlarging the time of redemption from six months

(1) 4 Kent. 180-1; Mich. St. 1839, 222-3; Green v. Crockett, 2 Dev. & B. Equ. 393; (2) Per Kent. Chr.; Hart v. Ten Eyck, 2 John. Cha. 100. Massina v. Bartlett, 8 Porr. 277.

1 Alab. (N. S.) 598; Vanderkemp v. Shelton, 11 Paige, 28; Holcomb v. Holcomb, 2 Barb. 23; Shineley v. Jones, 6 B. Mon. 274; Richards v. Cooper, 5 Beav. 304; Archdeacon v. Bowes, M'Cl. 153. It has been held, that he need not be, where the second mortgagee sues the mortgagor and subsequent mortgagees. Richards v. Cooper, 5 Beav. 304. Where a mortgagor upon his marriage settled the land upon his wife and issue, and became bankrupt; held, his assignee need not be a party to a suit for foreclosure. Steele v. Mawder, 1 Coll. Cha. 535.

How far, in a bill for foreclosure, a decree shall be delayed, for the purpose of adjusting the respective rights and interests of different parties, defendants; see Renwich v. Macomb, 1 Hopk 277; N. Y. &c. v. Cutler, 3 Sandf. Ch. 176; Duberly v. Day, 7 Eng. L. & Equ. 188; Robinson v. Turner, Ib. 138.

So, the grantee of an easement by a conveyance prior to the mortgage. Combs v. Stewart, 10 B. Mon. 463.

(a) In this State, in case of a creditor's bill for sale of mortgaged land, if the defendant in his answer assents to a sale, the court may decree an immediate sale for payment of the mortgage. Gibson v. M'Cormick, 10 Gill & J. 65. Time will be granted, only when the mortgagee applies for a sale. Ib. If the mortgage is payable by instalments, it may be foreclosed when the first falls due. Salmon v. Clagett, 3 Bland. 179. The sale of an infant's mortgaged estate must always be for his benefit. Williams, Ib. 194. In case of a decree for sale, the mortgagor must be allowed time to pay the debt. Jones v. Betsworth, 3 Bland. 194. But see 196 n. See, also, Worthington v. Lee, 2, 603; Lausdale v. Clerke, 2, 358; Atkinson v. Hall, Ib. 372; Wadrop v. Hall, Ib. 666; Hunter v. Grant, Ib. 667; Buchanan v. Shannon, Ib.; Worthington v. Lee, Ib. 681. The mortgagee must be made a party, unless his whole interest is divested. Ib. 682. See Md. L. 187, 213, 1261.

(b) In this State, where a mortgage is payable by instalments, and the land consists of a single eighty acre lot or a farm, and a sale becomes necessary for any but the last instalment, portions may be sold as nearly square, and as near to the north-east corner, as possible. Mich. St. 1839, 227. A mortgage payable by instalments is to be treated like distinct mortgages. Ib. 228. In case of foreclosure, the sheriff immediately makes a deed to the purchaser, which is left with the register of deeds, and after one year delivered to the grantee, (or after two years, unless the mortgage was made as security for the price of the land,) in case the mortgagor does not in the meantime redeem. St. 1840, 146. If the land consists of distinct lots, they are separately sold, and only enough of them to satisfy the claim. A deed is made by the officer and recorded, and, unless the debtor redeem in two years, paying seven per cent. interest, is delivered to the purchaser. St. 1844, 38; Rev. St. 500-3. See Caswell v. Ward, 2 Dougl. 374.

In Arkansas, the mortgagee files a petition, upon which a sale is ordered, like that on other executions. If the property proves insufficient, a new execution issues, on which other property may be taken. The officer gives a certificate, which is acknowledged and recorded. Before a sale takes place the property may be redeemed. Ark. Rev. St. 580. In Alabama, in case of sale by order of Chancery upon an incumbrance, one claiming under the mortgagor, but not a party, may redeem within five years. Clay, 329. The same right of redemption is allowed to a mortgagor as to an execution debtor; provided, the defendant in the execution, if in possession at the time of sale, shall deliver it without suit to the vendee. An execution creditor, whose debt is unsatisfied, may redeem, as in other cases of execution sale. One who redeems is bound to pay the occupant for his improvements. Ib. 503. See Ala. L. 1849-50, 68.

(c) An express power to sell is an exception to the rule.

to six months, or for shorter periods, according to the equity arising from circumstances.(1)

5. In Massachusetts, the mortgagee, after condition broken, may recover possession by action, or may enter openly and peaceably, if not opposed by the mortgagor or other person claiming the premises; and a continued peaceable possession for three years will foreclose the mortgage.(a)

6. In case of entry without a judgment, a memorandum or certificate thereof is made upon the deed, signed by the mortgagor or party claiming under him, and recorded; or else a certificate of two competent witnesses to prove the entry, is made and sworn to, and recorded; and no entry is effectual for foreclosure, unless a certificate or deposition in proof thereof is thus made and recorded.(2)

7. In case of entry before condition broken, the three years, limited for redemption, will not begin to run till breach of condition, and written notice that the possession is thenceforth to be held for condition broken or for foreclosure; unless the mortgagee make a new entry or commence an action. The same certificate or deposition, to prove such notice or new entry, shall be made and recorded, as above provided in case of other entries.(3)

8. A mortgagee, pending an action upon the mortgage, entered upon the land *in pais* for condition broken, and afterwards entered under a judgment in the suit. Held, the latter entry was a waiver of the former, and the three years for foreclosure dated from the latter.(4)(b)

(1) 4 Kent, 181-2; Coote, 569; Jones v. Creswicke, 9 Sim. 304.

(2) Mass. Rev. St. 634. See Boyd v. Shaw, 2 Shepl. 58.

(3) Ib. 635-6.

(4) Fay v. Valentine, 5 Pick. 418. See Cutts v. York, &c., 6 Shepl. 190; Smith v. Kelley, 27 Maine, 237; Bellows v. Stone, 14 N. H. 175; Deming v. Comings, 11 N. H. 474; Rangely v. Spring, 28 Maine, 127.*

* Entry by an attorney, not duly authorized, will be sufficient, if afterwards adopted in writing by the mortgagee. Cutts v. York, &c., 6 Shepl. 190.

It has been held in Massachusetts, before the statute referred to in the text, that, if the mortgagee enter before, and continue in possession after, breach of condition, the three years began to run, upon the mortgagor's receiving actual or implied notice of his intention to hold for the purpose of foreclosure. Erskine v. Townsend, 2 Mass. 495; Scott v. McFarland, 13, 309; Pomeroy v. Winship, 12, 514. See Taylor v. Weld, 5, 109; Thayer v. Smith, 17, 429. It is not a sufficient entry for foreclosure, that the mortgagor signs a paper containing the words, "I hereby give possession." Pease v. Bensop, 28 Maine, 336. But, where a statute provides, that a certificate shall be evidence of entry and possession; proof is not admissible against such certificate, that there was no actual entry. Oakham v. Rutland, 4 Cush. 172. Entry on one of several lots, in the same county and town, for the purpose of foreclosure, is sufficient for all. Shapley v. Rangeley, 1 W. & M. 213. The mortgagee need not have his deed with him, nor make any express declaration of his intent, when he enters. An authority from the mortgagor to deliver possession may be verbal. It is sufficient, if the mortgagee goes to the land at the time, and afterwards takes possession and occupies, with the mortgagor's assent. Skinner v. Brewer, 4 Pick. 468. See further, Wright v. Tukey, 3 Cush. 290; Colby v. Poor, 15 N. H. 198; Merriam v. Merriam, Mass. S. J. C. Oct. 1850. Law Rep. July, 52, p. 169.

(a) Entry after breach of condition is presumed to be for the purpose of foreclosure. Hunt v. Stiles, 10 N. H. 466.

(b) Where a mortgagee, having entered for breach of condition, is placed under guardianship as a spendthrift, the guardian may restore possession to the mortgagor, and thus prevent a foreclosure. Botham v. McIntier, 19 Pick. 346.

The assignee of a mortgage having received rent from the tenant in possession, his administrator, on his death, called on the tenant to attorn or surrender, but he denied the right of the administrator, and refused to do it. The administrator then brought an action against

9. In Maine, an entry to foreclose shall be made by process of law, by the written consent of the mortgagor, &c., or by the mortgagee's taking open and peaceable possession before two witnesses. Foreclosure may also be effected by a public notice in the newspaper, or a notice regularly served on the mortgagor, &c.; in each case to be recorded.(1)(a)

10. Where a mortgagee, in Maine, took possession of the land, under an execution, in presence of his own agent and the sheriff only; held, they were not the *two witnesses* required by law.(2)

11. In New Hampshire, the mortgagee may hold for foreclosure, by a peaceable entry with or without legal process, after condition broken; provided, in the former case, he publish a notice; or by remaining in possession, with notice of his purpose, if he entered before breach of condition. The time of redemption is one year. And this rule is not affected by a subsequent statute, giving the court full Chancery power over mortgages.

12. If the mortgagee remain in possession, a year after condition broken, *with the mortgagor*; this is a sufficient possession to foreclose the mortgage.(3)

13. In Rhode Island, three years' possession is sufficient to foreclose a mortgage. Possession is to be taken, either by legal process, or by peaceable and open entry in presence of two witnesses, who shall give a certificate of the fact. The party giving possession shall acknowledge it to be voluntarily done before a magistrate, and both the certificate and acknowledgment shall be recorded. The court are empowered to hear in equity all bills of foreclosure, brought after the mortgagee has taken possession, by consent of parties, without legal process.(4)(b)

14. In this State, the general doctrine of foreclosure by *lapse of time*, independently of statutory provisions, has also been recognized. Thus, where a mortgagee had been in visible possession of the land for ten years, nine of them after condition broken, and, four years after the death of the mortgagor, conveyed to one having no actual notice of the mortgage, and affected by it only so far as it varied constructively from the registry; and the purchaser occupied eighteen years and made valuable improvements; and the mortgagor's estate, being insolvent, was administered by the mortgagee; held, the right of redemption, as against the purchaser, must be deemed to have been abandoned by all parties interested, and a bill for that purpose, brought by a devisee of one of the mortgagor's heirs, was dismissed.(5)

(1) 1 Smith's St. 161-2; Me. Rev. St. 555. See Sts. 1852, 226; Cushing v. Ayer, 25 Maine, 383; Chase v. Palmer, 25 Maine, 341.

(2) Gordon v. Hobart, 2 Sumn. 401.

(3) N. H. St. 1829, 529-30; Rev. St. 246; Gibson v. Bailey, 9 N. H. 168; Wendall v. New Hampshire, &c., 9 N. H. 404; Gilman

v. Hadden, 5 N. H. 30. See Cushing v. Smith, 3 Story Rep. 556; Deming v. Comings, 11 N. H. 474.

(4) R. I. L. 210-11. See Daniels v. Mowry, 1 R. I. 151.

(5) Dexter v. Arnold, 1 Sumn. 109.

him on the mortgage, without notice to the heirs or representatives of the mortgagor, who was dead, recovered a conditional judgment, sued out an execution, entered, and remained in possession three years. Held, the mortgage was foreclosed. Shelton v. Atkins, 22 Pick. 71.

(a) A written surrender, not recorded within thirty days, is wholly inoperative. Southard v. Wilson, 29 Maine, 56.

(b) This statute is adopted by the U. S. Court. Dexter v. Arnold, 3 Sumn. 152.

15. But where a part of several parcels of land, mortgaged by one deed, have been conveyed by the mortgagee to a *bona fide* purchaser, against whom the right of redemption is barred by lapse of time; the mortgagor may still redeem such portions of the land as remain in the mortgagee's possession.(1)

16. In Vermont, the mortgagor is allowed by the decree a definitive time, sometimes one and two years, to redeem, and in default, the equity of redemption is foreclosed. In Connecticut, the land mortgaged, upon foreclosure, is never decreed to be sold. The bill of foreclosure is not a proceeding *in rem*; there is no sale, and possession is not enforced. The mortgagor is allowed fifteen years to redeem, after entry by the mortgagee for breach of condition. Where, before foreclosing, a suit has been brought *on the note*, the costs of such suit become part of the mortgage debt. By a late act, in case of a suit upon a mortgage before it is due, a tender of the debt and costs defeats the action. So, if a part only is due, a tender of such part defeats the action, and stops the interest.(2)

17. In New York, upon a bill for foreclosure or satisfaction, the court may decree a sale of the whole or a part of the land.(a) When a bill is filed for satisfaction, the court may not only compel a delivery of the land to a purchaser, but, on the return of the report of sale, may decree payment of any balance remaining due, and recoverable by law, either from the mortgagor or a surety, if the latter be joined in the bill; and issue executions, as in other cases. During and after such process, no suit at law shall be brought for the debt, unless authorized by Chancery.(b) The bill must set forth whether any proceedings have been had at law upon the debt; and if judgment has been recovered, the bill will be dismissed, unless the sheriff has returned on execution, that the debtor has no property except the mortgaged premises. Sales shall be made, and deeds given, by a master, and shall vest the same title in the purchaser that a foreclosure would have vested in the mortgagee, and shall be as valid as if executed by both mortgagor and mortgagee.(c) The surplus proceeds shall be brought into court, for the

(1) 1 Sumn. 109.

(2) *Palmer v. Mead* 7 Conn. 152-3; *Smith v. Bailey*, 1 Shaw, 163; *Ib.* 267; 4 Kent, 181; *Pettibone v. Stevens*, 15 Conn. 19; Conn. St. 1840, 30-1. See *Preston v. Briggs*, 16 Verm. 124; Conn. L. 1849, 51, 52; *Ib.* 1850, 34; Conn. Sts. 1849, 26.

(a) It is held in Alabama, that the decree cannot properly leave it discretionary with the master to sell the whole or a part of the land. *Walker v. Hallett*, 1 Alab. (N. S.) 380.

(b) If a suit at law has been commenced on the bond, a bill for foreclosure may be brought without discontinuing it; but no judgment will be rendered or execution issued in such suit, without leave of Chancery. If the suit is against one not party to the bill, against whom it is doubtful whether there could be a decree over, in case of deficiency, though made a party; and if the land is insufficient security for the whole debt; the court will allow the suit to proceed in order to settle the validity of a defence, but will not issue execution without leave of Chancery. *Suydam v. Bartle*, 9 Paige, 294. See *Thomas v. Brown*, *Ib.* 320.

(c) A decree of foreclosure and consequent sale, upon a bill filed against the mortgagor alone, do not bind purchasers from him. *Watson v. Spence*, 20 Wend. 260. Nor can they be ejected upon execution. *Fuller v. Van Geesen*, 4 Hill, 171.

A purchaser under a void decree, in possession of land, is regarded as a stranger, and cannot set up against the owner of the equity an outstanding title in the mortgagee, at whose suit the decree was obtained. *Ib.* The deed takes effect immediately, though the master's report is made afterwards. *Fuller v. Van Geesen*, 4 Hill, 171.

If the mortgagee become the purchaser, and agree in writing to convey to a third person, no redemption will be allowed, though the deed have not actually passed. *Merritt v. Lambert*, 7 Paige, 344.

use of the defendant or other party entitled, and, if not taken out in three months, invested for their benefit. If the bill is filed for the payment of an instalment or of interest, it shall be dismissed, upon the defendant's paying the amount due, with costs, before the decree for a sale. If paid afterwards, proceedings shall be stayed, but a decree of foreclosure and sale entered, to be enforced upon any subsequent default, on a new petition, and by a further order. In such case, the court will ascertain, through a master, whether a portion of the land may be sold, sufficient to pay what is due, and decree accordingly. If a sale of the whole will be most beneficial, such sale will be decreed, and the whole debt paid, deducting interest on the portion not due, if not payable on interest; or the court may order such portion to be put out at interest for the benefit of the parties.(1)(a)

18. By later statutes, land sold under mortgage, or a decree thereon, may be redeemed in one year. So any distinctly sold portion of the whole. Ten per cent. interest shall be paid. A tender may be made either to the officer or the purchaser, who shall give a certificate of the payment; or, in case of their refusal, absence, or disability, or if they are unknown, to the public treasurer. The certificate to be recorded. The mortgagee has possession after a sale, unless in eight days the mortgagor gives security against waste, &c. Creditors may redeem in succession, according to their respective priority, paying seven per cent. interest. The mortgagee need not make a claimant under a subsequent decree party to the bill. Provision is made for foreclosure by means of a public advertisement. Within fifteen months after an execution sale, the mortgagor may redeem the whole of the premises or any part separately sold, subject to redemption by any other creditor.(2)

19. In New Jersey, the statute provides, that possession by the mortgagee twenty years after default of payment shall bar the right of redemption. Upon a bill for foreclosure, the court may order a sale of the whole, or a sufficient portion of the land, either by a Master, or by a sheriff upon *fiery facias*. But the sale shall pass no greater estate, than the mortgagee would have acquired by foreclosure. Where a mortgagee sues either upon the mortgage or the bond, if there is no suit in equity pending at the time, and the defendant brings into court the amount of debt and cost; the court will discharge him from the mortgage, and order a reconveyance and a delivery to him of all evidences of title. The purchaser takes no greater estate, than the mortgagee would have done by foreclosure. If a part of the debt is not

(1) 2 N. Y. Rev. St. 191-3. See William-son v. Champlin, 8 Paige, 70; Shufelt v. Shufelt, 9, 137; Sabin v. Stickney, 9 Verm. 155; Harris v. Fly, 7, 421; M'Carthy v. Graham, 8, 480; Van Hook v. Throckmorton, Ib. 33; Yechte v. Brownell, Ib. 212; Norton v. Stone, Ib. 222; Beekman v. Gibbs, Ib. 511; Post v. Leet, Ib. 337; Seaman v. Hicks, Ib. 655; Torrey v. Bank, &c., 9, 149; Farmers, &c. v. Millard, Ib. 620; Ruckman v. Astor, Ib. 517; Manhattan, &c. v. Greenwich, &c., 4 Edw. Ch. 315; Burr v. Stanley, 4 Edw. Ch. 27.

(2) N. Y. L. 1837, 455-6; 1838, 261-3; 1840, 289-90; 1842, 383, 409; 1844, 529; Sts. 1847, 508. See Cameron v. Irwin, 5 Hill, 276; Wilson v. Troup, 2 Cow. 195; Arnot v. Post, 6 Hill, 65; Lamerson v. Marvin, 8 Barb. 9; Van Slyke v. Shelden, 9, 278.

(a) In Kentucky, where a mortgage is payable by instalments, the mortgagee may enter upon the first breach and remain in possession, subject to account, but shall not have a foreclosure of the whole land. *Caufman v. Sayre*, 2 B. Monr. 203. See *Massina v. Bartlett*, 8 Por. 277; *Leverett v. Redwood*, 9, 79; *Walker v. Hallett*, 1 Ala. (N. S.) 379. Adopting the same practice as in New York.

due, the whole land may be sold and the whole debt paid with a *rebate* of interest.(1)

20. In Georgia, where application is made to the court for foreclosure of a mortgage, the court shall order that the debt be paid on or before the first day of the next term—the order to be served and published in a newspaper; and, if not complied with, the court may render judgment for the amount due, and pass a rule absolute for a sale of the land, as upon execution. The surplus money, if any, shall be paid to the mortgagor. If the mortgagor make affidavit of payments or set-offs, which ought to be allowed him, the court shall submit the matter to auditors.(2)

21. In North Carolina, a strict foreclosure has been allowed.(3)

22. In Ohio, the mortgagee may have a decree of foreclosure, where the debt equals two-thirds of the value of the land; and he may demand a sale. In Tennessee, the mortgagor has two years to redeem, after confirmation of the master's sale, under a decree of foreclosure.(4)

23. By the English law, an equity of redemption may be foreclosed by the act of the mortgagor himself; for, upon a bill to redeem, the plaintiff is required to pay the debt by a given time, usually six months from liquidation of the debt, in default of which the bill is dismissed; and this proceeding is a bar to a new bill, and equivalent to a foreclosure.(5)

24. In Massachusetts, a tender for the purpose of redemption may be made, even before entry for breach of condition. If not accepted, a tender shall not prevent a foreclosure, unless a suit thereon is commenced within one year thereafterwards. A bill for redemption, offering to pay the money due, may be brought without previous tender; but the plaintiff shall pay costs, unless the defendant has unreasonably neglected or refused to render an account.(a) Where, after entry of the mortgagee, it appears that he has not unreasonably neglected or refused to render an account, the court, upon a bill to redeem, may award to him, in addition to the balance due on the mortgage, interest thereon, from the expiration of three years after entry, to the time of rendering judgment, at a rate not exceeding 12 per cent. a year. Substantially the same provision as to tender is made in Maine. In the latter State, if the mortgage is given to secure the payment of money only, and the whole is due, after payment or tender, the mortgagor may, by a bill in equity, compel the mortgagee to give a deed of release, if he has neglected or refused to do it, though not in possession; or he may proceed, as above provided, without a tender.(b) Where the mortgagee or one claiming under him has entered for breach of condition, the mortgagor or any one claiming under him may redeem within

(1) 1 N. J. L. 412, 705, 162; N. J. 1 Rev. Sta. 917-18-20.

(2) Prince, 168, 423-4. See Hobby v. Pemberton, Dudl. 212; Butt v. Maddox, 7 Geo. 495.

(3) Spiller v. Spiller, 1 Hayw. 482. See ch. 37; Ingram v. Smith, 6 Fred. Equ. 97.

(4) 4 Kent, 181, n.; 5 Ham. 356; Henderson v. Lowry, 5 Yerg. 240.

(5) 4 Kent, 185.

(a) See Bourne v. Littlefield, 29 Maine, 302. Filing a bill is the commencement of suit. Van Vronker v. Eastman, 7 Met. 157.

(b) In the same State, a bill in equity to redeem lies against the State. The statute relating to tender does not apply to suits in the United States Court. Gordon v. Hobart, 2 Sumn. 401.

three years, by bringing a bill in equity. The court, upon a hearing, may render judgment according to equity and good conscience, and award execution accordingly; and, if the defendant fails to appear, or refuses to comply with the order or judgment, the money shall be paid into court, and execution issue. In New Hampshire, payment or tender will render the mortgage void. If the mortgagee refuse to release or to state an account upon a written request, the mortgagor may *petition* the court, and, upon his bringing the money into court, if merely *tendered* previously, the court shall order a discharge, and an attested copy of the decree shall be recorded in the Registry of Deeds. If the mortgagee refuse to state an account, the court shall ascertain the amount due, and make a similar decree.(1)(a)

25. In Massachusetts, after the death of the mortgagor, only his heir or assignee can redeem. In Maine, the executor also may do it.(2)

26. The statutory provision in Massachusetts, authorizing a mortgagor to bring a bill for redemption, without actual tender, after having demanded an account from the mortgagee, has been the subject of judicial construction in several cases.

27. A mortgagee was asked by the assignee of the mortgagor, at the office of the former, in W., what was due on the mortgage. He answered that he owned the whole estate; and, to a second inquiry, that the records would show. Being asked what money would answer, he replied, nothing but specie; and that, if tendered, he should act his pleasure about receiving it; and, if he took it, he would discharge upon the records. He also said, that his papers were at C., (distant eight or nine miles from W.,) and he could not ascertain the sum due. Held, a sufficient demand and refusal, to sustain the bill; but not such an *unreasonable* refusal, as would subject the defendant to costs.(3)

28. A mortgagor asked the mortgagee, when absent from the town where the latter resided, to make out and furnish in reasonable time an account of the sum due. He replied, that, if the mortgagor would call upon him at home, he would furnish all the information in his power. Without thus applying, the mortgagor brought a bill to redeem. Held, it would not lie.(4)

29. But where, upon a demand made, the mortgagee said, he had no other account to render than one rendered two years before, which turned out to be erroneous; held, a sufficient demand and refusal to sustain a bill for redemption.(5)(b)

(1) Mass. Rev. St. 636; Sts. 1850, Ch. 21. (See Sts. 1853, 909;) Me. L. 1837, 439-40; Rev. St. 555; N. H. St. 1829, 530-1; Rev. St. 246.

(2) *Smith v. Manning*, 9 Mass. 422; Me. Rev. St. 557.

(3) *Willard v. Fiske*, 2 Pick. 540.

(4) *Fay v. Valentine*, 2 Pick. 546.

(5) *Battle v. Griffin*, 4 Pick. 6.

(a) If the mortgagor would avail himself of a tender made by a third person, he must bring a bill in reasonable time. *Bailey v. Willard*, 8 N. H. 429. A tender must be unconditional. *Wendell v. N. H., &c.*, 9, 404. *Holton v. Brown*, 18 Verm. 224. If a mortgage is assigned just before the right of redemption expires, for the purpose of preventing a tender, the time may be enlarged. *Deming v. Comings*, 11 N. H. 474.

(b) Such demand may be valid, though accompanied by other demands and proposals, which the mortgagee is not bound to notice. *Allen v. Clark*, 17 Pick. 47. The account should state, not only the amount due, but the items. *Ib.* In New Hampshire, unless the demand for an account is immediately complied with, the right of redemption lasts till it is. *Wendell v. N. H. &c.*, 9 N. H. 404.

30. In Maine, where the mortgagee, or any one claiming under him, has entered for condition broken, the mortgagor, or any one claiming under him, may redeem within three years after such entry, by bringing a bill in equity. The court, upon a hearing of the bill, may render judgment according to equity and good conscience, and award execution accordingly; and, if the defendant does not appear, or refuses to comply with the order or judgment, the money shall be paid into court, and execution issue.(1)(a)

31. The question has frequently arisen, whether the foreclosure of a mortgage operates as payment or extinguishment of the debt,(b) or whether the mortgagee may still maintain an action at law, for the balance due him, after deducting the fair value of the property. The better opinion is said to be, that such action may be brought.(c) This question also involves the further one, whether the foreclosure is thereby opened, and the right of redemption revived.(2)

32. Judge Story says, if foreclosure of a mortgage operated as payment of the debt, it would frequently prove, in literal exactness of language, *mortuum vadium*, a dead and worthless security. If the mortgagee is compellable to make an election, the pursuit of a remedy upon the personal security is an abandonment of the pledge, while an appropriation of the latter is an abandonment of the debt. In a case therefore of suspected insolvency, he would be encircled with perils on every side; and, instead of a double security for his debt, would be left with scarcely a single plank to save himself in the shipwreck.(3)

33. The English authorities, upon both the points above stated, seem somewhat confused and contradictory.

34. It was held, in an early case, that a suit upon the bond after foreclosure opened the foreclosure, and let in the mortgagor to redeem. And Lord Thurlow is said to have declared, that after foreclosure, so long as the mortgagee kept the estate, he must take it *in satisfaction*, because there was no means of ascertaining how far it paid the debt;(d) but, after having sold it, he might recover the balance due, in a suit upon the bond. On the other hand, in the case of *Perry v. Barker*, Lord Eldon inclined to the opinion, that, after sale, no suit would lie upon the bond, because the plaintiff had disabled himself to reconvey the estate; but, at the same time, he remarked that Lord Thurlow had decided that such action would lie, either with or without a sale. In a subsequent hearing of the same case, Lord Erskine held, that a foreclosure was no bar to a suit upon the bond; but, that the mortgagor was thereby enabled to redeem, and, if the mortgagee had sold the land, he

(1) 1 Smith's St. 159-63.

(2) 4 Kent, 183. See Coote, 570-1.

(3) Hatch v. White, 2 Galli. 154; (Omal)

v. Swan, 3 Mas. 474.) See Cullum v. Emanuel, 1 Ala. (N. S.) 23.

(a) If a mortgagee of land in Maine, in possession for breach of condition, require, as the terms of redemption, payment of more than is due, the party paying may recover back the money in Massachusetts, in an action for money had and received. *Cazenove v. Cutler*, 4 Met. 246. See *Cushing v. Ayer*, 25 Maine, 383; *Pease v. Benson*, 28 Mass. 366.

(b) It does so operate, if the property equals the debt in value, even though the foreclosure is effected by an assignee, holding only a part of the mortgage debt. *Johnson v. Candage*, 31 Maine, 28; *Bassett v. Mason*, 18 Conn. 131.

(c) *A fortiori*, after mere entry to foreclose. See ch. 37, sec. 4.

(d) In the case of *Lockhart v. Hardy*, 9 Beav. 349, the Master of the Rolls expressed the same opinion.

would be allowed time to get it back. But he also held, that, where this was impracticable, Chancery would restrain the suit by a perpetual injunction.(1)

35. Judge Story questions the correctness of the rule, which allows a court of equity to restrain such suit, before the creditor has received full satisfaction; and also that, by which the suit is held to have the effect of opening the foreclosure. A foreclosure may well be deemed a *purchase*, at the full value of the land, if less than the debt, and, if greater, at the amount of the debt. Where the value much exceeds the debt, a foreclosure can very rarely take place; it is, therefore, of itself, *prima facie* evidence of inferior value. By taking the land the creditor incurs an inconvenience. If it afterwards fall in value, he is the loser, and, therefore, he ought to be benefited by any rise in value. If, after foreclosure, the mortgagee should seek further relief *in equity*, there might be ground for enforcing the principle of reciprocal equity; but there seems to be no ground, upon which equity should decree an injunction, in such case, against the enforcement of *legal rights*. And, even if it should thus interfere, where the mortgagee still retains the estate, it would seem that, after a sale, he ought to recover the balance remaining due. But, at all events, all decisions concur in the principle, that *at law* foreclosure does not bar a suit for the balance of the debt.(2)

36. Judge Story proceeds to remark, that, whatever may be the doctrine of Chancery upon the subject, when acting upon its own peculiar principles alone, yet, where a statute expressly limits the right of redemption to a certain time after possession taken, and negatives it afterwards, a foreclosure cannot be opened by a suit upon the bond.

37. In Connecticut and Mississippi, after foreclosure, the mortgagee may maintain an action for so much of his debt as the estate is insufficient to satisfy, estimating the value at the time when the right of redemption expires. And in Connecticut, the bringing of such action shall not open the foreclosure.(3)

38. In New York, it has been decided that a foreclosure is not opened by bringing a suit for the debt.(4)(a)

39. But, in Vermont, it was held to be reasonable, though not actually decided, that the foreclosure should be opened, and that the mortgagor, on being sued, might file his bill to redeem, on payment of debt and costs; and that the mortgagee, when he brings the suit, should have power to reconvey. In the same State, an action may be maintained upon promissory notes, though secured by a mortgage which has been foreclosed, and though, with others secured in the

(1) *Dashwood v. Blythway*, 1 Eq. Cas. Abr. 317; *Tooke v. —*, 2 Dick. 785; *Perry v. Barker*, 8 Ves. 527; *Ib.* 13 Ves. 197.

(2) *Hatch v. White*, 2 Galli. 159-60-1.

(3) Conn. St. 194. See *The Derby, &c. v.*

London, 3 Conn. 62; *Coit v. Fitch*, Kirby, 254; *McEwen v. Welles*, 1 Root, 202; *Southard v. Wilson*, 29 Maine, 56; *Stark v. Mercer*, 3 How. 377.

(4) *Lansing v. Golet*, 9 Cow. 346.

(a) Declaration on a bond. Plea, that the bond was executed to secure a mortgage, which was foreclosed, and the premises sold, whereby the debt was satisfied. Replication and proof, that the premises did not sell for enough to pay the bond and mortgage. General demurrer and joinder. Judgment for the plaintiffs. *The Globe, &c. v. Lansing*, 5 Cow. 380.

same way, they were described in the bill of foreclosure; if not presented to the Master on taking the account, nor included in the decree.(1) In Massachusetts,(2) the Revised Statutes provide, that where a mortgagee sues after foreclosure for the balance of his debt, the mortgage shall have the right to redeem at any time within one year from judgment recovered.(a)

40. The right of redemption may be revived by the acts of the mortgagee, or by special agreement, even after foreclosure.

41. Thus, the foreclosure is waived by a subsequent acceptance of the money due, or a part of it.(3)

42. A mortgagee, having taken legal possession of the land for foreclosure, afterwards agreed in writing with the mortgagor, that he would reconvey, whenever his debt should be satisfied from the rents and profits, or otherwise. After the lapse of three years from entry, the mortgagor brought a bill to redeem, and a redemption was decreed.(4)

43. So, where the assignee of a mortgage, having purchased the land at a sale made under a decree for foreclosure, agreed with the mortgagee, for valuable consideration, to hold the land as security for the sum paid for the assignment, and *in trust* for the assignor; decreed in equity, that the assignee should reconvey to the assignor upon payment of the sum stipulated, deducting equitable allowances for profits and waste.(5)

44. On the other hand, where a mortgaged estate has been sold, and the mortgagee discharges the mortgage, upon the supposition that the sale is valid, and it is afterwards set aside, the mortgage will be revived in equity.

45. A mortgagee purchased the mortgaged estate at a sale upon execution, and, having received a deed from the officer, entered satisfaction on the mortgage. Upon a bill in equity filed by the debtor, to set aside the sale as irregular and void, it was decreed that the sale be set aside, and the deed cancelled; but also, that the complainant should pay the amount due to the defendant, within a certain time, or else the mortgage be foreclosed and the land sold.(6)

46. In Massachusetts, a widow, claiming dower, cannot maintain a bill in equity to redeem, where, under the circumstances, she might maintain a suit at law. Hence, the bill must allege, either that the husband mortgaged the land before marriage, or that the wife joined

(1) *Lovell v. Leland*, 3 Verm. 581; *Langdon v. Paul*, 20 Verm. 217. See *Lawrence v. Fletcher*, 8 Met. 165; 10, 344; *Leland v. Loring*, 10, 125.

(2) Mass. Rev. St. 638.

(3) *Batchelder v. Robinson*, 6 N. H. 12; *Deming v. Comings*, 11, 474.

(4) *Quint v. Little*, 4 Greenl. 495.

(5) *Southgate v. Taylor*, 5 Munf. 420.

(6) *Zylstra v. Keith*, 2 Des. 141.

(a) The mortgagee may sue upon the mortgage note, after entry for condition broken, and before foreclosure. It is no defence, that the value of the property equals the amount of the note. *Bank, &c. v. Fox*, Maine S. J. C., April T. 1841—Law Rep. July, '41, p. 121. See *Briggs v. Richmond*, 10 Pick. 396. In New Hampshire, after foreclosure, the property is treated as payment *pro tanto*. If more notes than one were secured, and one only was due at the time of entry, the payment shall be applied to this one. *Hunt v. Stiles*, 10 N. H. 466. In Maine, where a mortgage is foreclosed, the value of the land shall go to extinguish the debt, wholly or *pro tanto*. *Southard v. Wilson*, 29 Maine, 56.

in a mortgage made after marriage; in either case, the title of the wife being a mere equity, and not a legal estate.(1)(a)

47. In Virginia, a mortgagor may in general redeem, after the mortgagee has purchased the land, at a sale made under a judgment for the debt. But if the judgment was recovered as against an absconding and fraudulent debtor, redemption will be refused, upon the maxim, that "he who hath done iniquity, shall not have equity."(2)

48. Where the mortgagor, in a suit for redemption, pays money into court, and the defendant disputes his right to redeem, and prevails, the defendant is not entitled to retain the money. The payment is a *provisional* one, an offer to pay money in discharge of the debt, and for the purpose of removing the incumbrance. The defendant, by his defence, denies that there is any debt secured by mortgage, and his own formal act shows that he has no claim to the money.(3)

49. Where the mortgagor has contracted to convey the right in equity to a third person, who thereupon, on his own account, pays the mortgage debt to the mortgagee, and the mortgagor afterwards rescinds the bargain; the latter cannot avail himself of such payments, on a bill in equity to recover the land.

50. Bill in equity to redeem a mortgage. Two of the plaintiffs, purchasers of an equity of redemption, contracted with one Richardson, to sell him the land for \$5,000, he providing for the redemption and for payment of the mortgage debt, amounting to \$3,000 nearly, and securing the surplus to the plaintiffs; the defendants, the mortgagees, having agreed to convey the land to Richardson, if not redeemed, and to pay him the amount due for redemption, if it should be seasonably demanded. Richardson paid the mortgage debt to the defendants; who, in fulfilment of their agreement, gave a bond to Richardson conformable thereto. Two of the plaintiffs were parties to this arrangement. Their inducement was, that the third plaintiff was absent at sea, and therefore a title could not be made to Richardson except through the defendants, and also an apprehension by the defendants, that the mortgagors might have a right to redeem without the consent of the plaintiffs. Hence, it was agreed that Richardson should take his title from the defendants, after a foreclosure of their mortgage. Held, the intention and effect of the transaction was, that the defendants assigned the mortgage to Richardson, subject to the remaining equity, the plaintiffs releasing their equity of redemption, on being paid or secured their shares of the surplus over the mortgage debt; that the bargain between two of the plaintiffs and Richardson did not depend upon the consent of the absent plaintiff, as the title was to come through the defendants; that Richardson's payment to the defendants must be considered as made for himself, upon a purchase of the land, not in discharge of the mortgage, which would defeat the object; that, although the absent plaintiff had no opportunity to assent to the bargain or otherwise, yet, as the other

(1) *Messiter v. Wright*, 16 Pick. 151.

(2) *Dabney v. Green*, 4 H. & Mun. 101.

(3) *Putnam v. Putnam*, 13 Pick. 131, 132.

(a) On the other hand, in case of a mortgage made before marriage, the widow cannot have a remedy *at law* against the mortgagee, or one holding under him. *Van Dyne v. Thayre*, 19 Wend. 162. See *Collins v. Torrey*, 7 John. 278; *Coates v. Cheever*, 1 Cow. 475; *Cooper v. Whitney*, 3 Hill, 95.

plaintiffs were unable to redeem, the transaction was the best that could be done for him in preventing a foreclosure; and that the plaintiffs were not entitled to redemption.(1)

CHAPTER XXXIX.

MORTGAGE—EQUITABLE MORTGAGES AND LIENS.

1. Deposit of title deeds.
9. Lien for purchase-money.

45. Lien of purchaser after payment.

1. IN Equity, if the owner of an estate *deposit the title deeds* with a creditor, this constitutes a mortgage of such estate, as against the owner himself, and any purchaser from him having actual or constructive notice of the fact; which mortgage, like others, may be enforced by a bill and decree for sale or foreclosure.(a) This doctrine has been strongly opposed, since its first introduction in 1783, by very distinguished judges; but is said to be now firmly established. The rule, however, is construed strictly, and not extended by any implication. Thus, it is held, that all the deeds must be actually and *bona fide* deposited with the mortgagee himself. Nor will a mere parol agreement to deposit or to mortgage be enforced.(2)

2. A lease having been pledged by a person, who afterwards became bankrupt, to the plaintiff, as security for a loan, the pledgee filed his bill for a sale of the leasehold. Held, this was a delivery of the title for a valuable consideration. The court had nothing to do but to supply the legal formalities; and, in all these cases, the contract is not to be performed, but is executed. The court afterwards ordered the lease to be sold, and that the plaintiff be paid his money.(3)

3. In a note to this case, it is said, Lord Thurlow held, the deposit of deeds *entitled the holder to have a mortgage*, and to have his lien effectuated; and, although there was no special agreement to assign, the deposit affords a presumption that such was the intent.

4. So, where the title-deeds of an estate were deposited with the

(1) Howard v. Agry, 9 Mass. 179.

(2) 4 Kent, 149-50; Pain v. Smith, 2 My. & K. 417; Lewthwaite v. Clarkson, 2 Y. & Coll. 372. See 3 Ib. 55; Hodge v. Atty-Gen., Ib. 342; Tylee v. Webb, 6 Beav. 552; Rogers v. Maule, 1 Y. & Coll. Cha. 4; Ede v. Knowles, 2 Ib. 172; Meggison v. Foster, Ib. 336; Rolleston v. Morton, 1 Dr. & War. 195; Mandeville v. Welch, 5 Wheat. 284; Hockley v. Bantock, 1 Russ. 141; Langston, 17 Vez. 230; Ashton v. Dalton, 2 Coll. 565;

Brizick v. Manners, 9 Mod. 284; Sims v. Helling, 9 Eng. L. & Equ. 45; Hiern v. Mill, 13 Vez. 114; Boson v. Williams, 3 Y. & J. 150.

Whether the rule is adopted in the United States, see 2 Greenl. v. Cruise, 85 n.; Rockwell v. Hobby, 2 Sandf. Ch. 9; Day v. Perkins, Ib. 359; Hall v. McDuff, 11 Shepl. 311; Clabaugh v. Byerly, 7 Gill, 354.

(3) Russell v. Russell, 1 Bro. 269, & n.

(a) As to equitable mortgages, see 2 Dea & Chit. 393; 2 My. & K. 417; 8 You. & Coll. 55. In case of foreclosure of an equitable mortgage, six months are allowed to redeem. Thorpe v. Gardside, 2 You. & Coll. 130. See Coote, 220. Such mortgage cannot prevail against a creditor without notice, who afterwards recovers a judgment. Whitworth v. Gaugain, 3 Hare, 416.

plaintiff as security, and the defendant, fourteen years afterwards, when the owner was upon the eve of bankruptcy, took a mortgage, ante-dated, and purporting, but untruly, to be for money then advanced; and the defendant had notice of the deposit, but avoided inquiring for what purpose it was made; held, in a bill brought by the plaintiff against the defendant for foreclosure, that the latter should either pay the plaintiff's demand, or stand foreclosed, &c. The court remarked, that the deposit of title-deeds as security is evidence of an agreement to make a mortgage, and the agreement is to be carried into execution by the court against the mortgagor, or any one claiming under him, with notice express or implied.(1)

5. Lord Eldon said, the decision, that a mere deposit of deeds shall be evidence of an agreement for a mortgage, is much to be lamented. It has led to discussion upon the truth and probability of evidence, which the very object of the statute of frauds was entirely to exclude. In another case, the same judge declared, that a deposit of deeds should not be considered as a mortgage, except in a clear case; and he refused so to treat it in the cause before him.(2)

6. Sir William Grant remarked, that the mere fact, that one man's title deeds are found in another's possession, is not conclusive of any purpose to mortgage the estate. It may exist without any contract whatever. Where the deposit is made when the money is advanced, it is obvious that the purpose of the deposit must be, to secure the repayment of the money, and there is little to be supplied by other evidence. The connection is not so direct, between a debt antecedently due and a subsequent deposit; nor is the inference so plain. And, where the deeds are delivered, not as a present security, but only for the purpose of enabling the attorney to draw a mortgage, which has been agreed for; the principle is wholly inapplicable.(a) The deposit of deeds is indeed held to imply an obligation to execute a conveyance, whenever required. But, in such case, the primary intention is, to execute an immediate pledge; with an implied engagement to do all that may be necessary to render the pledge effectual for its purpose. But, in the case supposed, there was no intention to put the deeds into pledge. Nor does the death of the owner, before making the proposed mortgage, give any effect to the transaction as a deposit.(3)

7. So Lord Eldon remarked, that it was an error to suppose, that a deposit of deeds can refer to nothing but an intention to subject the estate. A deposit may be of considerable use, without any such object. The right to hold the deeds, and so to work out payment, is of great value.(4)

8. It is understood to have been the old rule in the English Chancery, that, if a first mortgagee voluntarily left the title deeds with the mortgagor, he should be postponed to a subsequent mortgagee without notice, and in possession of the deeds; because he thereby enabled the mortgagor to impose upon others, who, in the absence of a registry,

(1) *Birch v. Ellames*, 2 Anst. 427.

(2) *Ex parte Haigh*, 11 Ves. 403-4, and n. See *Chapman v. Chapman*, 3 Eng. L. & Equ. 70.

See *Whitbread's case*, 19 Vez. 211; *Coote*, 222.

(3) *Norris v. Wilkinson*, 12 Ves. 197-8-9.

(4) *Ex parte Hooper*, 19 Ves. 479.

(a) See *Keyes v. Williams*, 3 Y. & Coll. 55.

could look for their security only to the deed, and the possession of the mortgagor. Chancellor Kent, however, is of opinion, upon a review of the cases, that there is not the requisite evidence of the existence of any such rule in equity, as has been stated by some of the judges; or, if it once existed, that it has been changed. He says, the settled rule is now, that this circumstance will not defeat a prior mortgage, unless accompanied with fraud or gross negligence, or a voluntary, distinct and unjustifiable concurrence, on the part of the first mortgagee, to the retaining of the deeds. And, in the United States, where the registry system generally prevails, the alleged rule is still less applicable. Hence, where a leasehold is mortgaged, the leaving of the lease with the mortgagor is no evidence of fraud, because the registry is a beneficial substitute for the deposit of the deed, and gives better and more effectual security to subsequent mortgagees.(1)(a)

9. Analogous to the lien just mentioned, is the equitable lien which the vendor of land has against the purchaser, for the price of the land, or such part of it as remains unpaid. Chancellor Kent says, this right, said to be derived from the civil law, is well established in England, and has been recognized in the States of Kentucky, New York, Connecticut, Ohio, Tennessee, North Carolina, Indiana,(b) and by the Supreme Court of the United States. In Connecticut, however, it has been somewhat qualified. In Pennsylvania, the right was formerly assumed to exist, but has been since denied. The same author and Judge Story give the following general view of the law upon this subject.(2)

10. To constitute this lien, no possession is required, and it applies equally, whether the transaction is a sale, or a mere executory contract. Although sometimes placed upon the footing of an express agreement or assent, it is now held to be independent of any such consideration.

(1) *Berry v. Mutual, &c.*, 2 John. Cha. 608-9; *Johnson v. Stagg*, 2 John. 510. See *Head v. Egerton*, 3 P. Wms. 279; *Van Meter v. McFaddin*, 8 B. Mon. 435; *Shitz v. Deffenbach*, 3 Barr, 233; *Ryall v. Rolle*, 1 Atk. 168; *Coote*, 214, 486; *Hewitt v. Loosemore*, 9 Eng. L. & Equ. 35; *Hooper v. Ramsbottom*, 6 Taun. 12; *Goodtitle v. Morgan*, 1 T.R. 755; *Sumpster v. Cooper*, 2 B. & Ad. 223; *Harrington v. Price*, 3, 170; *Womble v. Battle*, 3 Ired. Equ. 183; *Mims v. Macon, &c.*, 3 Kelly, 341; *Manly v. Slason*, 21 Verm. 271; *Clower v. Rawlings*, 9 Sm. & M. 122; *Atwood v. Vincent*,

17 Conn. 583; *Weed v. Beebe*, 21 Vern. 495; *Conover v. Warren*, 1 Gilm. 498; *Hepburn v. Snyder*, 3 Barr, 72; *Watson v. Wells*, 5 Conn. 468; *School, &c. v. Wright*, 12 Illin. 432; *Williams v. Stratton*, 10 Sm. & M. 418.

(2) 4 Kent, 151-3; 2 Story, 461-71. See 11 Gill & J. 217; *Kleiser v. Scott*, 6 Dana, 137; *Howlett v. Thompson*, 1 Ired. Equ. 369; *Nazareth, &c. v. Lowe*, 1 B. Monr. 259; *Williams v. Woods*, 1 Humph. 408; *Roberts v. Rose*, 2, 145; *Campbell v. Baldwin*, Ib. 253; *Stewart v. Ives*, 1 Sm. & M. 197.

(a) It has been held in Massachusetts, that the Supreme Court has no jurisdiction of suits in equity for foreclosure or redemption of equitable mortgages. *Eaton v. Green*, 22 Pick. 526.

(b) And in Alabama, Mississippi, Virginia and Georgia, (2 Yerg. 85;) *Haley v. Bennet*, 5 Por. 452; *Graham v. McCampbell*, Meigs, 52. Also in Maryland, Missouri, Michigan, Illinois and Vermont, 2 Sugd. (Amer.) 324, n. But in Virginia, by a recent statute, it does not exist, unless expressly reserved. Vir. Code, 510. So in Vermont, it is now expressly abolished. Sts. 1851, 42. And in North Carolina, a late decision has settled that the English rule is not in force in that State. *Cameron v. Mason*, 7 Ired. Equ. 180. The lien is said to exist only in equity; and not where the vendor has a legal remedy. *Pratt v. Van Wyck*, 6 Gill & J. 498; *Colquitt v. Thomas*, 8 Geo. 258; *Rowntree v. Jacob*, 2 Taun. 141. It applies to forced sales by operation of law. *Mims v. Macon, &c.* 3 Kelly, 342. Whether it applies to a mortgage, or the assignment of one, see *Pratt v. Van Wyck*, 6 Gill & J. 498; *Mount v. Suydam*, 4 Sandf. Ch. 399. Judge Marshall says, it has not been extensively recognized. 7 Wheat. 52.

11. The lien in question is *prima facie* presumed to exist, but may be negatived by special circumstances. Thus it does not exist where the object of the sale was not money, but some collateral benefit. It was once held, that the lien was defeated by the vendor's taking an express and distinct security, such as a bond or note, for the price; but this rule is now so far qualified, that the lien is destroyed only by the taking of *collateral security*, whether in property or in the engagement of some third person.(a) The giving of a receipt upon the deed for the consideration does not destroy the lien.

12. This lien is valid as against the purchaser, his heirs, &c., and widow, and all subsequent purchasers from him with notice or without consideration; but not against creditors holding under a *bona fide* conveyance, or subsequent purchasers without notice. To avail himself of notice to a subsequent purchaser, the law does not require the vendor to attend such subsequent sale, nor is the lien defeated, if such purchaser have notice *before payment of the purchase-money*.(b)

13. The lien of a vendor upon land sold, for the purchase-money, may be classed as a *constructive trust*, not within the statute of frauds. It is said to be neither *jus in re*, nor *jus ad rem*, neither property nor a right of action; but a *charge*.

14. The history of the doctrine, that the vendor of land has a lien for the unpaid purchase money, is thus given by Chancellor Walworth, in the case of *Fish v. Howland*.(1)

(1) 1 Paige, 24-30.

(a) In Maryland, taking a note with an indorser is no waiver of the lien. *Magruder v. Peter*, 11 Gill & J. 217. But where, upon a sale of land, there is a written declaration that the vendor takes an assignment of a certain mortgage security, without recourse to the mortgagee for payment of the mortgage debt; there is no lien for the purchase-money. *Richardson v. Ridgely*, 8, 87. An express lien excludes an implied one. *Ridgely v. Iglehart*, 3 Bland, 547. The lien referred to is paramount even to the claim of the vendee's widow for dower. *Ellicott v. Welch*, 2, 244. It may be taken advantage of as against the vendee, by a surety who pays for the land, even as against a second purchaser with notice. *Melny v. Cooper*, 2 Bland, 199; *Magruder v. Peter*, 11 Gill & J. 217. Where a vendor has not conveyed the legal title, and the vendee does not live in the State, the former may maintain a bill in equity for a sale of the land, without first proceeding at law. *Green v. Fowler*, 11 Gill and J, 103. *Prima facie*, the law implies a lien for the purchase-money of land sold. And a provision in the contract of sale, reserving the legal title in the vendor till payment of the whole price, is conclusive evidence of such lien. *Magruder v. Peter*, 11 Gill & J. 217. In Alabama, the lien is waived by taking personal, or a distinct collateral security. *Foster v. Trustees, &c.*, 3 Alab. (N. S.) 302. In Kentucky, where there are several purchasers from the original vendee, the lien shall be apportioned among them *pro rata*. *Burks v. Chrisman*, 3 B. Monr. 50. Whether there shall be an entire lien upon separate lots conveyed by one transfer; see *Dawson v. Mitchell*, 4, 213. If a suit is brought to enforce the lien against a subsequent purchaser, the former one must be made a party. *Singleton v. Gayle*, 8 Por. 271. See 1 Sm. & M. 197; *Gilman v. Brown*, 1 Mas. 191; 4 Wheat. 255; *Williams v. Roberts*, 5 Ham. 25; *Foster v. Trustees, &c.*, 3 Alab. (N. S.) 302; *Marshall v. Christmas*, 3 Humph. 316.

(b) See *Hallock v. Smith*, 3 Barb. 267; *Briscoe v. Bronaugh*, 1 Tex. 326; *Manly v. Slason*, 21 Verm. 271; *Honore v. Bakewell*, 6 B. Monr. 67; *Hopkins v. Garrard*, 7, 312; *Thornton v. Knox*, 6, 74; *Woodward v. Woodward*, 7, 116; *Ewing v. Beauchamp*, 6, 422; *Hoggatt v. Wade*, 10 Sm. & M. 143; *Kilpatrick v. Kilpatrick*, 23 Miss. 124; *Thredgill v. Pintard*, 12 How. 24; *Scott v. McCulloch*, 13 Miss. 13; *Boon v. Barnes*, 23 Miss. 136; *Beirne v. Campbell*, 4 Gratt. 125; *Glasscock v. Robinson*, 13 Sm. & M. 85; *Way v. Patty*, 1 Smith, 44; *Taft v. Stephenson*, 9 Eng. L. & Equ. 80; *Miller v. Stump*, 3 Gill, 304; *Lynam v. Green*, 9 B. Mon. 363; *Crane v. Palmer*, 8 Blackf. 120; *Bisland v. Hewett*, 11 S. & M. 164. As to the parties by whom the lien may be enforced, see *Kleiser v. Scott*, 6 Dana, 138; *Betton v. Williams*, 4 Flor. 11; *Growning v. Belin*, 10 B. Mon. 383; *Planters', &c. v. Dodson*, 9 Sm. & M. 527; *Green v. Demoss*, 10 Hump. 371; *Wellborn v. Williams*, 9 Geo. 86; *Dixon v. Dixon*, 1 Md. Ch. 220.

15. The earliest case is *Chapman v. Tanner*, in 1684.(1) In that case, Lord Guilford held, that the vendor of land, to one who had become bankrupt, had a lien for the price, upon a principle of natural equity, and did not stand as a general creditor. But it is said, there was a special agreement that the seller should retain the title deeds.(2)

16. In *Bond v. Kent*,(3) a mortgage was given for a part of the price, and a note for the rest. Held, there was no lien for the latter sum.

17. In *Coppin v. Coppin*,(4) Lord King held, there was a lien, notwithstanding the indorsement of a receipt for the price upon the deed.

18. In *Pollexfen v. Moore*,(5) Lord Hardwicke charged the land with the lien in the hands of an heir. But the conveyances were there retained.

19. In *Burgess v. Wheat*,(6) the general principle is recognized.

20. In *Tardiff v. Schrugan*,(7) a man conveyed an estate to his two daughters, in consideration of an annuity, and they gave a joint bond therefor. One of them married and died, and her husband, having a life interest in a moiety of the land, refused to pay any part of the annuity. Upon a bill filed by the other sister and her husband, Lord Camden held, that a moiety of the annuity was a lien upon the land in the hands of the defendant; and decreed, that he should pay a moiety of the arrears, and keep down a moiety of the future payments.

21. In *Farwell v. Heelis*,(8) Lord Bathurst held, that taking the bond of the purchaser, payable at a future time, was a discharge of the lien. (It is said, however, that this case has been often overruled.)(a)

22. In *Blackburn v. Gregson*,(9) the same question was agitated, but not decided.

23. In *Austin v. Halsey*,(10) where a legatee claimed the privileges of the vendor in asserting a lien, Lord Eldon recognized the rule, that the vendor has such lien, as against the purchaser, unless the contract clearly shows a contrary intent.

24. In *Nairn v. Rouse*,(11) Sir William Grant admitted the general rule, but remarked, that if the vendor does not trust to the lien, but carves out a security for himself, it is doubtful whether the lien is or is not waived.

(1) 1 Vern. 267.

(2) Amb. 726, 1 Bro. 424, n. b.

(3) 2 Vern. 281.

(4) 2 P. Wms. 291.

(5) 3 Atk. 272.

(6) 1 Eden, 211.

(7) Cited 1 Bro. 423.

(8) Amb. 724.

(9) 1 Bro. 420, 1 Cox, 90.

(10) 6 Ves. 475.

(11) 6 Ves. 752.

(a) Upon the question, whether the lien is waived by taking other security, see *Honore v. Bakewell*, 6 B. Mon. 67; *Thornton v. Knox*, Ib. 74; *Palmer*, 1 Dougl. (Mich.) 422; *Clover v. Rawlings*, 9 Sm. & M. 122; *Johnson v. Sugg*, 13, 346; *Mauly v. Slason*, 21 Verm. 271; *Roon v. Murphy*, 6 Blackf. 272; *Hallock v. Smith*, 3 Barb. 267; *Mackreth v. Symmons*, 15 Ves. 344; *Hanna v. Wilson*, 3 Gratt. 243; *Follett v. Reese*, 20 Ohio, 546; *McKillip v. McKillip*, 8 Barb. 552; *Young v. Wood*, 11 B. Mon. 123; *Shelton v. Tiffin*, 6 How. 163; *Aldridge v. Dunn*, 7 Blackf. 249; *Boos v. Ewing*, 17 Ohio, 500; *Kinsley v. Williams*, 3 Gratt. 265; *Watson v. Willard*, 9 Barr, 89; *Anthony v. Smith*, 9 Humph. 508; *Vail v. Foster*, 4 Comst. 312; *McClure v. Harris*, 12 B. Mon. 261; *Russell's, &c.*, 3 Harris, 319; *Hoggatt v. Wade*, 10 Sm. & M. 143; *Sharp v. Kerns*, 2 Gratt. 348; *Parker v. Kelly*, 10 Sm. & M. 184; *White v. Stover*, 10 Ala. 441; *Graggs v. Bailey*, Ib. 341; *Bradford v. Marvin*, 2 Flori. 463; *Wilder v. Smith*, 12 B. Mon. 94; *Woods v. Bailey*, 3 Flori. 41; *Kyles v. Tait*, 6 Gratt. 44; *Kirksey v. Mitchell*, 8 Ala. 402.

25. In *Elliott v. Edwards*,⁽¹⁾ the holder of a lease assigned it, with a proviso that the assignee should not transfer, &c., until payment of the price, and took security from a third person. Held, the vendor still had a lien for the price.

26. In *Hughes v. Kearney*,⁽²⁾ the purchaser gave his note for the purchase-money, which was put into the hands of a third person as trustee, until the incumbrances upon the estate could be ascertained and paid off therefrom, and the balance to be paid to the vendor. Held, the balance of the purchase-money, included in the note, was a lien upon the land in the hands of an heir.

27. In *Muckreth v. Symmons*,⁽³⁾ where a bond was given for the purchase-money, there was held to be a lien. Lord Eldon intimated, that taking a mortgage upon another estate, as security, might not be a waiver.

28. In *Grant v. Mills*,⁽⁴⁾ the lien was held not to be waived, by the purchaser's drawing bills upon himself and partner, obtaining an acceptance of them, payable at a future time, and delivering them to the vendor. The bills were viewed, not as security, but only as a *mode of payment*. So, in *Ex parte Peake*,⁽⁵⁾ it was held, that a bill, and in *Ex parte Loaring*,⁽⁶⁾ that a negotiable note, on time, which was discounted and afterwards dishonored, was no waiver of the lien. The same point was settled as to a note or bond, payable on time, in *Sanders v. Leslie*.⁽⁷⁾ A more recent case is referred to in a note of Simons & Stuart, settling the same point as to a bond, although in that case there were peculiar covenants, and other circumstances which were held to make an exception to the rule.⁽⁸⁾ But in *Winter v. Lord Anson*,⁽⁹⁾ where the purchaser gave his bond, payable at the death of the vendor, with interest annually, and a receipt for the money was indorsed upon the deed; held, the vendor's intention was evidently to part with the estate immediately, and to wait for the price, and therefore there was no lien.

29. The American cases upon the subject are said to be uniform,⁽¹⁰⁾ with a single exception in South Carolina,⁽¹¹⁾ where it was held, that a bond payable on time defeated the lien.

30. In Kentucky,^(a) the general rule is recognized in *Francis v. Hazlerigg*,⁽¹²⁾ and *Cox v. Fenwick*,⁽¹³⁾ but it is also held, that if the vendor takes distinct and independent security, such as the promise of a third person; or if other circumstances indicate that the vendor does not rely upon the land, the lien is waived. The same principle is recognized in Virginia,⁽¹⁴⁾ and by the Circuit and Supreme Courts of the United States; and the general rule by Chancellor Kent.⁽¹⁵⁾

(1) 3 Bos. & P. 181.

(2) 1 Sch. & Lef. 132.

(3) 15 Ves. 329.

(4) 2 Ves. & Bea. 306.

(5) 1 Mad. 346.

(6) 2 Rose's Cas. in Bank. 79.

(7) 2 Ball & Bea. 514.

(8) *Ex parte Parkes*, 1 Glynn & Jame. 228.

(9) 1 Sim. & Stu. 434.

(10) 1 Paigo, 29.

(11) *Representatives, &c. v. Comptroller*, 2 Des. 509.

(12) Hard. 48.

(13) 3 Bibb, 183.

(14) *Cole v. Scott*, 2 Wash. 141; *Willson v. Graham*, 5 Munf. 297.

(15) *Garson v. Green*, 1 John. Cha. 308.

(a) So in Missouri—*Marsh v. Turner*, 4 Misso. 253; Maryland—11 Gill & J. 217; Tennessee—*Campbell v. Baldwin*, 2 Humph. 248; Ohio—*Jackman v. Hallock*, 1 Ham. 318; *Patterson v. John*, 7, 226; and North Carolina—*Wynne v. Alston*, 1 Dev. 416. See Burks v. Chrisman, 3 B. Monr. 50; *Portwood v. Oulton*, Ib. 249; *Broadwell v. King*, Ib. 452.

31. A deed was made by a grandfather to his grandson, in consideration of love and affection and divers other good considerations, and with the purpose of disposing of the grandfather's property after his death, and securing a legacy to his son; and that he in the meantime might retain control of the land, so far as to secure a support. For this purpose, the grandfather took back a life lease at a nominal rent, and a bond conditioned (virtually) that, whenever the grandson neglected to provide a support for him, he might resume possession or claim rent. Held, these facts showed that the vendor did not rely upon any implied lien, but carved out his own security for his support by a direct incumbrance upon the land; and this express lien for a part of the consideration negated the right of any implied lien for the residue.(1)

32. The death of the vendee of real estate does not avoid the lien for the purchase-money. For the heir cannot be permitted to hold, what his ancestor unconscientiously obtained. And, after recovering a judgment at law against the administrator of the vendee, upon a note given for the purchase-money; upon a deficiency of personal estate, the vendor may have a decree in Chancery to have the estate sold.(2) It has been contended that the English law, enforcing such lien against an heir of the vendee, could not be regarded as applicable, in a State where the lands of one deceased are bound for his debts in the hands of the heir, without any express obligation upon the latter. But the objection was considered by the court as without weight.(3)

33. It has been already stated, (sec. 11,) that a vendor has no lien upon the land for his purchase-money, *unless his object is money*. And he must rely upon his lien on the land, there being no other security. Hence, where a father conveyed to his son, taking back a bond for the support of himself and his wife for life, and a lease of a part of the premises for the same term; held, such lien did not exist.(4)

34. A purchased land of B, without paying for it, and conveyed it to C. C. gave back two mortgages to A of equal date, for parts of the consideration, intending that one of them should be assigned to B, as security for the purchase-money, and have priority, according to an original agreement between A and B. The mortgages were simultaneously recorded; but the one designed for B was first assigned to him, and afterwards the other was assigned to D, *bona fide*, and for full value. Held, D took his mortgage, subject to B's equity against A; that the statute of registry had no application to this case, as between B and D; that A took B's mortgage as trustee for B; that the principle, by which a lien is waived by the taking of collateral personal security from a third person, did not apply here, because C was in fact the vendee, and the mortgage was upon the land itself; that the implied waiver of a lien (it seems) can be set up only by purchasers without notice; and that B's title should prevail.(5)

35. The assignee of a vendor may enforce a lien upon the land for the purchase-money, as well as the vendor himself.(a)

(1) *Fish v. Howland*, 1 Paige, 20.

(2) *Garson v. Green*, 1 John. Cha. 308;
Hughes v. Kearney, 1 Sch. & Lef. 132.

(3) *Eskridge v. McClure*, 2 Yerg. 84.

(4) *Meigs v. Dimock*, 6 Conn. 458.

(5) *Stafford v. Van Rensselaer*, 9 Cow. 316; *Van Rensselaer v. Stafford*, 1 Hopk. 569.

(a) So the sureties of the vendee for the purchase-money, may sometimes have the benefit

36. A conveyed to B, who paid \$1,000, and gave a bond for \$2,000, payable in two years, and containing a memorandum, below the seal, that the land should be liable for the \$2,000, till paid. A assigned the bond to C, but, a few days previously, B conveyed the land to D, who had loaned him \$1,200, taking back a bond of defeasance. D had notice of the bond from B to A, and of its indorsement. C brings a bill in equity against B and D, praying a sale of the land. Held, D, as an assignee with notice, was chargeable with the lien; and, on a similar principle, C, as an assignee of A, should have the benefit of it; that an equitable lien was assignable, as well as a legal mortgage. Decreed, that C should recover the amount due, or, if not paid in a certain time, the land to be sold.(1)

37. It has been doubted, whether *creditors* of a vendee, acquiring his land, shall, like *purchasers* without notice, hold it discharged from the equitable lien of the vendor for the purchase-money. But the Supreme Court of the United States have decided, that as against creditors, as well as purchasers, the lien does not exist, more especially where they hold under a mortgage.

38. In 1792, A purchased land from B, and sold it to C, who took his title from B. C gave A a bond for the price, which, in March, 1796, was surrendered, upon his accepting bills for the amount, some of which were never paid. In September, 1796, C conveyed the land, with other lands, to D, in trust for E, who was a surety for C to a large amount, and also to secure him for future advances and liabilities. In March, 1797, D conveyed the land to F, in trust, for the purposes mentioned in the deed from C to D. In June, 1797, C (with two others) conveyed the land, together with other lands, to F, for the payment of their debts. Some doubt having arisen respecting the registration of these deeds, F brought a suit against C, and recovered judgment, and the land was bought upon execution for them, and afterwards conveyed to them upon the former trusts. Both A and C had become insolvent, and had been discharged under the bankrupt or insolvent laws. A, and a trustee for the creditors of A, bring a bill in equity against C and F, to subject the land to payment of the original purchase-money. F alleges that he had contracted to sell the land to C, but, as he had not paid the price, he (F) still retained the legal title. Held, that the lien of the plaintiff should not prevail, against the claim of F on behalf of creditors. Chief Justice Marshall remarks, that, whether the lien of the vendor be established as a *natural equity*, or from analogy to the principle, that a *bargainor* holds in trust for the bargainee, till payment of the price; still it is a secret, invisible trust. The vendee appears to hold, divested of any trust; and gains credit, upon the confidence that he is the owner in equity as well as at law. A vendor ought to take a mortgage, for the purpose of general notice; otherwise, he is in some degree accessory to a fraud. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien

(1) *Eskridge v. McClure*, 2 Yerg. 84.

of such lien. *Kleiser v. Scott*, 6 Dana, 137; *Burks v. Chrisman*, 3 B. Monr. 50; *Carter v. Welch*, 4 244. But see *Foster v. Trustees, &c.*, 3 Alab. (N. S.) 302. So where an administrator purchases land sold by himself, the parties beneficially interested have a lien for the purchase-money. *Baines v. McGee*, 1 Sm. & M. 208.

should be set up in a court of chancery, to the exclusion of *bona fide* creditors. In the United States, the claims of creditors stand on high ground. There is not, perhaps, a State in the Union, the laws of which do not make all conveyances not recorded, and all secret trusts, void, as to creditors, as well as subsequent purchasers without notice. To support the secret lien of the vendor against a creditor, who is a mortgagee, would be to counteract the spirit of these laws. Judge Marshall examines the conflicting English decisions upon this subject, and also the observations of Mr. Sugden, which seem to favor an opinion contrary to the judgment in this case; and he draws a distinction between an assignment made under a bankrupt or insolvent law, which is not regarded as made for valuable consideration, but merely places the assignee in precisely the same situation with the assignor; and a conveyance made by the mere act of the party, for the security of one or more creditors, or of creditors generally.(1)

39. Whether, if A sells an estate to B, which A purchased from C, but B takes his title directly from C, A can enforce an equitable lien upon the land, never having had a legal title, *qu.*(2)

40. In Indiana, it would seem, a valid title to real estate may pass by mere agreement, accompanied with delivery of possession. But, in case of such agreement, the vendor may reserve an express lien upon the property, for payment of the purchase-money.

41. A agreed with B, by a sealed instrument, to sell B certain land and a steam-engine, the price to be paid in three years; B to have immediate possession of the land, and, after erecting a mill-house, to have the engine also, which was to remain on the land till payment of the purchase-money, when a title was to be made. B took possession of the land, built the house, and put the engine in operation. In September, 1821, A assigned the agreement to C, and in July, 1824, C assigned it to D. In March, 1823, a judgment was recovered against A, and the land sold on execution. D brings a bill in equity against the execution purchaser, claiming a lien upon, and praying a sale of the property, to satisfy the claim for the purchase-money. Held, the doctrine of *implied* lien was inapplicable to this case; that the agreement not to remove the engine gave an express lien upon it, and the express covenant, that the title should remain in A till the price was paid, created a lien upon the land; that the lien was assignable, and, after the assignment to C there remained in A only the bare legal title, which he held in trust for the purposes of the contract; and that the execution purchaser, having notice, took the estate, subject to the same trust. Sale decreed, with an injunction to the persons in possession, &c.(3)(a)

42. In Pennsylvania,(4) where a writing had been executed, con-

(1) Bayley v. Greenleaf, 7 Wheat. 46; acc. Roberts v. Rose, 2 Humph. 145; Roberts v. Salisbury, 3 Gill & J. 425; Gann v. Chester, 5 Yerg. 205; 4 Kent, 154, n.; *contra*, Twelves v. Williams, 3 Whart. 493; Shirley v. Sugar, &c., 2 Edw. 511. See Hoagland v. Latourette, 1 Green, 254; Aldridge v. Dunn, 7 Blackf. 249; Taylor v. Baldwin, 10 Barb.

626; Badham v. Cox, 11 Ired. 456; Green v. Demoss, 10 Humph. 371; Fawell v. Heelis, Amb. 724; Chapman v. Tanner, 1 Vern. 267; Dwight v. Newell, 3 Comst. 185; Kline v. Lewis, 1 Ashm. 31.

(2) Bayley v. Greenleaf, 7 Wheat. 50.

(3) Lagow v. Badollet, 1 Blackf. 416.

(4) Stouffer v. Coleman, 1 Yeates, 393.

(a) Since held, in the same State, that the vendor retains an equitable lien on the land for the price (unless he voluntarily parts with it,) against the vendee and subsequent purchasers with notice. Deibler v. Berwick, 4 Blackf. 339.

veying by words of actual grant, but called *an article of agreement*, and looking to a future conveyance, there being a covenant to convey afterwards by good and sufficient deed; Chief Justice McKean stated the question as being, whether the party *did sell and convey*, or only *agree to do it*; and then suggested the further doubt, whether the taking of a bond for the price was not a waiver of the lien.(a) In a subsequent case,(1) however, the court remark, that the doctrine of equitable lien could not apply, in that case, because *the legal title* still remained in the proposed vendor. In the same case, the English doctrine upon the subject is rejected, as having being first introduced in England, three years after the charter to William Penn; as impracticable in a State, having no court with full equity powers; as being alike opposed to the general understanding and practice of the people, and to the universal policy of the law in regard to the registration of deeds, the liens of mechanics, judgment creditors, creditors of deceased persons, &c.; and as leading to the utmost confusion and uncertainty of titles. It is said, that only two cases in Pennsylvania have ever recognized the doctrine in question; one of them being that already referred to; and the other, *Irvine v. Campbell*,(2) being also a case of the purchase of a mere equitable title, inasmuch as the instrument was in the form of an executory agreement, and contained a covenant for further assurance.

43. In Maryland, it has been held, that, where a vendee gave a bond for the price, taking a bond for a deed, and left the State, after selling to a third person, with notice that a part of the price was unpaid; the first vendor might enforce a lien.(3)

44. In the same State, where a creditor of one deceased has a claim for the price of land conveyed to him, and makes application to have the land sold for payment of debts; the land in question shall be first disposed of.(4)

45. A lien, similar to that just described, is the lien of a purchaser of land, who has paid the purchase-money *prematurely* or *by surprise*, that is, before receiving a conveyance. This right, however, has been asserted in very few cases, and the existence of it seriously questioned.(5)(b)

(1) *Kauffett v. Bower*, 7 Ser. & R. 64; acc. *Green v. Crockett*, 2 Dev. & B. 393.

(2) 6 Bin. 118.

(3) *Wright v. Woodland*, 10 G. & J. 387.

(4) *Spencer v. Pearce*, 10 Gill & J. 294.

(5) 2 Story, 463, n.

(a) It has been since held, that, in case of an actual conveyance and a bond for the price, ejectment will not lie to compel payment. *Megargel v. Saul*, 3 Whart. 19. But, if the deed provide that the land shall be subject to the condition of sale, viz., a lien in favor of the vendor; upon an execution sale of the property, as the purchaser's, the vendor has a claim upon the proceeds, prior to that of the judgment creditors of the vendee. *Barnitz v. Smith*, 1 W. & Serg. 142.

(b) It has been held in Kentucky, that, where an execution sale is void, the purchaser still has a lien upon the land for the purchase-money, because it has gone to the debtor's use; and Chaucery will restrain a suit for the land by injunction, till it is paid. *Shepherd v. McIntire*, 5 Dana, 576. See *Christopher v. Blackford*, 1 B. Monr. 197; *Burgess v. Wheate*, 1 W. Bl. 150; *Sugd.* 258; *Mackreth v. Symmons*, 15 Ves. 345; *Oxenham v. Esdaile*, 3 Y. & J. 264; *Ludlow v. Grayall*, 11 Price, 58; *Finch v. Winchelsea*, 1 P. Wms. 284; *Small v. Attwood*, 1 Younge, 507; *Rockwell v. Hobby*, 2 Sandf. Cha. 9; *Blackburn v. Pennington*, 8 B. Mon. 217.

CHAPTER XL.

LIEN OF MECHANICS, ETC., FOR LABOR AND MATERIALS.

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|---------------------------|------------------|
| 1. Lien by legal process. | 11. Illinois. |
| 2. Lien of mechanics, &c. | 12. Missouri. |
| 3. Massachusetts. | 13. Tennessee. |
| 4. Connecticut. | 14. Kentucky. |
| 5. New Hampshire. | 15. Michigan. |
| 6. Rhode Island. | 16. Arkansas. |
| 7. Maine. | 17. Mississippi. |
| 8. Pennsylvania. | 18. Georgia. |
| 9. Ohio. | 19. Alabama. |
| 10. Indiana. | |

1. UNDER the general title of *estates on condition*, and in immediate connection with the subject of *mortgages*, may properly be considered certain other *liens*, which one man may acquire upon the land of another as security for a debt. Of these, perhaps the most important is the lien acquired by means of *legal process*—consisting either in an *attachment*, made at the commencement of a suit, or in a *judgment or execution*, in which the suit terminates. These, however, will be considered in another portion of this work, relating to the methods of *acquiring title* to real property.

2. There is another species of lien, unknown to the common law, and originated of late years by express statutes in many of the States; viz., the lien of *mechanics* and *material-men* or furnishers of materials, upon the buildings which they erect or provide for. There is a general similarity in the laws of those States which have legislated upon this subject, but it may be worth while briefly to state their respective specific provisions.(a)

3. In Massachusetts,(1) any person furnishing labor or materials, by contract with the owner of land, for erecting or repairing any building thereupon, may acquire a lien upon the same. The contract must be written, signed by or for the owner of the land, and recorded.(b) The lien continues only six months after the money is finally payable, unless during that time a suit has been brought. When any sum remains unpaid sixty days after it is due by the contract, the creditor may by petition obtain a decree for a sale of the land. The petition may be filed in court, or in the clerk's office. It shall contain a brief statement of the contract, and the sum due, and a description of the land. The court shall order notice to the debtor, and to all others holding similar liens upon the land. The owner may contest any or all the claims, and the several claimants may contest those of each other. The court shall allow the several demands, whether immediately payable or not, if not conditional; with a *rebate* of interest if payable at a fu-

(1) Mass. Rev. St. 684-9; Sts. 1851, 849.

(a) It is said, rules, both of law and equity, are applicable to a proceeding to enforce a mechanic's lien. *Greenough v. Wigginton*, 2 Greene, 435. But whether equity can interfere in this class of cases, see *Coteman v. Freeman*, 3 Kelly, 137.

(b) The lien in question may exist, though the contract be not recorded till after the death of the owner of the land. *Poster, &c.*, 20 Pick. 542. The registry of a lien is not a *record*. *Davis v. Church*, 1 W. & S. 24.

ture time. If the creditor has been prevented from an entire performance, without his own default, by the failure of the debtor to perform, the former shall recover a proportional part of the amount contracted for. If either of the creditors establishes his lien, the court orders a sale by an officer of the whole land, or such part as will satisfy the claims, if for the interest of the parties. The mode of selling and the right of redemption are the same as in case of the sale of equities of redemption. The officer may be ordered to make distribution of the proceeds, or, if the claims are not all ascertained at the time of sale, to bring the money into court; and, if circumstances so require, the court may make several orders of distribution. The surplus proceeds are paid over to the debtor, but are liable to attachment or execution before such payment. Where the property has been attached before the contract was recorded, the attachment shall be a prior lien upon the value of the property as it was when attached; and the creditor, having recovered judgment, shall be paid the proportion due him according to this estimate. If the attachment is subsequent to the recording, the latter has the same priority as any attachment would have. Attachments are paid according to priority; but, when lien creditors have equal rights among themselves, and the fund is insufficient to pay the whole, they are paid proportionally. The lien shall attach to estates less than a fee, and to equities of redemption, if the employer has these interests in the land. If the employer die, or convey away his estate, his heirs or assignee may be made parties to the suit. If he die after suit brought, it may proceed against his heirs or assigns. If the creditor die before or after suit brought, it may be commenced or prosecuted by his executor, &c. If the petitioning creditor fail in his suit, other creditors, made parties, may still recover. If the former commence the suit within the sixty days, but other creditors prosecute it, he may still recover, but shall have no costs, and may be required to pay them. These provisions are no bar to a common law remedy for the debt. After payment, satisfaction shall be entered or a release given, as of mortgages. By a subsequent act, any person working upon a building, under a contract with the owner, or with one who has contracted with the owner for the erection, &c., or the purchase of the land to build upon, shall have a lien for his personal wages. He must, within sixty days after doing the work, file in the registry of deeds a true account of his claim, and description of the property, subscribed and sworn to, and sue in seventy days from the doing of the work. By St. 1852, 874, the privilege is extended to one furnishing labor *and materials* to the owner or other party authorized to contract therefor. In case of materials, written notice must be given of the proposed lien, before furnishing them. Different laborers may join in one petition.

4. In Connecticut,(1) where a person performs labor, or furnishes materials, in the erecting or repairing of a building, to the value of more than two hundred dollars, he shall have a lien upon the land and building, paramount to any other lien which is acquired subsequently to the commencement of such services. Upon this lien, the property is

(1) Conn. St. 1836, 22; Conn. L. 1837, 38; St. of Conn. 402-3; Ib. 1839, 31-2. See *Bank, &c v. Curtiss*, 18 Conn. 342. By Sts. 1852, there is a lien on buildings for their construction, erection or repairs, if the materials or services exceed \$25. It takes precedence of liens arising after the commencement of the services, and is to be foreclosed as a mortgage. A certificate shall be filed within sixty days with the town clerk.

subject to *foreclosure*, as on a mortgage. The lien of any claimant continues only sixty days after the completion of his work, unless he lodge with the town clerk a written notice or certificate, describing the premises and the amount claimed, which shall be sworn to and recorded. After satisfaction of the lien, or a judgment that nothing is due, the claimant, on request of any party interested, shall file a certificate of such fact, which shall be recorded, and operate as a discharge. For a neglect to file such certificate in ten days, he forfeits a sum not exceeding one-half of the debt claimed. Any sub-contractor, having a claim exceeding \$50, and a written agreement with his employer, and the written assent of the owner, may acquire a lien by recording his contract within sixty days, (as above,) but not beyond the amount due from the owner. If several thus acquire a lien, for an amount exceeding that due from the owner; they shall be paid proportionally. If the employer is insolvent, the owner is required, upon notice of the lien, to withhold the money from him. The lien in question is made a subject of chancery jurisdiction.

5. In New Hampshire, a lien is acquired, by recording a written contract with the town clerk, where the property lies, within thirty days after the claim is due. An attachment is afterwards made upon legal process, and *relates* to the time of recording, subject to prior incumbrances. If the owner fails to perform in full, and in consequence the creditor does the same, he has a lien *pro tanto*.(1)

6. In Rhode Island, mechanics and material-men may have a lien upon buildings, canals, turnpikes and railroads, and the land over which they are constructed. If the party claiming a lien is a *sub-contractor*, he must notify the proprietors that he has been employed, within thirty days from the time of being thus employed, and that he claims a lien. The lien continues four months from the time when the last payment falls due. In three months from completion of the work, an account shall be filed in the office of the town or city clerk. Otherwise, there shall be a lien only against the employer. The remedy is a suit for sale of the property. But this is subject to the claim of any prior attaching creditor, upon the value of the property as it was at the time of his attachment. Notice is given to all lien creditors, and all recover their claims, and may contest those of each other. If the whole services have not been rendered, without fault of the creditor, he has a claim for a part. A tenant shall have no lien for repairs of the demised premises, unless assented to by the landlord.(2)

7. In Maine,(3) a person agreeing, in writing, to erect, repair, or alter a building, or to furnish labor or materials therefor, may acquire a lien upon the house and land, or the equity of redemption therein. Within ninety days from the time stipulated for payment, the lien shall be secured by attachment, and shall have precedence of all other attachments. The contract must have been recorded, within ten days from the making, in the office of the town clerk. A tender of the sum due discharges the land. Where one hires a lot or mill-privilege for the purpose of erecting a building thereon; an attachment, within six months from the time the mechanic's claim is due, gives a prior lien upon the tenant's interest in the land and upon the building.

(1) Rev. St. 250.

(2) R. I. St. 1834, 829; *Ib.* 1836, 939.

(3) Maine St. 1837, 418-19. *Conner v. Lewis*, 4 Shepl. 268; Rev. St. 559.

8. In Pennsylvania, mechanics and material-men,^(a) including those who furnish *curb-stone* for pavement, have a lien from the commencement of the building. It continues only two years therefrom, unless in six months from the performance of the work, &c., a suit is brought, or claim filed with the prothonotary of the county.^(b) And satisfaction, when made, shall be entered upon the record, under penalty of one-half the sum sued for or claimed by the creditor. The suit may be a personal action, or a writ of *scire facias*. In the latter, the building itself is alone liable. The statutes are limited in their operation to certain enumerated towns, cities and counties; and bind only the estate of the contracting party.⁽¹⁾

9. In Ohio, any person furnishing labor or materials for building has a lien, by making out an account within four months from the date of his claim, which is to be sworn to and registered in the office of the county recorder. The lien continues two years from commencement of the work, &c. If there was a written contract, it must also be filed. In case of a suit and judgment upon the account, the lien continues till it is terminated. If the owner has a mere equitable title, the court may order a lease of the property to satisfy the liens. So where the officer fails to sell on execution. The lien may be discharged, like a mortgage, on the record.⁽²⁾

10. In Indiana, mechanics, &c., have such lien, jointly or severally, for any amount over thirty dollars. The remedy is a bill in Chancery, commenced in one year from the furnishing of materials or completion of the work. All may join in such bill, or one may file a bill alone against the others and the employer. The property shall be sold, and the proceeds proportionably distributed. But the lien may be discharged by the filing of a bond. The act applies only to new erections, or contracts for repairs made *with the owner*, not those made with a

(1) Purd. Dig. 595-6-7. See *Bickel v. v. Kelly*, 6, 483; *Sts.* 1844, 140, 665; 1843, James, 7 Watts, 9; *Walter v. Streeper*, 2 357; 1842, 66, 22, 197, 464, 213; 1840, Miles, 348; *Keppel v. Jackson*, 3 Watts & S. 412.
320; *Lepman v. Thomas*, 5, 262; *Pentland* (2) *St.* 1841, 66-70.

(a) A journeyman is not entitled to a lien. *Jobsen v. Boden*, 8 Barr, 463. But the word *employed* (in furnishing materials, &c.,) does not mean one who follows the supplying of such materials as a regular business, but applies to any one who actually supplies them. *Savoy v. Jones*, 2 Rawle, 343.

Where a building contract provides, that the contractor shall give security in \$500 that no liens shall be entered on the houses, a lien filed by the contractor himself is nevertheless valid; the provision applying only to liens of other persons and sub-contractors. *Young v. Lyman*, 9 Barr, 449.

Where several mechanics file liens against the same buildings, a sheriff's sale upon one of them defeats and discharges all the others, and the purchaser takes a clear title. The proceeds of sale are rateably divided among the whole. *Anshutz v. McClelland*, 5 Watts, 487.

A *scire facias*, being in *rem*, does not lie after a judicial sale of the property. *Ib.*

Where a mechanic, &c., has agreed with a builder or architect to furnish labor or materials for the building of a third person, such builder, &c., must be made a party. *Barnes v. Wright*, 2 Miles, 193.

Where one specially contracts to furnish all materials and erect a building for a certain sum, it has been held, that he cannot recover a balance due upon its completion by filing a claim under the lien law. *Hoatz v. Patterson*, 5 Watts & S. 537.

(b) Where materials were furnished Jan. 22d, and the claim filed July 23d; held, this was too late to secure a lien. *Hoops v. Parsons*, 2 Miles, 241.

mere tenant. Notice shall be filed and recorded in a public office, within sixty days from the time when the debt becomes due.(1)(a)

11. In Illinois, a lien is given to any one who contracts with the owner of land to erect or repair a building or machinery, or to furnish labor or materials; also to any one who supplies materials which are used for this purpose. A suit shall be brought within three months from the time fixed for payment, and execution issue against the property only. The time of completing is not to go more than three years, or of payment more than one year, beyond the time stipulated for completion. A suit is brought to enforce the right, to which all persons interested may become parties. No priority of title arises from priority of contract. Each creditor's share shall be ascertained; and, if practicable, such part only sold as will satisfy the liens. The act applies to owners of limited or incumbered estates, as well as those in fee; and embraces the executors, &c., of both parties. No incumbrance, either prior or subsequent, shall have priority, with regard to the building or materials, over the claim of the person who erected or supplied them; and no lien shall continue in force, as against a creditor or incumbrancer, more than six months from the last payment, unless a suit be commenced.(2)(b)

12. In Missouri, artisans, builders, mechanics and laborers, doing labor or furnishing materials for a building, under a contract with the proprietor, shall have a lien upon such materials and work, each for his own. A sworn account shall be filed with the clerk of the court, within six months from the time when the debt falls due, and by him recorded. The account shall contain a description of the property. A suit may be brought within twelve months from completion of the work; either in common form, in which case execution shall issue against the property in question, only to the amount of the plaintiff's proportional lien, if the defendant was owner or possessor of the property at the

(1) Ind. St. 1834, 165-7.

(2) Illin. Rev. L. 447; St. 1839-40, 147-

50. See *Logan v. Dunlap*, 3 Seam. 189; *Delabay v. Clement*, 3, 203.

(a) Workmen upon a building may, by giving notice to the owner, hold him liable for any amount due at that time to their employer—the latter being indebted to them. Rev. St. 412-13.

A bill must be filed within a year from the time of furnishing the materials. *Close v. Hunt*, 8 Blackf. 254.

The party must file in the recorder's office of the proper county, within sixty days after the debt became due, a notice of his intention to hold the lien. *Pifer v. Ward*, 8 Blackf. 252.

(b) The work must be done or the materials furnished before such lien can attach, and the petition must make judgment creditors parties, in order to defeat their rights. *McLagan v. Brown*, 11 Ill. 519.

Only those who furnish labor or materials, by contract with the owner, have a lien for the price. *Dawson v. Harrington*, 12 Ill. 300.

Although it might be proper to order a sale by a master or commissioner, yet the same result is produced by a special execution to the sheriff. The return of that officer would be a report of the sale, which, if not made in pursuance of law, might be set aside, and another sale ordered. *Kelly v. Chapman*, 13 Ill. 530.

The decree need not direct to whom the surplus money, if any, arising from the sale, should be paid; that may remain subject to a future order of the court. *Ib.*

The rights of a person not made a party are not affected by the decree or any proceedings under it. *Ib.*

It is the duty of the party who complains of the verdict, to preserve the evidence in the record, either by a bill of exceptions or a certificate of the judge. *Ib.*

time of the contract, and also against his property generally; or by *scire facias* against the original debtor and all persons owning or possessing the property, and in this case execution shall run against the property alone. When a claim of this kind has been paid, the creditor shall, under penalty of forfeiting the amount of his lien, acknowledge satisfaction, to be put upon the record, as in case of mortgages. The lien extends to a convenient space of land, not exceeding five hundred square feet clear of the building, if owned by the contractor. A late statute gives a lien to *sub-contractors*, who do work, &c., upon buildings, provided, that upon making settlement with their employer they give notice of their claims to the owner. Such party must also have given written notice of his intention to work, and, within ten days of the time when his claim is due, file a copy of the settlement. He may then enforce his demand by a suit. By another act, the lien of mechanics, &c., operates upon any *qualified* interest in the property, and every mechanic, &c., has a lien, whether employed by the owner, his agent, the contractor, or sub-contractor. In case of leased land, the building will be held, and also the lessee's interest in the lease, unless forfeited, in which case the building may be removed, a ground-rent being paid to the lessor. The land is also liable, unless the lease was recorded before the debt was incurred. Notice must be given within thirty days from the contracting of the debt or completion of the work. Such notice must either be personal, or, if this is impracticable, posted on the building, and, within six months afterwards, a statement filed with the clerk of St. Louis county. The lien will have priority of all claims arising since the work was commenced. A suit must be commenced within ninety days from the filing of the account, and the lien ceases in twelve months from completion of the work, unless a suit is brought. The liens to be discharged upon the record.(1)

13. In Tennessee, a mechanic, supplying work and materials by special contract, has a lien upon the building and the land, not exceeding one acre. The lien is paramount to all legal process, except a judgment prior to the commencement of the building. A suit must be brought in one year from completion of the work; or within six months, in *Davidson county*. Courts of law have jurisdiction, and enforce the lien by *feri facias*.(2)(a)

(1) Misso. St. 108-9; St. 1840-1, 105-6; (2) Ten. St. 1825, 32; 1829, 47; Foust v. 1843, 83-4. Wilson, 3 Humph. 31.

(a) The act applies, only where one person undertakes and completes the building. A suit must be instituted within ninety days after filing the lien. *Lee v. Chambers*, 13 Mis. 238. Where the lien is filed and a judgment obtained before a justice, the clerk can issue an execution without a return of *nulla bona*, on an execution issued by the justice. *Illingworth v. Miltenberger*, 11 Mis. 80.

The provisions, which require a sub-contractor to give notice to the owner of his intention to do work, &c., before commencing, are repealed by the act of 1843, so far as St. Louis county is concerned; and this last act is specially applicable to St. Louis county, and is not repealed by the general law of 1845. *Speilman v. Shook*, 11 Mis. 340.

There need be no contract between the owner of a house and a sub-contractor, to give the latter a lien. He has only to give the notice required by the statute, after doing the work. *Urin v. Waugh*, 11 Mis. 412.

A mechanic, under a special contract, furnished certain articles and did certain work for the erection of a house, and, within six months after completing the contract, filed his account. Held, his lien was good, and his deed from the sheriff, given after a sale under a judgment rendered on his account, was valid. *Viti v. Dixon*, 12 Mis. 479.

The court of common pleas of St. Louis county has not jurisdiction of actions to enforce mechanics' liens, under the Missouri statute of 1842. *Hammond v. Barnum*, 13 Mis. 325.

14. In Kentucky,(1) persons furnishing labor or materials (*journey-men* excepted,) for the construction or repair of any building in *Lexington*, have a lien upon the land according to their respective interests, and to the extent of the employer's estate therein. If the latter claim the land by an executory contract, which is afterwards set aside or rescinded, the lien shall continue against the owner of the land, so far as he is benefited by the services. If the employer is evicted from the land, and has a claim for improvements against the owner, the person claiming a lien shall be substituted for him to the extent of his lien. Private corporations, trustees for charity, &c., are included in the act. In six months from the completion of erecting, repairing, or furnishing materials, or from the cessation of services by order of the employer, an account shall be filed with the clerk of the court, specifying the lien, which shall be notice to all the world. The party gains no lien, unless he follows this course, or proceeds by suit to enforce the lien; in which case the *lis pendens* commences with the filing of the bill. The proceeding is governed by equity rules as to liens and priorities.

15. In Michigan, mechanics, &c., may acquire a lien by contract in writing. A suit may be brought in sixty days from the debt's becoming due, and must be brought in six months after the last instalment is payable. Notice is given to the owner and other parties having liens. If the plaintiff, in consequence of the defendant's not complying with his contract, has fulfilled his own only in part, his lien is effectual *pro tanto*. A portion of the property is sold, if circumstances make it proper. The same redemption is allowed, as in case of execution sales of equities of redemption. The lien may attach to estates mortgaged or less than a fee; and is subject to any prior attachment. It is discharged on the margin of the record.(2)

16. In Arkansas, mechanics, &c., who contract verbally or in writing, if for over \$100, have a lien, by filing an account within three months from the accruing of their claim. A *scire facias* is commenced, and the plaintiff takes upon execution his share of the property, in proportion to the amount and order of his lien. If the property is insufficient, a new *scire facias* issues. A suit must be brought within one year from completion of the work. The lien includes the land around the building, not exceeding two acres, exclusive of the building. The lien is subject to incumbrances, existing before the work commenced, and recorded or known to the party; and sale is made accordingly. Concurrent jurisdiction is given to courts of law and equity. Where several mechanics have a lien on the same property, priority is allowed in the order of time. If the property is insufficient to satisfy the claim, execution issues against any property of the debtor. A judgment upon the lien gives a lien upon all his real estate in the county. The claimant may at the same time bring suits upon the debt, and to enforce his lien. The lien embraces only the interest of the party contracting.(3)

17. In Mississippi, mechanics, &c., have a lien in the city of Natchez.

(1) Ky. St. 1837, 215-6. See *Laviolette v. Redding*, 4 B. Monr. 81; *Finch v. Redding*, Ib. 88; *Longest v. Breden*, 9 Dana, 141; *Graham v. Holt*, 4 B. Monr. 6. Where a bill is pending upon a mechanic's lien, the property may still be sold on execution, subject to such lien. *Glenn v. Coleman*, 3 Ib. 134.

There can be no separate sale of a house, irrespective of the owner's interest in the land. *Fetter v. Wilson*, 12 B. Monr. 90.

(2) Mich. Rev. St. 537-42; St. 1839, 231, 232.

(3) Ark. Rev. St. 542; St. 1842-3, 69-71; 1844, 5, 19; 1846, 82.

The proceeds of sale are distributed among the several claimants. The lien continues only two years from commencement of the building, unless a suit is brought or claim filed within six months from the doing of the work or finding of materials. "A written contract of agreement" is to be recorded within three months from the time of making it. And the lien is discharged, like a mortgage, upon the record. By a late act, mechanics erecting or repairing buildings in any way, whether by special agreement or not, have a lien prior to all others. So upon the land, subject to prior incumbrances. There must be a suit or registration within twelve months from the time the debt falls due. Execution runs against the property, and equitable distribution is made of the proceeds. Justices of the peace have jurisdiction of an account within their usual power. In such cases, the contract is filed with them.(1)

18. In Georgia, an act passed in 1835 provides, that the second section of a former act shall not affect any claim which does not exceed thirty dollars. If the claim is for a less sum, the lien may be preserved without recording. The requisition, also, in the fourth section, that a suit be brought in six months, is repealed. But in Prince's revision of the laws of Georgia, which purports to come down to 1837, there is contained no statute upon this subject. Steam saw-mills, at or near any water-course, are subject to lien, for services therein, timber or firewood used in them, or provisions or supplies furnished to them. Millwrights and builders of gold machines also have a lien.(2)

19. In Alabama,(3) all master builders and mechanics, contracting to erect buildings, or to do jobs of work upon the same, shall have a lien thereupon for all their dues, unless the contrary is agreed when the contract is made. But the contract must be written and signed, or the amount liquidated between the parties, and a net balance struck in favor of the claimant; or an award made in his favor upon submission to arbitration; or a judgment recovered by him. And, if his claim is contested, even where a net balance is struck, he shall proceed at law to judgment and execution, as also where there has been a reference to arbitration, and an award in his favor. The contract shall be recorded with the clerk of the court, within thirty days from the time of making.(a)

(1) Missi. St. 1819, p. 32; 1840, 58-60. See *Andrews v. Washburn*, 3 Sm. & M. 109; *Planters, &c. v. Dodson*, 9, 527; *Jones v. Alexander*, 10, 627.

(2) Geo. St. 1835, 146; 1842, 122. See *Coleman v. Freeman*, 3 Kelly, 137.
(3) Aik. Dig. 308.

(a) Various decisions have been made, in construction of the statutes above referred to; but most of them are predicated upon the particular phraseology of the several acts, and involve few general principles.

With regard to the party who is liable to be affected by the lien in question; it is held, that, if the employer is either an intruder upon, or a particular tenant of the land, the general owner cannot be affected by the lien. A law, giving this effect to a contract between third persons, would be void for unconstitutionality. Hence, to a petition in such case, the general owner may become a party defendant. *Thaxter v. Williams*, 14 Pick. 49. See *Holdship v. Abercrombie*, 9 Watts, 52. So, an execution sale under the lien law passes only the title of the party in possession, when the building was erected. *O'Conner v. Weaver*, 4 W. & S. 223; *Evans v. Montgomery*, Ibid. 218.

So, it is held, that the lien law only prefers such lien to every other lien or incumbrance, which attached upon the building *after its commencement*. *Jones v. Hancock*, 1 Md. Ch. 187.

If, when the lien attaches, the person causing the building to be erected has no title to

the premises, but a mere right, resting in contract, to a conveyance, on performance of a condition, which is afterwards lost by his failure to perform the condition; subsequent proceedings to enforce the lien will convey no right or title to the purchase. *Scales v. Griffin*, 2 Doug. 54.

So, a mortgage is not affected by a lien subsequently accruing. *Hoover v. Wheeler*, 23 Miss. (1 Cush.) 314; *Troth v. Hunt*, 8 Blackf. 580; *Zyle v. Ducomb*, 5 Bin. 585; *Leigh v. Bean*, Ash. 207; *Browne v. Smith*, 2 Browne, 229 n.

But rents accruing after the lien attached, and rightfully received by the administrator of the mortgagor, may be subjected to the lien. *Ib.*

In September, a party filed a claim for work done between May and September, and offered in evidence a written admission made in September, that the claim was correct. In July, he had mortgaged the property. Held, such admission could not prejudice the interest of the mortgagee, and the mortgagee, claiming the property, might appear to and defend the action. *Carson v. White*, 6 Gill, 17.

If the property be ordered to be sold, and some of the defendants hold incumbrances older than the lien, those incumbrances, in the order of the dates, should be preferred to the complainant's. *Close v. Hunt*, 6 Blackf. 254.

The defendants, in such case, who are incumbrancers, not being in fault, are not liable for costs. *Ib.*

But where a carpenter finished a dwelling-house on the 17th of November, 1842, and filed his claim in the office of the clerk of the county, on the 17th of January, 1843, and on the 22d of December, 1842, the owner, then in possession of the house, mortgaged it to a person having no actual knowledge of the lien; held, the lien was prior to that of the mortgage. *Vandyne v. Vanness*, 1 Halst. Ch. 485.

February 25, A and B, to secure their lien, filed their account in the clerk's office, as required by the statute, an abstract of which was entered on the judgment docket. At the April term, they instituted an action of assumpsit on the account, and obtained judgment against the owner of the land; execution was issued against the specific property, and sale made. On the 19th of March, the owner had executed a mortgage on the property. Held, the title acquired under the sale was paramount to the mortgage; that the bringing of an action of assumpsit did not waive the lien; that the declaration in such action may be in the usual form, and need not refer to the lien; that the execution may issue against the specific property, and that the filing of the account and affidavit, and entering an abstract upon the judgment docket, is notice to all the world of the lien. *Spence v. Etter*, 3 Eng. 69.

An unfinished house was sold and a mortgage given back for the price, and immediately recorded. The mortgagee proceeded with the building. Held, persons furnishing labor and materials, after the mortgage was recorded, had a claim prior to the mortgage. *American, &c. v. Pringle*, 2 S. & R. 138.

Where the owner of land subject to a mechanic's lien mortgages it, but remains in possession, the mortgagee is not entitled to notice of the petition. *Howard v. Robinson*, 5 Cush. 119.

The lien of a judgment recovered against the proprietor, after the commencement of the work, and before its completion, is paramount to that acquired by the mechanic, by filing his account, &c., after the completion of the work. *McCullough v. Caldwell*, 3 Eng. 231.

A building partly completed was bought at sheriff's sale by A, and a deed given him. A judgment being recovered against A, after completion of the building, it was sold thereupon, as A's. Held, in distributing the proceeds, the judgment creditor had priority of a mechanic, who worked for A, in completing the building. *Stevenson v. Stonehill*, 5 Whart. 301.

With regard to the forms of proceeding in suits upon the lien law, the description of the debt and the premises, joinder of parties, claims and property; numerous cases have been decided, often turning upon points of mere local application, and, therefore, not requiring extended notice. It has been held, in general, that the statute must be strictly pursued; and the particulars of the claim fully stated. *Greene v. Bly*, 2 Greene, (Iowa,) 508. So, the petitioner must prove the contract as alleged, and he cannot abandon the contract set out, and recover upon a *quantum meruit*. *Carroll v. Craine*, 4 Gilm. 563.

The same strictness has been required, in stating the place where the property is located. Hence, where the statute extended the provision to the village of L., and a building was described in the original lien and the *scire facias*, as between the turnpike and the village, and was proved to be upon an out-lot adjoining it; held, the act did not apply. *Tilford v. Wallace*, 3 Watts, 141. But see *Springer v. Keyser*, 6 Whart. 187; *Davis v. Church*, 1 W. & S. 24; *Sullivan v. Johns*, 5 Whart. 366.

But, if there is a want of common certainty in a description of a lot of land by the number thereof, the defendant must show wherein the defect or uncertainty consists. *O'Halloran v. Sullivan*, 1 Ib. 75.

A claim for materials, under the Pennsylvania statute, without specification of kind or quantity is bad. *Lauman, &c., 8 Barr*, 473. See *Noll v. Swineford*, 6 Barr, 107. But, a

reference to a special contract, in a mechanic's claim, is unnecessary, under the Pennsylvania statute of 1845. *O'Brien v. Logan*, 9 Barr, 97.

Items of claims were set forth thus: "June 30, 1847. To building 63 2-3 perches, at \$1 50 and materials, \$95 50." "July 29. To 13 perches in cellar doors, at \$1 50, \$19 50." Held, the date was presumed to be the time when the work was completed, and the quantity ascertained. *Donahoo v. Scott*, 2 Jones, 45.

A mechanic who adopts a statement of his claim, signed by his attorney at law, is entitled to the benefit of it by his *sci. fa.* *Ib.*

A petition alleged, that payment was to be made as the work progressed, and, if any balance should remain when the work was completed, that was to be paid as the parties could agree. Held, this was a sufficient statement of the time of payment. *Mix v. Ely*, 2 Greene, (Iowa), 513.

The omission, from the body of a mechanic's claim, of the initial letter of the middle name of the owner, is immaterial. *Knabb's Appeal*, 10 Barr, 186.

Claim against a house, (describing it,) "and the lot of ground and curtilage appurtenant to said building," "for work and labor done within six months last past, for and about the erection and construction of the said building and appurtenance." Held, not sufficiently certain. *Barclay, &c.*, 1 Harr. 495. See *Shaw v. Barnes*, 5 Barr, 18.

Where there is a contract to erect houses for a specified sum, and it has been wholly or partially performed, if the completion has been dispensed with by the owners, it is not necessary to set forth the items of work, materials, &c., in the claim filed. *Young v. Lyman*, 9 Barr, 449.

Where the copy of a bill annexed to a mechanic's claim sets forth an impossible date, as "1846," for "1845," the variance is not fatal, if the real date of furnishing the materials be proved. *Hillary v. Pollock*, 1 Harr. 186.

Where a claim for a lien on buildings, &c., under the Pennsylvania act of 1826, on account of bricks furnished, was dated Nov. 7, 1847, and alleged that the whole number was furnished within six months last past, and a bill of particulars was annexed which specified June 3, 1847, as the date of the last delivery; held, the time when the bricks were furnished was alleged with sufficient certainty. *Calhoun v. Mahon*, 2 Harr. 56.

A description of the lot, as "number 751, in the city of Dubuque," is sufficient; so also "a brick house upon the said lot, to be 20 feet by 30, two stories high, and a cellar." *O'Halloran v. Sullivan*, 1 Greene, 75.

Where a plaintiff, in a *sci. fa.* upon a mechanic's claim, in Pennsylvania, has been nonsuited, he may file another claim for the same demand, and proceed thereon, though the former claim remains on the records of the court. *Bournonville v. Goodall*, 10 Barr, 133.

Taking a bond with warrant of attorney, and entering judgment on it, are not *filing a claim* or *instituting a suit*, within the meaning of the lien law. *Williams v. Tearney*, 8 S. & R. 58.

In a suit to enforce a mechanic's lien, the defendant may set off a claim for unliquidated damages, founded upon the plaintiff's breach of contract to erect the building. *Bayne v. Gaylord*, 3 Watts, 301.

So in *scire facias* against the owner and the contractor, the contractor may set off a claim due him from the plaintiff. *Gable v. Parry*, 1 Harr. 181.

A joint lien may be filed against several houses belonging to one person. If two houses, contracted for together, are contiguous, the party may either file one lien against all, or a separate one against each, making a fair and rateable apportionment of the amount claimed. *Pennock v. Hoover*, 5 Rawle, 291. See *Croskey v. Coryell*, 2 Whart. 223; *McCall v. Eastwick*, 2 Miles, 45; *Donahoo v. Scott*, 2 Jones, 45.

The thirteenth section of the Pennsylvania act of 1836 authorizes a joint claim against two or more buildings owned by the same person, but not a joint claim against two or more separate blocks of buildings, situate on different streets. *Chambers v. Yarnall*, 3 Harr., 265. *Young v. Chambers*. *Ib.*

In the case of a claim against a block of buildings, joint entries in the book of original entries of the material-man, for lumber furnished for the same and another block, unaccompanied by any other evidence that the lumber was furnished for the block in question, are not admissible in evidence. *Ib.*

A material-man filed his claim in *scire facias*, against A as owner, and B as contractor, in which the defendants prevailed. A new *scire facias* was then brought against C as owner, and B as contractor. Held, the judgment was no bar, as a former recovery. *Hampton v. Broom*, 1 Miles, 241.

Where a mechanic's claim is filed against a mansion-house, barn, wagon-house, &c., on one farm, to which they are all appurtenant, and are intended to be occupied and used together, there is no necessity for an apportionment of the claim among the several buildings. *Lauman's Appeal*, 8 Barr, 473.

A material-man, who has indiscriminately furnished materials to a contractor, for the erection of two houses, belonging to different owners, may divide his bill, and file a separate lien against each house. *Davis v. Farr*, 1 Harr. 167.

There is no mechanic's lien against a lessee for years, for work and materials for buildings erected by him on the ground leased. *Haworth v. Wallace*, 2 Harr. 118.

So, buildings and fixtures, erected by a lessee for years, for the purposes of trade, are not the subject of a mechanic's lien in favor of creditors of the lessee. *Church v. Griffith*, 9 Barr, 117.

Nor on an alteration of, or addition to, a house. *Matter of Howett*, 10 Barr, 379; *Landis' Appeal*. *Ib.*

A carpenter's lien extends to so much of the tract of land on which the house is built, as, with the house, would be required to discharge it. *Van Dyne v. Van Ness*, 1 Halst. Ch. 485.

A church is the subject of a mechanic's lien. *Presbyterian Church v. Allison*, 10 Barr, 413.

A lien embraces the quantity of ground necessary to the proper use of the building, as intended at its commencement. It is also limited to the description in the claim filed. *Pennock v. Hoover*, 5 Rawle, 291; *McDonald v. Lindall*, 3 Rawle, 492.

A building, partly brick and partly frame, having been repaired, was removed, and afterwards a cellar was dug under it and walled up, a new chimney built, and the house newly weather-boarded and plastered. Held, this was a building *erected and constructed* within the meaning of the lien law. *Burling, &c., Ashm.* 377; *Olympic, &c.*, 2 Browne, 275.

But, the addition of a basement to a frame house, fitted for occupancy, is not an *erection* within the law. *Miller v. Oliver*, 8 Watts, 514.

The lien attaches to an engine, by which a steam saw-mill is propelled, it being part of the building. *Morgan v. Arthurs*, 3 Watts, 140. So, it seems, one who furnishes lumber for the shelves of a vault has a lien. *Harker v. Conrad*, 12 S. & R. 301. But, not in Pennsylvania, on a steamboat. *Walker v. Anshutz*, 6 W. & S. 519. The lumber may be delivered at a shop, distant from the building. So, it need not be actually used, or in a usual or necessary manner. *Hinchman v. Graham*, 2 S. & R. 170; *Harker v. Conrad*, 12, 301.

A wife, by joining with her husband in a written contract with a mechanic, for furnishing labor or materials for erecting a building on her land, does not thereby create a lien on her estate, and therefore cannot properly be joined with her husband in a petition. But such contract creates a lien on the husband's estate, and, if she be joined, the petitioner may discontinue as to her, and proceed against the husband. *Kirby v. Tead*, 13 Met. 149; *Rogers v. Phillips*, 3 Eng. 366. *Contra*, *Greenough v. Wigginton*, 2 Greene, 435.

By such a contract it was provided, that the last payment should be made "upon the entire fulfilment of the contract, in all its parts, on or before the first day of May," 1844, also, that if any difficulty should arise, it should be submitted to two housewrights. The building was not completed on the first of May, but was completed on or before the tenth day of June. A difficulty arose, as to the construction and execution of the contract, and the parties submitted it, on the twelfth day of June, to two housewrights, who decided, on the fourteenth day, that the husband and wife should pay to the mechanic a balance less than \$430; and, on the thirteenth day of December, the mechanic filed a petition, that the land might be sold, and the proceeds applied to the discharge of the balance found due him. Held, the lien on the husband's estate was not dissolved at the filing of the petition, by virtue of the provision, "that the lien shall be dissolved at the expiration of six months after the time when the money due by the contract, or the last instalment thereof, shall become payable, unless a suit for enforcing the lien shall have been commenced within the said six months." *Ib.*

At the time of the contract, the parties had not had a child born alive; but, after the mechanic filed a petition, they had a child born alive. Held, the lien extended to the husband's estate as tenant by the curtesy initiate. *Ib.*

A married woman cannot be an *employer*, so as to charge the land, unless she has a separate estate therein, with a power of charging it; neither can a husband, since the statute of 1846, in regard to property of married women, charge his estate in the curtesy in his wife's lands, unless she join with him in the contract for labor. *Fetter v. Wilson*, 12 B. Mon. 90.

So, the lien does not attach to the separate property of a wife, upon her contract, either separate or jointly with her husband, and her separate property cannot be made liable at law for such contract. She has no power thus to contract. *U. S. Dig.* 1852, *H. & Wife*.

The fact that the materials furnished, for which a lien is claimed, were charged to the contractor individually, without reference to the building, does not preclude the plaintiff from showing, that they were furnished on the credit of the building; and, whether the materials so furnished were actually used in the construction, is immaterial. *Presbyterian &c. v. Allison*, 10 Barr, 413. The acceptance of a note by a mechanic is not a waiver of his lien, unless it was so intended. *Greene v. Ely*, 2 Greene, (Iowa,) 508. *Mix v. Ely*, *ib.* 513.

Where a promissory note has been given for part of the debt for which a mechanics' lien has been filed, the amount may be recovered by the claimant, who holds the note which had been dishonored. *Johns v. Bolton*, 12 Penn State R. (2 Jones,) 339.

Nor is an agreement to receive payment, partly in cash, and the balance in lumber at fair prices, whenever called for, &c., and the acceptance of a guarantee from a third person, for the fulfilment of this contract, a waiver. *Hinchman v. Lybraud*, 14 S. & R.

It has been held in New Jersey, that proceeding by personal action against the debtor is not a waiver of a carpenter's lien. *Van Dyne v. Van Ness*, 1 Halst. Ch. 485. But it is decided otherwise in Pennsylvania, where the defendant prevails in the first suit. *Whelan v. Hill*, 2 Whart. 118.

A, having purchased lumber from B, to be used in a building, came into possession of a note signed by B, payable in lumber to a larger amount than that received by A, and afterwards purchased of B more lumber, exceeding the amount of the note. A and B agreed that the note should go to the account of another building, upon which B lost his lien by neglecting to file his claim seasonably. C purchased the former building before the latter was commenced. B files a lien claim against the former building, for the whole amount of lumber furnished. Held, B's claim was extinguished *pro tanto* by the note, and could not be enforced for the whole, as against C. *Hopkins v. Conrad*, 2 Rawle, 316.

The lien commences with the completion of the work, or the delivery of the materials, under the contract, the requisites of the act being complied with. *McCullough v. Caldwell*, 3 Eng. 231.

The six months allowed for filing such claim does not begin to run, until extra work done at the request of the owners is finished, although the work which had been specially contracted for had been previously completed. *Johns v. Bolton*, 2 Jones, 339.

When a work was completed, the mechanic took a note for the price due, which note became due May 1, 1848. Held, proceedings instituted March 27, 1849, were commenced within a year after the wages became due. *Mix v. Ely*, 2 Greene, 513.

Under the lien law for the city of New York, (St. 1844, p. 339,) a mechanic's lien is limited to one year from its commencement, notwithstanding the recovery of a judgment thereon against the owner, before the end of the year. *Freeman v. Cram*, 3 Comst. 305.

The commencement of a building within the meaning of the lien law, is the first labor done on the ground, which is made the foundation, and to form a part of the work suitable and necessary for its construction; and this is unchanged by any change in the ownership of the land and building, or in the plan, provided the original design of its character remains. *Pennock v. Hoover*, 5 Rawle, 291.

If, after such lien has accrued, the employer die, a bill to enforce it may be filed against the heirs. *Pifer v. Ward*, 8 Blackf. 252.

The administrator of the defendant may properly be made a party; and, if the plaintiff takes a judgment, without making the heirs a party, he does it at his peril. *Mix v. Ely*, 2 Greene, 513.

A person entitled to a lien has no preference over the general creditors, when the debtor has deceased, and his estate has been rendered insolvent within one year from the time of granting administration. [WELLS, J., dissenting.] *Severance v. Hammatt*, 28 Maine, 511.

As to the admission of parol evidence and books of charges, see *Hills v. Elliott*, 16 S. & R. 56; *Church v. Davis*, 9 Watts, 304; *Rehner v. Zeigler*, 3 Watts & S. 258; *Dickinson, &c. v. Church*, 1 Watts & S. 462.

As to the laws of New York and New Jersey upon this subject, see *Haswell v. Goodchild*, 12 Wend. 373; 3 N. Y. Rev. St. 273; St. 1844, 451, 339; 1853, 708; 1854, 953, 960; N. J. St. 1840, 75; *Taylor v. Baldwin*, 10 Barb. 626; *Flanigan v. Feuring*, 2 N. J. 387.

The word *owner* in the lien law is the correlative of *contractor*; meaning the person who employs him, and for whom the work is done. *McDermott v. Palmer*, 11 Barb. 9.

A mechanic who proceeds, under the lien law of New York, against the owner of a building, for work done under the contractors, cannot recover, if nothing be due to the latter on their contract. *Pike v. Irwin*, 1 Sandf. 14.

Where proceedings were instituted by a mechanic against the owner, at the request of the latter, for work done under the contractors, and he promised to pay the demand, on being furnished with an order from the contractors, which was done; held, the owner might prove, in his defence, that there was nothing due from him to the contractors. *Ib.*

If, after the workman has given notice of his demand to the owner, the contractor fails in ten days to settle the demand, or to agree in writing to submit the matter to arbitration, the owner becomes liable to pay the demand, no matter what the state of accounts may be between the mechanic and contractor. *Monteith v. Evans*, 3 Sandf. 65.

For the law of Iowa, see Code 1851, 154. Personal service of petition is necessary, when the defendant can be found in the county; if not to be found in the county, notice posted on the buildings subject to the lien is a sufficient service; in which case it must appear by the officer's return that the defendant could not be found. *Colcord v. Funck*, 1 Morris, 178.

In Vermont, a written contract to build or repair a house gives a lien for three months. *Verm. Sts.* 1849, 16.

The statutes of Maryland, upon this subject, I have been unable to examine. It has been held in that State, that, in order to have a lien, the mechanic must file with the clerk of the county court a statement of his demand, with the items and particulars thereof, including the sum due, the nature of the work, the kind and amount of materials, and the time when the work was done, and the materials supplied. *Carson v. White*, 6 Gill, 17.

CHAPTER XLI.

REMAINDER—VESTED AND CONTINGENT REMAINDERS.

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| <ol style="list-style-type: none"> 1. Definition—cannot be after a fee. 4. By what words created. 5. Vested or contingent. 7. When contingent. 9. Classification of contingent remainders. 20. Exception to third class—limitation for a long term—remainder after the ter- | <ol style="list-style-type: none"> mination of a life. 24. Limitation after a life, where the term for years is short. 28. Exceptions to fourth class—Shelley's case—"designatio personæ," &c. 34. Ch. J. Willes' division of contingent remainders. |
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1. A REMAINDER is a remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same at one time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not in abridgment of it. Thus, if A, being an owner in fee, convey the land to B for ten years, remainder to C and his heirs forever, B is tenant for years, with a remainder to C in fee. Both these estates subsist at one time, and both are parts of one entire estate, making together the absolute and perpetual inheritance of the land. The former is said to be merely carved out of the inheritance. Hence, where the fee-simple is first conveyed, this being the whole estate, no remainder can be validly limited upon it. Thus, where land is conveyed to A and his heirs, and, if he die without heirs, remainder to B in fee, the remainder is void. So, where land was devised to one corporation and its successors, so as they paid a certain annual sum to another and its successors, on failure of which, the estate of the former to cease, and the latter to have it; held, the latter limitation was void.(1)

2. The same rule applies to a limitation after a remainder in fee. Thus, where a will, after giving an estate in fee in remainder to children, provided that, if their mother survived them, it should go to her; held, the children took a vested remainder in fee, and not a contingent remainder.(2)

3. Upon the same principle, it has been held, that even upon a conditional, base or qualified fee, no remainder can be limited, because the entire fee passes, leaving only a possibility of *reverter* in the grantor. Thus, if lands be given to A and his heirs, so long as B has heirs of his body, or till B returns from Rome, remainder to C in fee; the remainder is void as such, though it might be good as a *shifting use*, or executory limitation. This principle, however, has been doubted. And upon an estate tail, since the statute *de donis*, a remainder may be validly limited.(3)(a)

4. The estate above described may be created, without the use of

(1) Co. Lit. 143 a; 4 Kent, 196-7; 1 Abr. 70 Rep 97 b; Gardner v. Sheldon, Vaugh. Eq. 186; Dyer, 33 a. Buist v. Dawes, 4 269; Willion v. Berkley, Plow. 235; 4 Kent, 198-9; Peppercorn v. Peacock, 3 Man. & G. 356; Doe v. Simpson, 5, 780.

(2) Blanchard v. Brooks, 12 Pick. 64.

(3) Co. Lit. 18 a; Edward Seymour's case,

(a) As to *merger* in case of conditional fees, see Doe v. Simpson, 4 Bing. N. 333.

the word *remainder*, by any expressions of equivalent meaning; as, for instance, that after the death of A the land shall *revert and descend* to B, &c.(1)

5. Remainders are either *vested* or *contingent*. The former is when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate; or where, if the precedent estate should terminate immediately after its creation, the remainder would then take effect. In other words, a vested remainder is a present interest, though to be enjoyed in future; an immediate right of present enjoyment, or a present fixed right of future enjoyment. And there may be many successive remainders, all of which shall be vested. Thus, if the land be limited to A for life, remainder to B in tail, remainder to C in fee; B's remainder is vested, because, if A should immediately die, B would take; and C's is vested, because, if A should immediately die, and also B, without heirs, C would take. A vested remainder is in general subject to the same dispositions with an estate in possession. It gives a legal or equitable seizin.(2) But it is said, that in some instances a vested remainder would seem to possess the essential qualities of a contingent estate.(3)(a)

6. Devise to the wife of the testator during widowhood; and, upon her marriage, one-half the estate to go to a son. Another clause devised to the son, upon the death of the widow, *the remaining part* of the testator's landed property. The introductory clause of the will expressed an intent to dispose of all the testator's property. The widow having married, held, the son was entitled to possession of one moiety of the estate, and that he took a vested remainder in the other; that the remainder was subject to execution, and the purchaser entitled to possession upon the death of the widow, notwithstanding the son's death during her life. The son took a vested remainder in the whole estate, because it depended upon a certain event, the death of the widow, who took a life estate by implication, determinable as to a moiety by her marriage. The conditional limitation to the precedent estate, to wit, the second marriage, gave the son possession of a moiety on the happening of that event.(4)

7. A remainder is contingent, when it is limited to take effect on a condition, which may never happen or be performed, or not till after the determination of the preceding estate.(5)

8. It was remarked by Lord Chief Justice Willes to the House of Lords, that "the notion of a contingent remainder is a matter of a good deal of nicety; and if I should trouble you with all that is said in the books concerning contingent remainders, and the instances that are put of them, I am afraid it would rather tend to puzzle than enlighten the case."(6)

9. Mr. Fearne divides contingent remainders into four classes.

(1) 2 Cruise, 238.

(2) 1 N. Y. Rev. St. 723; Willes, 337; 4 Kent, 201; 1 Prest. on Est. 94-8; Bowling v. Dobyn, 5 Dana, 438; Jackson v. Sublett, 10 B. Mon. 467.

(3) 4 Kent, 204.

(4) Chapin v. Marvin, 12 Wend. 538.

(5) 2 Cruise, 238.

(6) Willes, 337.

(a) A remainder in fee, limited upon an estate tail, is *vested*, because the latter must at some time come to an end. 1 Steph. 302.

10. First, where the remainder depends on a contingent determination of the prior estate, by the act either of a third person or of the prior owner himself. Thus, if A convey to the use of B till C returns from Rome, and after such return to remain over to D in fee; here B's estate will end, and D's take effect, only upon a particular event, which may possibly never happen. So, where one conveys to the use of A in tail, until he does such an act; then to B in tail; B has a contingent remainder.(1)

11. Second, the remainder may be limited to take effect only upon the happening of an event, which is wholly independent of the mode of termination of the prior estate.

12. Thus, if a lease for life be made to A, B and C, and, if B survive C, remainder to B in fee, the remainder does not depend upon the manner of termination of the prior estates, but upon B's survivorship. In other words, the prior estates are subject to no contingency, but must expire by their natural limitation. The contingency is in the remainder only.(2)

13. Devise, to the use of A, the heir at law, for life; and from and after his death to the use of B in fee, in case B should survive A; but, if she should die living A, to the use of A in fee. B has a contingent remainder.(3)

14. Third, the remainder may be limited upon an event which, though it must happen at some time, may not occur till after the termination of the prior estate, in which case, as will be seen hereafter, the remainder becomes void.

15. Conveyance to A for life, and, after the death of B, remainder to C in fee. If A should die before B, C's remainder could never take effect. Hence it is contingent.(4)

16. A testator devised land to his wife, and proceeded to devise "to any child or children of mine which I shall leave at my decease, and to their heirs, and to all the G's (children of his wife) who shall be living at my wife's decease, equally to be divided among them all, the reversion and remainder of said real estate after the death of my wife, in equal portions to each of them and their heirs in common; and if none of the G's be living at the decease of my wife, then the said reversion shall remain to my said child or children and their heirs." The wife survived all her own children, and the son and only child (by a former wife) of the testator, and died. Held, the wife's children had only a contingent remainder, which never vested; and the estate vested in the testator's son, either as devisee or heir, and descended to his heirs, not to the collateral relations of the testator.(5)

17. A testator gave his daughter the income, &c., during the life of her husband; and, if she survive him, to her, her heirs, &c., a moiety of the estate—the other moiety to her children in fee; and, if she survive her husband and all her children, to her, her heirs, &c.; and if she should die, living her husband, then to him the income, &c., of a moiety for life, and the residue of the estate to her children in fee. The husband and four children of the daughter were living, at the making of the will, the death of the testator, and at her death. Held,

(1) *Fearne*, 5; *Arton v. Hare*, Poph. 97; *Large's case*, 3 Leo. 182.

(2) *Co. Lit.* 378 a; *Ryder*, 11 Paige, 185.

(3) *Doe v. Scudamore*, 2 B. & P. 289.

(4) *Boraston's case*, 3 Rep. 20 a.

(5) *Dixon v. Pickett*, 10 Pick. 517.

she took a life estate for the joint lives of herself and husband; that her children took a vested estate in one moiety; that the remainder to them in the other moiety was contingent, depending upon the event of her dying before or after the husband; that, if she should survive him, she would take it in fee; if he should survive her, he would take a life estate in this moiety, with remainder to her children; and that, as he did survive her, the children took a vested remainder.(1)

17 a. Devises to two grandchildren, with this proviso, "if both my said grandchildren shall happen to die under age and without any lawful issue, then it is my will that three fourth parts shall be equally divided between A, B and C," &c. The grandchildren lived many years after they arrived at full age, and then both died without issue. Held, the devise over to A, B and C, &c., never took effect.(2)

17 b. A testator gave all his personal estate to his wife; also, all his real estate in fee, except two lots of land. Those parcels he devised to his wife for life, and, after her death, in case his daughter A (his only child) should die without having married, or without leaving any child or children, one parcel to his nephew B, and the other to his nephew C. The daughter survived the mother, but afterwards died without issue. Held, the nephews took contingent remainders in fee, which would take effect, only in case the daughter died childless during the life of the widow; that the daughter, in the meantime, took the fee by descent; and that, on her surviving the widow, the remainders fell, and she became entitled to the premises absolutely.(3)

17 c. A testator devised certain lands, slaves, bank stock, &c., to his executors, in trust, to apply the rents and profits to the support of A and his family, until he should be thirty-five years of age, and, if his business habits should then be good, then to convey the same to A absolutely; otherwise, in trust, to settle the same, so as to give the use and profits to A for life, with remainder over to such child or children as he might leave living at his death; but, if he should leave no child, then remainder over to the children of B. A died before he arrived at the age of thirty-five. Held, A took only a life estate, subject to be enlarged to an absolute estate on the contingency mentioned; and that, on his death before the happening of the contingency, the remainder took effect, and the absolute estate vested in his children.(4)

18. Fourth, the remainder may be limited to persons not in existence or ascertained at the time of such limitation. Conveyance to A for life, remainder to the right heirs of B, who is living. Inasmuch as *nemo est hæres viventis*, and until B's death it cannot be known who his heirs will be, and he may die before A, the remainder is contingent.(5)

19. Conveyance to A and B for their joint lives, remainder to the heirs of the survivor. Since it is uncertain which of them will survive the other, the remainder is contingent.(6)

20. An exception to the third class above enumerated, is where the prior estate is for a very long term, and the remainder is limited upon the death of the particular tenant, or of a third person. Here, the improbability, of such person's outliving the prior estate, is so great, that

(1) *Blanchard v. Brooks*, 12 Pick. 47.

(2) *Doe v. Watson*, 8 How. (U. S.) 263.

(3) *Wolfe v. Van Nostrand*, 2 Comst. 436.

(4) *Mooney v. Evans*, 6 Ired. Eq. 363.

(5) See *Woodson v. Haviland*, 18 Conn. 101.

(6) *Biggot v. Smyth*, Cro. Car. 102.

the remainder is held to be not contingent but vested. As the life cannot exceed the term, and the term must determine with the life, the limitation from the expiration of the life is in effect a limitation from the end of the term.(1)

21. Conveyance to the use of A for ninety-nine years, if he live so long, and, after his death, of B in fee. B's remainder is vested.(2)

22. A person covenants to stand seized to the use of himself for life, remainder to A for eighty-nine years, if B, his son, should live so long; remainder, after B's death, to C, another son, in tail. C takes a vested remainder.(3)

23. A conveyed to the use of himself for life, remainder to the feoffees for eighty years, if B, and C, his wife, should so long live; if C survived B, to the use of C for life; after her death, to the use of the son of C and B in tail; for default of such issue, to the use of D and E in tail, remainder to A's right heirs. A died, and C died leaving a son, who died without issue. In a suit between D and E, and the heir of A; held, the remainder in tail to the first son of C and B, and the remainder to D and B, were vested remainders, the law not regarding the possibility that B and C would outlive the term of eighty years.(4)

24. Where the term is so short that there is a probability of its terminating before the life, the remainder is contingent.

25. Limitation to A for twenty-one years, if he live so long, after his death to B in fee. The remainder is contingent.(5)

26. And, in some cases, the same rule has been adopted where the possibility seemed very remote.

27. Devise to A for sixty years, if he live so long; from and after his death, to B, his son, in tail. A was forty years old (at the date of the will.) Held, this limitation could not be construed to mean from the death of A *during the term*, or to give A a term for sixty years, if he should so long live, and vest the inheritance immediately in B; but that, if A should outlive the term, which was possible, B could not take, and therefore the remainder was contingent.(6)

28. To the fourth class of contingent remainders, there are three exceptions.

29. The first arises out of the rule in *Shelley's case*, so called.(7)

30. The principle settled by that case is, that where a freehold estate is limited to a person, remainder to his heirs, or the heirs of his body; instead of his taking a particular estate, with a contingent remainder to his heirs, the whole inheritance vests at once in him. This point, which has been the subject of great discussion, will be more particularly considered hereafter.(a)

31. Upon a similar principle, where the grantor or deviser of an estate limits the remainder to his own heirs; instead of a contingent

(1) 2 Cruise, 244.

(2) Weale v. Lower, Pollexfen, 67.

(3) 2 Cruise, 244; cites Lord Derby's case, Lit. R. 370.

(4) Napper v. Sanders, Hut. 119.

(5) Pollexfen, 67.

(6) Beverley v. Beverley, 2 Vern. 131.

(7) 1 Co. 104; 2 Rolle's Abr. 417.

(a) See *Shelley's case—Deed, Devise*.

Under the "act regulating the descent of real estate," passed June 13, 1820, in New Jersey, (R. L. 774, sec. 1,) the estate of the children of a devisee for life, with remainder to his heirs, is a contingent, and not a vested remainder, during the life of the life tenant. Den v. Demarest, 1 N. J. 525.

remainder to the heirs, the effect is, to leave the reversion in fee in himself.

32. Thus, where one devised his estate to his widow during her widowhood, and, after her death or marriage, ordered that it should be distributed in the same manner as if it had not been devised; held, no valid remainder was created, but the reversion in fee, expectant upon the wife's life estate, descended to the testator's heirs at law.(1)(a)

33. A third exception is, where the term *heirs* is plainly used as *designatio personæ*; as, for instance, in case of a limitation to a man and the heirs of his body, *now living*. So, if an estate is devised to a person *and his heirs* during his natural life; remainder over after his death; the word *heirs*, if it have any legal effect, is *designatio personæ*, meaning that those who are the heirs apparent shall enjoy *with the devisee* during his life; and he takes only a life estate. This construction, however, is confined to *devises*.(2)

34. Mr. Fearn's fourfold classification of contingent remainders is simplified to two general classes by Lord Ch. J. Willes; viz: 1. Where the person to whom the remainder is limited is not *in esse*; 2. Where the commencement of the remainder depends on some matter collateral to the determination of the particular estate. His lordship's language is, however, that there are but two sorts of contingent remainders *which do not vest*. This would hardly imply that he supposed there were any other contingent remainders which do vest, were it not for some expressions in a subsequent part of the same opinion; where, putting the case of the grant of an estate by A to B for ninety-nine years, determinable in B's life; he says, if B outlive the term, surrender, &c., A may enjoy the estate again—therefore, he has a *contingent freehold* during B's life. It must be a *vested interest*, for it was never out of him. If A had a *contingent freehold*, he might grant it over; and if he do, it must be of the same nature it was before—a *vested freehold*. In these remarks, the words *vested* and *contingent* seem to be used not as contradictory, but synonymous, or at least consistent terms.(3)

(1) Whitney v. Whitney, 14 Mass. 88. But see Bates v. Webb, 8 Mass. 458.

(2) 4 Kent, 212; Throop v. Williams, 5 Conn. 98.

(3) Smith v. Parkhurst, 3 Atk. 138; Willes, 337-9; Throop v. Williams, 5 Conn. 99; 1 N. Y. R. St. 723; 1 Wooddeson, 191.

(a) See *Reversion*.

CHAPTER XLII.

REMAINDER—VESTED AND CONTINGENT REMAINDERS.

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| <ol style="list-style-type: none"> 1. Contingency of remainder depends on <i>present</i> capacity of taking effect. 2. Law favors vested remainders. 4. Remainder may be vested, though not to take effect upon every possible termination of prior estate. 7. Intervention of contingent estate—remainder not thereby contingent, unless the estate is a fee. 11. Contingent estates may be <i>devised</i>, as substitutes for each other. 17. Cross remainders. 18. Prior limitation to trustees and their heirs till a certain event. 20. Where one of concurrent remainders, &c., | <ol style="list-style-type: none"> vests—rest defeated. 21. Successive remainders—whether the contingency named affects only one or the whole. 22. Limitation after an estate, depending on a contingency which never happens. 28. After the conditional termination of an estate, which never takes effect. 30. After the conditional termination of an estate which takes effect, but terminates otherwise. 31. Words importing not a contingent remainder, but when a remainder shall come into possession. 45. Remainder upon condition <i>subsequent</i>. |
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1. FROM the preceding remarks, it sufficiently appears that the question, whether a remainder is vested or contingent, does not depend upon the certainty or uncertainty of its ever taking effect in possession; but upon its present capacity of thus taking effect, if the possession were to become vacant. (a) Thus, if there be a lease for life to A, remainder for life to B, B's remainder is vested, although he may die before A. But, if there be a lease for life to A, remainder for life to B after the death of C, inasmuch as B's estate would not necessarily vest upon the present determination of A's estate, the remainder is contingent. The latter illustration, however, shows how a remainder contingent in its creation may become vested; for, upon the death of C, B's remainder undergoes this change, because, from that time, if at any moment A's estate should cease, B's would immediately take effect. Hence, also, it appears that a contingent remainder passes through two stages before it becomes an estate in possession. Thus, in the case supposed, upon the death of C, living A, B's contingent remainder becomes a vested remainder; and then, upon the death of A, the vested remainder becomes a vested estate. (1) So a remainder in fee, limited by will to the eldest son of the first taker, to whom an intermediate life estate is given, is contingent, until the birth of such son; but, on the happening of that event, before the termination of the life estate, it becomes a vested estate in remainder. (2)

2. These observations lead naturally to a consideration of the more minute distinctions between vested and contingent remainders. It may be remarked at the outset, that, in England, as the court never construes a limitation into an executory devise, where it may take effect as a remainder, because the former puts the fee in abeyance; so neither

(1) Fearn, 329, 331; Willes, 337; Williams v. Field, 2 Sandf. Ch. 533; Bentley v. Long, 1 Strobh. Eq. 43.
 (2) Wendell v. Candall, 1 Comst. 491.

(a) It has been said, that, in some cases, even without this capacity, a remainder may be vested. The true principle would therefore seem to be, that, *with this quality*, a remainder *must* be vested, and *may* be vested without it. Cornish, 102.

does it construe a remainder to be contingent, where it can be taken for vested, because the latter tends to *support* the estate, and the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder by fine or feoffment.(1)

3. Whenever the preceding estate is limited, so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse*, and ascertained, that the preceding estate may by any means determine before the expiration of the estate limited in remainder, such remainder is vested. But whenever the preceding estate, with the exceptions above named,(a) is limited so as to determine only on an event which is uncertain, and may never happen; or to a person not *in esse* or not ascertained; or so as to require the concurrence of some uncertain event, independent of the determination of the preceding estate, and duration of the estate limited in remainder, to give it a capacity of taking effect; the remainder is contingent.(2)

4. The definition, given above, of a vested remainder, does not require that it should be so limited as to take effect upon every possible determination of the particular estate. It seems to be sufficient, that the preceding estate is made to determine upon an event which certainly must happen, although it may determine upon other events which may not happen, and although it is only upon a determination in the latter mode, that the remainder will take effect. Thus, if an estate be limited to A for life, remainder to B for the life of A, inasmuch as the death of A is a certain event, and, if A's estate should terminate by forfeiture or surrender, the remainder would take effect; it is a vested remainder.(3)

5. Conveyance to the use of A for ninety-nine years, if he should so long live; from and after his death, *or other sooner determination of the estate limited to him for ninety-nine years*, to the use of trustees and their heirs during A's life, to preserve contingent remainders; and, *after the end or other sooner determination of the said term*, to the use of A's sons in tail, remainder over. Held, first in the King's Bench, and afterwards in the House of Lords, that the estate of the trustees was a vested, not a contingent remainder, because the trustees were persons *in esse* at the time, and the commencement of the remainder did not depend on any matter collateral to the determination of the particular estate. Lord Ch. J. Willes remarked, that, upon any other construction, in case of the death of the trustees during A's life, no estate would vest in their heirs, which would prove the universal practice of inserting the word *heirs* in such settlements, to be wholly useless and unmeaning, and that many thousand settlements would be overturned; in preference to which he would adopt precedent for law, and follow the maxim "*communis error facit jus*." That if a limitation were made to A for ninety-nine years, determinable on his life, with no remainder, the grantor would retain a vested reversionary interest, which would take effect on the expiration, forfeiture, or surrender of the term, and

(1) Wilkes v. Lion, 2 Cow. 333; Ives v. Legge, 3 T. R. 489, n.; Den v. Demarest, 1 N. J. 525; Wolfe v. Van Nostrand, 2 Comst. 436; Johnson v. Valentine, 4 Sandf. 36.

(2) Fearne, 329; Chapin v. Marvin, 12 Wend. 538.

(3) Fearne, 279-86; 4 Kent, 202; Cholmley's Case, 2 Co. 51 a.

this interest he might grant over, and thereby create a vested remainder in the grantee.(1)

6. The limitation in this case seems to have been most inartificially worded. The words "from and after A's death," were admitted on both sides to be wholly senseless, being immediately followed by "during A's life." Moreover, the limitations to the trustees and to A's sons, though successive, were to take effect, it would seem, upon precisely the same contingency, the termination of the term for years.

7. Where a contingent limitation intervenes between the particular estate and a remainder to a person *in esse*, the latter may be vested, provided the intervening limitation be not in fee. So, where neither remainder-man is *in esse* at the time, but the latter is born before any one in whom the former estate can vest.(2)

8. Limitation to A for life, remainder to his first and other sons in tail, remainder to B and his sons in the same way. B has a son born, but A has none. B's son takes a vested remainder, subject to be defeated by the birth of a son to A. The last limitation is said to be executed *sub modo*, so as to open and separate itself from the particular estate, whenever the contingency happens.(3)

9. Where the intervening estate is contingent for some other cause than that the party to whom it is limited is not *in esse*, if the contingency does not extend also to a subsequent remainder, this may be vested.(4)

10. But where the prior limitation is in fee, no subsequent remainder can be vested.(5)

11. Although a remainder cannot be limited after a fee, yet it may be created, to vest in the event of the first estate's never taking effect: or several estates in fee may be limited contingently as substitutes for each other; some to take effect on failure of the others, and in their room. Such remainders are said to be not expectant, but contemporaneous; the latter not contrary to, but concurrent with the former. It is not a fee mounted upon a fee, but a contingent remainder with a double aspect, or on a double contingency. And the limitation is not good as a remainder, if it is to *succeed*, instead of being *collateral* to, the contingent fee. Thus, in a limitation to A for life, remainder to his issue in fee, and, in default of such issue, remainder to B, the remainder to B is good, being collateral to the contingent fee in the issue. But, if the remainder to B is limited upon the event of the issue's *dying under age*, though it may be good as an executory devise or shifting use, it is void as a remainder, being dependent on an event, which rescinds a prior vested fee.(6)

12. Devise to A for life, and, if he should have any issue male, to such issue and his heirs forever; and if he should die without issue male, then a part of the lands to B in fee, and a part to C in fee. Held, all these several limitations in remainder created contingent remainders

(1) *Berrington v. Parkhurst*, 3 Atk. 135; Willes, 327-39; 6 Bro. Parl. Ca. 352.

(2) *Fearne*, 222.

(3) *Uvedall v. Uvedall*, 2 Rolle Abr. 119; *Bowles' case*, 11 Rep. 80.

(4) *Napper v. Sanders*, Hut. 119.

(5) *Eddington v. Kyme*, 1 Ld. Raym. 208; 12 Pick. 64.

(6) 1 Ld. Raym. 203; Doug. 505 n.; 4 Kent, 199-201; *Buist v. Dawes*, 4 Strobb. Equ. 37.

in fee. If A should have issue male, the fee would vest in him; if not, then it would vest in B and C.(1)

13. Devise to A for life, and, after his death, to his children equally, and their heirs; and in case he dies without issue, to B and C and their heirs, equally, &c. Held, the two last limitations were both contingent remainders in fee.(2) So, where there was a devise to A for life, remainder to trustees, &c., remainder to all the children of A, begotten or to be begotten by B, and their heirs forever, &c., remainder over; held, according to the clear intent, the children of A took a fee; but, for want of such children, the subsequent limitation would have taken effect.(3)

14. A devised to his daughter B, for her life; then to *her male heir*, C, if alive at her death, in fee; otherwise, to her next male heir in fee. Held, that B did not take an estate tail; that nothing vested in C during the life of B, because he was to take only if he should be living at her death, and therefore, till her death, the fee vested nowhere; that the estate to C was contingent, notwithstanding his being designated by name; that the fee-simple, which was to vest on the death of B, was not an executory devise, but a contingent remainder, having a preceding freehold to support it; that it was not a limitation of a fee after a fee, but a limitation of only one indefeasible estate in fee; that the will presented a *contingency with a double aspect*, to be determined immediately on the death of B, at which time an indefeasible estate would vest, either in C, or in the next heir male of B, as the case might be. In this case, Gibson, J., thus states the general rules of law pertaining to the subject. Where, of two limitations, (in fee,) both are to take effect; the latter can do so only as an *executory devise*, for a remainder, originally contingent, but afterwards vested by the happening of the contingency, is essentially the same as if it had been vested at its origin; but, where both are limited alternately on the same event, by the happening of which, one is to vest in exclusion of the other, there both are contingent remainders.(4)

15. Where the language used may be construed to create either successive and alternative contingent estates in fee, or a contingent preceding estate less than a fee, and a vested remainder in fee, the latter construction will be adopted, as the more accordant with the general policy of the law.

16. Devise to A, the testator's daughter, for life; then to the children of her body begotten, and their heirs; *in default thereof*, to the testator's son B, his heirs and assigns. B died, living A, having devised his interest, and then A died without children. The question was, whether B took a vested remainder, which could be devised, or only a contingent remainder. Held, he took a vested remainder. The clause, *in default thereof*, was equally applicable to the failure of A's children and of their heirs. If there had been no limitation over, or a limitation to other parties, the devise would have made a contingent fee-simple to the children of A. But, the subsequent remainder being limited to a collateral heir of the children, they must take an estate tail, with a

(1) Luddington v. Kyme, 1 Ld. Raym. 203; Barnardiston v. Carter, 3 Bro. Parl. Ca. 64. See Blanchard v. Brooks, 12 Pick. 65.

(2) Goodright v. Dunham, Doug. 265.

(3) Doe v. Perryn, 3 T. R. 484.

(4) Dunwoodie v. Reed, 3 Ser. & R. 435-452; Den v. Crawford, 3 Halst. 90.

vested remainder to B. Had the devise in question applied to the failure of A's children only, and not that of their heirs, then there would have been two contingent fees simple, the one to take effect only on failure of, or as a substitute for, the other. But the law would not adopt this construction, except where the language absolutely required it.(1)

16 *a*. Although, where a fee is given by a vested limitation, a remainder upon it must be an executory devise, and, if too remote, this and all subsequent remainders are void; yet, if a fee be limited in contingency, and the estate given over upon a contingency divesting the fee, if the fee so limited never vests, the gift over takes effect as a contingent remainder.(2)

17. *Cross-remainders* are another qualification of expectant estates, and they may be raised expressly by deed, and by implication in a devise. Thus, if a devise be made of one lot to A, and another lot to B, in fee, and if either dies without issue, the survivor to take, and if both die without issue, to C in fee; A and B have cross-remainders over by express terms, and, on the failure of either, the other, or his issue, takes, and the remainder to C is postponed. But if the devise had been to A and B, of lots to each, remainder over on the death of both of them, the cross-remainders to them would be implied. So, if different parcels of land are conveyed to several persons by deed, and by the limitation they are to have the parcels of each other when their respective interests shall determine, they take by cross-remainders. This subject will be more particularly considered hereafter.(3)(a)

18. Where the preceding contingent remainder is limited not in fee generally, but to trustees and their heirs, until the happening of a certain event, the subsequent remainders may be not contingent but vested.

19. Devise to A for life, and if she die without issue of her body living at her death, to trustees and their heirs, till B should be twenty-one years old. After which, devise to B for life, remainder to his sons in tail male. In default of such issue, or if B should die under twenty-one, and without issue, to C, &c., persons *in esse*. Held, the limitation to the trustees would take effect only upon A's dying without issue, and in this event would be not an absolute but a determinable fee; that B's estate was contingent only till he should come of age; and in the meantime, the subsequent remainders were vested.(4)

20. In case of concurrent remainders, or where a preceding contingent remainder is in fee; if, in the one case, one of such remainders, or, in the other, such preceding remainder, becomes vested, the other remainders thereby become void. Thus, where there is a devise to A for life, remainder to his issue male, in default thereof remainder over; upon the birth of such issue, the first remainder becomes vested, and the latter thereby void, even though the issue die before A himself.(5)

21. Where there is a limitation of several successive remainders, the

(1) *Ives v. Legge*, 3 T. R. 488 n. See 16 Pick. 191.
Blanchard v. Brooks, 12 Pick. 63.

(2) *Evers v. Challis*, 2 Eng. L. & Equ. 204.
 215.

(3) 4 Kent, 201. See *Packard v. Packard*,

(4) *Lethieullier v. Tracy*, 3 Atk. 774; *Amb.*

(5) *Keene v. Dickson*, 3 T. R. 495.

(a) See *Deed; Devise; Cross-Remainder*.

first of which is made to depend upon a certain contingency, the important question arises, whether this contingency applies only to the first remainder, or to all the succeeding ones also. Cases of this kind are divided into three classes. 1. Limitations after an estate which depends on a contingency that never happens. 2. Limitations upon a conditional termination of an estate which never vests. 3. Limitations upon a conditional termination of an estate, which, though the estate vests, never happens.

22. In the case of *Lethieullier v. Tracy*, cited above, (s. 19,) it was held, that neither the condition of A's dying without issue, nor the condition of B's coming of age, affected the remote subsequent limitations, which, accordingly, were vested remainders.

23. Devise, to the use of A for life, remainder to his first and other sons by any future wife in tail male, &c.; and, if A should marry any woman related to his then wife, all the above uses, so far as they related to the issue of A, to cease and be void; and, *in such case*, though A have issue, the trustees to stand seized to the use of C, &c. A died soon after the testator, not having again married, and without issue. Held, the remainder to C took effect, not being defeated by the want of such second marriage.(1)

24. Devise to trustees, to pay over the rents and profits to A and B, during the life of C, (A, B and C, being sisters of the testator,) their heirs and assigns; and, after the decease of C's husband, in trust for A, B and C, each a third part, for life; remainders to their sons in tail male, &c., cross-remainders over. C died, living her husband. The question was, whether, by C's death, not only her own estate, but the subsequent remainders also, were defeated. Held, the latter were not defeated.(2)

25. A different rule is adopted, where the intention of the testator seems so to require, or where the court cannot find upon the whole will sufficient to gather a different intent, so as to warrant them in supplying omitted words.(3)

26. Devise to A, the testator's son, and the heirs of his body; and, if A should die without issue, *and the testator's wife B should survive A*, that she should enjoy the premises for her life; after her decease to C for life; after her decease, (*A being dead without issue as aforesaid*), to D. B died in the life of A. Held, the remainder of D was defeated, being contingent upon A's dying without issue in the lifetime of B.(4)

27. Devise to trustees, in trust to pay a certain sum to A for life, and the rest of the rents to B her husband; and after her death, the whole to him for life. *If she should happen to survive her husband*, then to stand seized of all the lands *upon the trusts after mentioned*, viz.: to A for life, then to her son and the heirs of his body, remainder to the heirs of the body of the husband by her, remainder over. A died before B. Held, not only A's life estate, but all the subsequent remainders, were defeated.(5)

28. The second class of cases, is where a remainder is limited upon the conditional determination of a preceding estate, which never takes

(1) *Bradford v. Foley*, Doug. 53.

(2) *Horton v. Whitaker*, 1 T. R. 346.

(3) Doug. 78-9.

(4) *Davis v. Norton*, 2 P. Wms. 390.

(5) *Doe v. Shippard*, Doug. 75; *Fearne*, 236.

effect. And, here, whether the preceding estate is in fee or otherwise, it is said, that by whatever means it is out of the case, the subsequent limitation will take effect.(1)

29. Devise to trustees for years, remainder to the sons of A successively in tail male, provided they should take the testator's surname. If they or their heirs should refuse so to do, or die without issue, to the first son of B in tail male on the same condition. B had a son at the time of the devise. A died without having had a son. Held, whether the contingent limitation to persons not *in esse*, having only a term to support it, were void or valid; such limitation was not a condition precedent of the subsequent remainder, and that the son of B took a vested remainder.(2)

30. The third case, is where the remainder is limited upon a contingent determination of a preceding estate, which actually takes effect, but does not terminate in the mode pointed out. In this case, the remainder shall not take effect, unless the general intent of the testator so require.(3)(a)

31. Words of limitation are often used, which, though seeming to import a contingent remainder, the law construes merely as fixing the time when a vested remainder shall become an estate in possession. This construction is adopted, where an absolute property is given, and a particular interest in the meantime; as, *until the devisee shall come of age, then to him, &c.* And a remainder will always be construed as vested, where the words admit of it. Thus, where there was a devise to A for eight years, remainder to executors till such time as B shall be of age; and *when* B shall be of age, that he shall enjoy the same in fee; held, this was a vested remainder in B; that the legal construction was, a devise to executors till B reached twenty-one years, remainder to B in fee; and the remainder was no more contingent, than in the common case of a lease for life or for years, remainder over; that, inasmuch as the term must certainly end, the adverb *when* created no contingency, but merely denoted the time when B should have possession.(4)

32. Devise to A, when and so soon as he shall be twenty-one years of age; if he die under age, the property to go into the residue. Held, A took a vested interest, subject to the condition.

33. Devise to A, till B reaches the age of twenty-one years; when B reaches that age, to him and his heirs. B dies under age. Held, a vested remainder.(5)

34. Conveyance to the use of A for life, then to the first son of his body and his heirs male, and to four sons successively in tail; and *if it fortune* the said fourth son to die without issue male, then to remain to

(1) *Avelyn v. Ward*, 1 Ves. 422.

(2) *Scatterwood v. Edge*, 1 Salk. 229; 1 Ves. 422.

(3) *Fearne*, 362.

(4) 4 Kent, 204; *Driver v. Frank*, 3 M. & S. 32; *Goodtitle v. Whitby*, 1 Burr. 228; *Matthew Manning's case*, 8 Rep. 95 b; *Drake v. Pell*, 3 Edw. 253; *Ferson v. Dodge*, 23 Pick. 287. See *Rich v. Waters*, 22 Pick. 563;

Boraston's case, 3 Rep. 19; *Fearne*, 368; *Arnold v. Arnold*, 11 B. Mon. 81; *Hughes v. Hughes*, 12 Ib. 115; *Taylor v. Frobisher*, 10 Eng. L. & Equ. 116; *Maxwell v. McClinton*, 10 Barr. 237; *Haggard v. Ront*, 6 B. Mon. 247; *Childs v. Russell*, 11 Met. 16; *Danforth v. Talbot*, 7 B. Mon. 623.

(5) *Mansfield v. Dugard*, 1 Abr. Eq. 195; *Phipps v. Akers*, 4 Mann. & G. 1107.

(a) Sometimes called *adverbs of time*, as *when, then, after, from, &c.* *Johnson v. Valentine*, 4 Sandf. 36.

B. A died without issue male. Held, B's estate vested, the circumstance of A's having issue not being a condition precedent.(1)

35. Devise to A for life, then to B; and if my three daughters, or either of them, overlive A and B, and his heirs, then they to have it: and after them to C. B and two of the daughters died, living A. Held, this was not a contingent limitation, but only a designation of the time, when a vested remainder should become an estate in possession.(2)

36. Devise to the testator's wife for life, "to be for her own comfort, &c., while she remains my widow, without any disturbance, &c., from any of my children; and in case she alters her condition by marriage, then my said estate I will shall be divided as the law directs." Held, the testator's children took a vested remainder at his death.(3)

37. Devise to four children of the testator of four several estates, to each, one estate, and, when either of them shall die, the said estates to be equally divided among them that are living. The eldest son and heir died. Held, the remainder to the other children, in the estate given for life to this son, was not contingent but vested, and therefore was not void, in consequence of a merger of the son's life estate in the inheritance which descended to him.(4)

38. Devise to trustees, in trust, to apply the proceeds to the support and education of children during minority; and when and as they should come of age, to the use and behoof of them and their heirs. Held, the children took an immediate gift, with a trust interest during minority.(5)

39. Devise to the wife of the testator, of the use and improvement of one third part of his estate for life; "and I give and devise the same, at her decease, to my children" in fee. Held, the children took a vested remainder.(6)

40. Devise to the testator's three illegitimate sons, "if they should live to come of age." Held, whether the sons took a vested remainder, to become a vested estate afterwards, or only a contingent remainder; they had no estate in possession till they came of age, and, intermediately, the land descended to the heir at law.(7)

41. Devise of certain specified lands to the use of the testator's wife for life, and of all the testator's lands to A in fee; but, if he shall not live to be of age, then in like manner to his surviving brother, C; but if C shall die before of age, then, &c., to his surviving brother, D; but if D should die, &c., then to the first surviving son of E, in fee; for default of such issue, remainder to the testator's own right heirs forever. If the wife shall die before A, or before his survivor is of age, to take possession, then E to have the use and benefit of the lands, till the testator's heir shall be of age to take possession. The wife and E both died before A came of age. Held, upon the death of the widow, the estate did not descend to the heirs at law, until A came of age, but immediately vested in him; that, as the devise to E of the use of the land after the widow's death, till A should come of age, failed by the death of E, it should be considered as out of the case; and that the object of this devise to E (who was the mother of A,) was not to bene-

(1) *Holcroft's case*, Moore, 486.

(2) *Webb v. Hearing*, Cro. Jac. 416.

(3) *Bates v. Webb*, 8 Mass. 458.

(4) *Fortescue v. Abbott*, Pollexfen, 479;

T. Jones, 79; 2 Ventr. 365.

(5) *Goodtitle v. Whitby*, 1 Burr. 228.

(6) *Nash v. Cutler*, 16 Pick. 491.

(7) *Jackson v. Winne*, 7 Wend. 47.

fit her, but to enable her to take the profits of the land during A's minority.(1)

42. Devise substantially as follows: "all my debts to be paid from my personal estate, the remainder I give to my wife for the support of her and my minor children, during her widowhood, and the estate to remain undivided till my youngest child shall come of age. But if my wife should be still living and my widow, she shall have the whole income of my estate, keeping it in repair, &c.; but if she marry, she shall have £30 per annum from my estate for life. And it is my will, that all my children shall have an equal share of the whole of my estate that I now possess, or may possess at my death, at the time before mentioned for division; and should any of them die without heir lawfully begotten, their share shall be equally divided amongst the surviving children." Held, the estate devised to the children did not remain contingent till the death of the widow, or the coming of age of the youngest child; but immediately, upon the testator's death, they took a *vested remainder*, though not to take effect in possession till the happening of the last of the events referred to.(2)(a)

43. Where there is a devise to trustees *and their heirs* during the minority of A, then to him in fee, or upon trust to convey to him; inasmuch as A takes a vested remainder, to vest in possession upon his coming of age, the trustees have been held, notwithstanding the words of inheritance, to take only an estate for so many years as the minority of A shall last. But this doctrine has been questioned, as an anomaly in the law; and held wholly inapplicable to limitations by deed.(3)

44. Upon the above-named principle, where land is given to one for life, or any other estate upon which a remainder may be limited, and after the determination of that estate to a person sustaining a given character, as *heir at law*, *heir male*, or *next of kin*, of the testator, or of another; the remainder will vest in the person or persons who fill that character *at the death of the testator*, and not remain contingent

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| (1) Jackson v. Durland, 2 John. Cas. 314. | v. Nicholls, 1 Barn. & Cr. 336; Cornish, |
| (2) Tatem v. Tatem, 1 Miles, 309. | 105-7; Doe v. Lea, 3 T. R. 41. |
| (3) Stanley v. Stanley, 16 Ves. 491; Doe | |

(a) Devise to A for life, and after his death to three others, or the survivors or survivor of them, their heirs and assigns forever. Held, these were vested, not contingent remainders, so that, if a remainder-man died before the tenant for life, his heirs would inherit his interest. Moore v. Lyons, 25 Wend. 119. See Doe v. Frigg, 8 Barn. & C. 231; King v. King, 1 Watts & Serg. 205; People v. Conklin, 2 Hill, 67. But see also Cripps v. Wolcott, 4 Madd. 11.

Devise to the wife of the testator for her life or widowhood; upon her death or marriage the property to be sold, and the proceeds divided among his children. Held, his children who survived him took a vested remainder. M'Ginnis v. Foster, 4 Geo. 377.

Devise to a wife for life, at her death the property to be equally divided among all the testator's surviving children, and the legal representatives of those deceased. Held, the words of survivorship referred to the death of the testator, not of the tenant for life; and that all the testator's children living at his death took vested remainders, to be enjoyed after the death of the tenant for life. Vickers v. Stone, 4 Geo. 461.

Devise to a wife for life, then to be sold at her death, and the proceeds to be distributed among children. One of them died before the tenant for life. Held, his interest in the estate was vested, and liable for his debts. Field v. Hallowell, 12 B. Mon. 517.

Devise for life, with intermediate remainders; then to "such person of the surname of H, as shall be the nearest male relation to A and his heirs." Held, the last remainder vested at the testator's death. Stert v. Platel, 7 Scott, 422.

till the *termination of the prior estate*, unless there is a clear intention to the contrary.(1) But it is said, that the construction by which a limitation, to take effect *in futuro*, is construed as a vested, and not a contingent remainder, cannot be adopted, unless there is an intermediate disposition of the estate, or the rents and profits, or a direction that it shall go over, upon the party's dying before the specified time. Otherwise, the limitation must take effect, if at all, as an executory devise.(2)(a)

45. A remainder is sometimes contingent upon a *condition subsequent*, which operates to defeat it after being vested, instead of a condition precedent, the performance of which is necessary to its vesting. But it is said, a remainder cannot be thus divested, unless there are words in the will capable of producing this effect, and showing such intention. Of this nature is a limitation subject to a *power of appointment*. Thus, if an estate be limited to A for life, remainder to such use as A shall appoint, and in default of appointment, remainder to B; B's remainder is vested, but subject to be defeated by execution of the power.(3)

46. Limitation to the use of A for life; after his death, of B in fee, if B should live to be of age; provided and on condition, that if B should die under age, remainder over. Held, the remainder vested in B, subject to be divested by his dying under age.(4)

47. Devise to A for life, and, on his death, to and amongst his children, equally, at the age of twenty-one, and their heirs, but if only one child shall live to be of age, to him and his heirs at the age of twenty-one. And if A die without issue, or such issue die before twenty-one, devise over. Held, A's children took a vested remainder.(5)

48. Devise of land to A for the purpose of building a school-house, provided it should be built in a certain place; and of the residue of the testator's property to B. A took possession, but, after B's death, forfeited by breach of condition. Held, B had a contingent interest, which passed to her heirs.(6)

49. Upon the same principle, a remainder once vested may be defeated only *in part* by the happening of a subsequent event. Thus, where there is a devise to A for life, remainder to his children; the children of A, living at the death of the testator, take vested remainders, subject to be disturbed by after-born children, for whose benefit the estate will open, and let them in to take their proportional shares.(7)(b)

(1) Doe v. Spratt, 5 Barn. & Adol. 739.

(2) 4 Kent, 205.

(3) Driver v. Frank, 6 Price, 73-5; Packard v. Packard, 16 Pick. 191; 4 Kent, 204.

(4) Edwards v. Hammond, 1 Bos. & Pul. N. R. 313.

(5) Doe v. Nowell, 1 M. & S. 327; Randall v. Doe, 5 Dow. 202.

(6) Clapp v. Stoughton, 10 Pick. 463. See Austin v. Cambridgeport, &c., 21, 215.

(7) Fearn v. Perry, 3 T. R. 484; Dingley v. Dingley, 5 Mass. 535; At-

kins v. Beane, 14, 404; Denny v. Allen, 1 Pick. 147; Right v. Creber, 5 B. & C. 866; Sisson v. Seabury, 1 Sumn. 243; Hannan v. Osborn, 4 Paige, 336; Nodine v. Greenfield, 7 Paige, 544; Turner v. Patterson, 5 Dana, 295; Haywood v. Moore, 2 Humph. 584; Baker v. Lorillard, 4 Comst. 257; Johnson v. Valentine, 4 Sandf. 36; Carpenter v. Schermerhorn, 2 Barb. Ch. 314; Williamson v. Field, 2 Sandf. Ch. 533; Conklin v. Conklin, 3, 64; Munning v. Batdorf, 5 Barr, 503.

(a) In the case of Doe v. Lea, (3 T. R. 41,) a distinction was made, in reference to the point above considered, between the expressions "when and so soon as," and the word "if," which, in Brown v. Edwards, (2 Ves. 243,) was held to create a condition precedent. But this distinction seems to have been disregarded in several subsequent decisions.

(b) The general rule is stated to be, that where there is a devise to a *class of persons*, to take effect in enjoyment at a future period, the estate vests in the persons as they come in

50. Devise of all the remainder of my estate to my daughter, A, and the children born of her body, including all my wife has the improvement of, during her life, after her decease. A had three children when the will was made, and a fourth was born afterwards, all of whom survived the testator, and two more were born after his death. Held, the children of A, living at the testator's death, took a vested remainder in that portion of the estate devised to A for life, which, upon the birth of the other children, opened and let in their shares.(1)

51. Devise to A for life, and, immediately after her death, unto and among all and every such child or children, as she shall have lawfully begotten at the time of her death, in fee-simple, &c. Held, a vested remainder was hereby given to every child of A, subject to be in part divested by the birth of subsequent children; and that, upon the death of a child during A's life, his interest descended to his heirs. The decision was founded, in part at least, upon the presumed intentions of the testator in favor of his grandchildren. Spencer, J., dissented.(2)

52. A devised to B for life, and after her death to C, to have the improvement to her and her heirs, during her natural life; and declared, that after C's death, D, her son, should be sole heir of the estate. D died about a month after the testator, leaving a sister, E; and four years after his death, two other sisters, F and G, were born. Held, D took a vested remainder in fee, to take effect upon the termination of two preceding life interests; that on D's death his title passed to E; and that after the birth of F and G, they took as joint heirs with her under the devise.(3)(a)

(1) Annable v. Patch, 3 Pick. 360.

(2) Doe v. Provoost, 4 John. 61.

(3) Throop v. Williams, 5 Conn. 98.

esse, subject to open and let in others, as they are born afterwards. Johnson v. Valentine 4 Sandf. 36.

(a) Devise to the testator's sons, for ten years, of the improvement and income of a farm. Then to his grandchildren, the sons and daughters of said sons, after the expiration of ten years, all the lands, &c., of which the improvement for ten years has been given to said sons, in fee. Held, this passed a vested remainder to those grandchildren living at the testator's death, subject to open and let in those born afterwards, whether before or after the termination of the particular estate; and that the share of a grandchild, living at the testator's decease, but who died during the particular estate, descended to his father as heir. Ballard v. Ballard, 18 Pick. 41.

Devise to the testator's son, A, for life, if unmarried; if married and having children, to him, his heirs, &c.; if he die unmarried, without children, equally among the children of the testator's sons, B, C and D. A survives the testator, and dies unmarried. B, C and D had children at the testator's death, and born afterwards, some of whom died unmarried, minors, during their father's lives, before A's death. Held, A took a life estate; the children living at the testator's death took, *per capita*, vested remainders, which opened, and let in after-born children; and the shares of the children of B, C and D, who died, living A, passed to their fathers. Weston v. Foster, 7 Met. 297.

Devise to A, and his wife B, and C, and their heirs forever, "to have and to hold to the said, &c., and to the survivor or survivors of them, and to the heirs of such survivor, as joint tenants, and not as tenants in common, in trust to receive the rents, issues, and profits thereof, and to pay the same to D during his natural life, and from and after the death of D, in further trust, to convey the same in fee to the lawful issue of the said D, living at his death." Held, the first born child of D, at its birth, took a vested estate in remainder, which opened to let in his other children as they were successively born, and such vested remainder became a fee-simple absolute, in the children living, on the death of their father. Williamson v. Berry, 8 How. (U. S.) 495.

A devised as follows: "If I should have no child by my wife B, I do then give the use

53. The same principle has been applied even in case of a deed. A, in consideration of a sum of money and of natural love, conveyed to B, and C, his wife, the daughter of A, and to the children and heirs of C and their heirs, &c., *habendum* to B and C, and to the children and heirs of C, for the proper use, &c., of B and C, for their joint lives and that of the survivor, and immediately from the decease of such survivor, to and for the use, &c., of the children and heirs of the body of C, in fee, as tenants in common, &c. C had three children at the execution of the deed; and subsequently several children and grandchildren were born. Held, a remainder vested in the three children, and, upon the birth of the others, opened and admitted them to their shares; and that the share of any child, who died living B or C, vested in the issue of such child.(1)

54. So, where an estate is limited by deed of uses to parents during their lives, and then to the use and behoof of such child or children as may be procreated between them, and to his, her and their heirs and assigns forever; there is a remainder in fee to the children, which ceases to be contingent upon the birth of the first, and opens to let in the after-born children. The general rule of law, founded on public policy, is, that limitations of this nature shall be construed to be vested, when and as soon as they may.(2)

55. Devise to trustees, in trust to permit A. to receive the rents for life; and, after her death, devise "to the heirs of the body of A, share and share alike," in fee. At the testator's death, A had one child, and others were born afterwards. Held, by the "heirs of the body" was meant *children*, and that the first child took a vested remainder in fee, which, upon the birth of others, opened and let them in.(3)

56. Devise to A for life, remainder to the "second, third, fourth, and all and every other the sons of A, (*except the first or eldest son,*) successively in tail male," remainder over. At the testator's death, A had no children. Held, the remainder was contingent till A had two sons, both living, and then became vested, and not subject to be divested by subsequent changes in the family of A.(4)

57. It follows, from the doctrine above laid down, that, where the particular estate terminates, before the time within which the condition may happen that is to defeat the remainder, the remainder shall still become a vested estate, liable to be defeated by the happening of the condition.

58. Devise to A for life, after his death to B, if he live to be of age. A dies, living B. B takes a vested estate, determinable on his dying under age.(5)

(1) *Wager v. Wager*, 1 S. & R. 374.

(2) *Carver v. Jackson*, 4 Pet. 90-1-2.

(3) *Right v. Creber*, 5 Barn. & Cress. 866.

(4) *Driver v. Frank*, 6 Price, 41.

(5) *Bromfield v. Crowder*, 1 B. & P. N. R. 313-4; (*Doe v. Moore*, 15 E. 601.)

of all my personal estate not mentioned to my daughter C, during her natural life, at her decease to be equally divided, share and share alike, amongst all her children, to them and their heirs; and if I should have no child by my wife, I do then give and bequeath the use of all my estate, both real and personal, to C during her life, and at her decease to be equally divided amongst her children, to them, &c.; if I should leave no children, and my daughter should die and leave no children, then, at the decease of my wife," over. Held, at the death of A, without other children, those of his daughter took a vested remainder, which opened to let in after-born children. *McGregor v. Toomer*, 2 Strobh. Eq. 51.

59. As a remainder will not be construed to be contingent, where it can be construed as vested ; so a vested remainder will not be divested, without a special provision, or a clear intention, to that effect.(1) It has been said, however, that the principle of favoring vested estates is an entirely *technical* rule.(2)

CHAPTER XLIII.

REMAINDER—VOID CONDITIONS.

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| 2. Illegality. | 16. Exception—enlargement of prior estate. |
| 4. Remoteness of probability. | 19. Devise—conditional limitation. |
| 7. Abridgment, &c., of preceding estate. | 23. Limitation by way of use. |
| 14. Or of preceding remainder. | |

1. THERE are several circumstances, pertaining to the condition upon which a contingent remainder is limited, that will render such limitation void.

2. The contingency must be a *lawful act*. The law will never adjudge a grant good, by reason of a possibility or expectation of a thing which is against law ; for it is "*potentia remotissima et vana*," which, by intendment of law, "*nunquam venit in actum*," besides being against public policy.(3)

3. Hence a limitation to a bastard is void. So a limitation to the children, legitimate or illegitimate, of A, by the grantor.(4)

4. The contingency must be not a *remote*, but a *near* or *common* possibility. And the ordinary legal distinction between these two kinds of possibility is, that the latter is single and depends on only one uncertain event, while the former is double, depending on more than one, which are not independent, but the one requiring the previous existence of the other, and yet not necessarily arising out of it.(5)

5. Thus, a limitation to the heirs of A, there being at the time no such person as A, is void, though A should be born and die during the particular estate ; because there is first the contingency, whether there would be any such person ; and second, whether he would die during the continuance of the prior estate.(6)

6. A limitation, during the vacation of a mayoralty, to A for life, remainder to the mayor and commonalty in fee, is good ; but a limitation to a corporation not in existence at the time, though afterwards created, is void. So, a limitation to the right heirs or the first born son of A, not naming them, is good ; but a limitation to B, the first born son of A, is void, because there is first the contingency of A's having a son, and second, of his being named B, which is a possibility upon a possibility.(7)

(1) *Doe v. Perryn*, 3 T. R. 494 ; *Driver v. Frank*, 3 M. & S. 25.

(2) 6 Price, 73.

(3) *Cholmley's case*, 2 Rep. 51 b.

(4) *Blodwell v. Edwards*, Cro. Eliz. 509.

(5) Co. Lit. 25 b ; 184 a ; 2 Rep. 51 a ; *Fearne*, 378.

(6) *Cholmley's case*, 2 Rep. 51 b.

(7) Co. Lit. 264 a ; 2 Rep. 51 a, b ; *Fearne*, 378.

7. A remainder cannot be validly limited upon an event, which will operate to abridge, defeat, or determine the preceding estate; but must be so limited, as to take effect only upon the natural expiration of such estate. This rule is founded on the principle heretofore stated, that the benefit of a condition can be reserved only to the grantor or his heirs, who shall take advantage of any breach by entry. The effect of such entry, is to revest the estate, avoiding not only the particular estate, but also the remainder limited upon it.(1)

8. Conveyance to A for life, on condition that, if B pay the grantor a certain sum, then the land shall immediately remain to him. The remainder is void.(2)

9. Conveyance to A and B, remainder over, after the death of A, to C in fee. This remainder is void, because repugnant to the rights of B as survivor of A, by virtue of the first limitation.(3)

10. Conveyance to A, a widow, for life, remainder to B, in fee, on condition that A continues a widow. This remainder is void, because an entry, upon A's marrying, to defeat her estate, would defeat the remainder also. But a grant to A *during widowhood*, remainder to B upon A's marriage, makes a *limitation*, which will take effect by its own operation without entry, and therefore the remainder is good.(4)

11. Where the words used may be construed to change a contingent remainder into a vested remainder, instead of converting a vested remainder into a vested estate, and thereby defeating a prior limitation; this construction will be given.

12. Limitations to A for life, remainder to B for life; if B die, living A, the lands to remain to C. Held, the last limitation was valid, having no effect to abridge A's estate.(5)

13. It is to be observed also, that there is a distinction between conditions which operate to abridge or defeat a prior vested estate, and those which merely provide in what manner estates shall go over, which, *by virtue of the prior limitation* itself, are made dependent upon a condition. Thus, if land be limited to A for twenty-one years, *if B shall so long live*, and, in case of B's death during the term, to C in fee; this is a good remainder; for the condition does not abridge an *absolute* estate for years once vested, but a contingency is annexed to the estate for years itself. It must be admitted, however, that the dividing line between conditions always allowed to be valid, and those which are said to be void, as abridging the prior estate, is extremely nice. The following remarks of Mr. Douglas, in a note to the case of *Goodtitle v. Billington*,(6) throw some light upon the subject. He remarks, that a limitation does not cease to be a remainder, because it may vest in possession on an event, which, from *the terms* or from *the legal nature of the original limitation*, shall defeat the particular estate before its *natural or regular* expiration. Every remainder, limited after an estate for life, may vest in possession before the death of the tenant for life, which is the term of the natural expiration of the particular estate; namely, in consequence of any forfeiture which he may commit. Some have been inclined to consider conditional limitations after particular estates,

(1) 1 Cruise, 276; 4 Kent, 249-263.

(2) Colthirst v. Bejushin, Plow. 29; Brent's case, 2 Leon. 16.

(3) Plow. 24.

(4) Hardy v. Seyer, Cro. Eliz. 414; Fearnle 363.

(5) Colthirst v. Bejushin, Plow. 23.

(6) Doug. 755.

as, for instance, after an estate for life, but limited to vest in possession on a contingency which may happen before the death of tenant for life, as not being remainders.(1) Thus, if an estate is given to A for life, provided that when C returns from Rome, it shall thenceforth be to the use of B in fee, it is said, this limitation over is not confined to the remnant, expectant on the particular estate before given to A, but may interfere with, and in part defeat and supersede that first estate, instead of awaiting its regular determination; and therefore it does not answer the definition of a remainder in Co. Lit. 143 a. But this seems too great a refinement. Every estate for life may, by the act of the tenant, be defeated and abridged, before its regular expiration, and thereby let in the remainder over in the manner above stated; and the only difference between such limitations and the others is, that in the others, the estate for life is not abridged by the act of the tenant for life, but by some extrinsic event, which happens also to be the contingency on which the limitation over depends. What difference more than what is merely verbal, can there be shown to be, between *an estate to A till B returns from Rome, then to remain over to C*; and *an estate to A*, provided that, when C returns from Rome, it shall thenceforth be to B. Under both forms of expression, A takes an estate for life, defeasible on the very same event. And Mr. Fearné himself adduces the former, as an example of contingent remainder. Nor can it make any difference, whether the prior estate is limited generally, or expressly for life; because, in the former case a life estate is *implied*.

14. A condition, the effect of which is to defeat or abridge one vested remainder and substitute another for it, is void.

15. A conveys to B for life, remainder to C for life, provided that if A should have a son who should reach a certain age, then C's estate should cease, and the land remain to such son. The latter remainder is void.(2)

16. It has been said, that the rule above stated does not apply to the case where, although in terms the condition on which the remainder shall take effect will abridge the particular preceding estate, yet in effect it will merely operate to *enlarge* such estate; in other words, where the remainder-man and the particular tenant are one and the same person. In such case, no injury arises to the preceding tenant, and no entry on the part of the grantor or his heirs is necessary to defeat the preceding estate, at the same time defeating the remainder also. The operation is the same as if the remainder were limited to take effect upon the determination of the prior estate by its own limitation. Thus, if a conveyance be made to A and B, remainder in fee to the survivor, this remainder is valid.(3)

17. In illustration of this exception to the general rule, the case of *Goodtitle v. Billington*(4) is cited. This was a devise to the testator's wife, A, and his daughter B, for their lives, and the life of the survivor, in equal proportions—but if B marry and have lawful issue, then, after the death of A, to B in fee. But if B die unmarried and without lawful issue, to A in fee. A and B both survived the testator, and B survived A, but was never married. It was contended, that the

(1) Fearné, 9-10.

(2) *Cogan v. Cogan*, Cro. Eliz. 360; Hall v. Tufts, 18 Pick. 455.

(3) Fearné, 396; 2 Cruise, 111.

(4) Doug. 753 and n.

limitation to B, in case she should marry and have issue, was not to wait till the natural expiration of the first estate for life to her, but was to take effect in her lifetime, as soon as the contingency on which it was limited should happen; and that it was therefore not a *contingent remainder*, but a *conditional limitation*; because, although the condition, on which a remainder is limited, may happen before the expiration of the particular estate, and a contingency be thereby changed into a vested remainder, as in the case of *Luddington v. Kime*, and other like cases, (p. 503,) yet a remainder cannot operate to abridge the duration of the prior estate, by *taking effect in possession* before the natural termination of such estate. But Buller, J., remarked, that if B had married and had issue, her life estate would not have merged, because it was not limited to take effect till the death of the wife; and Lord Mansfield, that here the first limitation was to two persons and the survivor, so that a preceding freehold will be in the survivor, and the estate over is limited on a contingency, upon which a remainder may depend. It is to B and her heirs if she should marry and have issue, and it must have taken effect after the death of the survivor. Upon these grounds, the limitation was held valid as a contingent remainder. There is nothing in the case which indicates that it turned at all upon the consideration, that the remainder was limited to B, the tenant for life, herself; and the note of the reporter shows that he regarded this circumstance as wholly immaterial.

18. To render valid a condition, which operates by way of enlarging the prior estate, it is not necessary that the respective estates be of such nature as to cause a merger. Thus, the prior estate may be *in tail*. So, also, the remainder may be limited after other intervening remainders. But the law requires, in order to effect such enlargement: 1. A subsisting particular estate for its foundation, which is neither at will, revocable, nor contingent. 2. That the particular estate remain in the original grantee or his representatives unalienated, for the sake of privity. 3. That the remainder take effect immediately on performance of the condition, without any other act or proceeding whatever. 4. The two estates must be created by one deed, or by several delivered at one time.(1)

19. By *devise*, a condition may be made to defeat or abridge the preceding particular estate, operating as a *limitation*, to vest the property in the remainder-man, without the necessity of any entry by the heirs of the devisor. This is termed a *conditional limitation*. And it will be effectual even against the heirs of the devisor, to whom the prior estate is limited.(2) It is said, that the expression and idea of a *conditional limitation* are adopted to avoid the necessity of an entry by the heir; and that, in strictness, all conditional limitations are either executory devises or contingent remainders.(3)(a)

20. Devise to A for life, after her death to B in fee; provided, that if the testator's wife should have a son, the land should remain to him in fee. Held, on the birth of the son, the remainder vested in him.(4)

(1) Lord Stafford's case, 8 Rep. 75.

(2) *Fearne*, 270, 407-9.

(3) *Doug.* 756, n. 1.

(4) *Dyer*, 33 a, 127 a; *Pells v. Brown*, Cro. Jac. 592; *Frye v. Porter*, 1 Cha. Ca. 138; 1 Mod. 300.

(a) A conditional limitation is where an estate is so expressly defined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens, upon which the estate is to fail. 1 Steph. 278.

21. More especially will this construction be given, where the estate which the condition operates to defeat is limited to the heir, who, therefore, if an entry were necessary, would have to enter upon himself; and where, consequently, the condition, as such, would be nugatory and void.

22. Devise to A, the heir, and another devise to B; and if A molest B, A shall lose his devise, and it shall go to B. A enters upon the land devised to B. Held, A's land thereby vested immediately in B.(1)

23. A limitation in remainder, by way of *use*, may also be valid, as a *future or shifting use*, though it operate to abridge or defeat the prior estate.(2)

CHAPTER XLIV.

REMAINDER—BY WHAT ESTATE SUPPORTED.

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| 1. Contingent freehold remainder must be limited on a freehold.
4. Contingent remainder for years.
5. Possession not necessary—a right of entry sufficient—to sustain a remainder. | 9. Both estates must be created by one instrument.
13. Estate of trustees sufficient to support remainder. |
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1. It has already been stated, (ch. 2,) that a freehold cannot be limited to commence *in futuro*. Hence it follows, that a freehold contingent remainder, in order to be valid, must be preceded by a vested freehold estate; in which case the whole interest conveyed passes out of the grantor immediately, in connection with the prior estate. But if this be less than freehold, a freehold interest cannot vest immediately anywhere, and the remainder is therefore void.(3)(a)

2. Devise to A for fifty years, if he live so long, remainder to the heirs male of his body. Held, the latter limitation was a void remainder.(4)

3. It has been seen, that where the particular estate is limited to A for years, remainder to B after the death of A; if the term is so long as to render it impossible or highly improbable that A should survive its expiration, the remainder will be deemed to be vested and not contingent. On the other hand, where the term is so short that the life may probably outlast it, the remainder is contingent, and, being limited upon an estate less than freehold, is void.(5)

4. The reason of the rule above stated is inapplicable, where a remainder is not freehold, but only for years. Hence, the rule itself is

(1) 2 Mod. 7.
 (2) 4 Kent, 249.
 (3) Fearne, 281.

(4) Goodright v. Cornish, 1 Salk. 226.
 (5) Fearne, 24-5.

(a) In New York, a contingent remainder may be limited on a term of years, provided the nature of the contingency is such, that the remainder must vest in interest, if ever, during the continuance, or upon the termination, of not more than two lives in being at the time of the creation of such remainder. *Butler v. Butler*, 3 Barb. Ch. 304.

stated not to apply to such a case.(1) In an early decision,(2) however, it was held, that a contingent remainder for years could not be limited upon a prior estate for years, not upon the ground above referred to, but because a lease for years operates *by way of contract*, and therefore the particular estate and the remainder estate operate as two distinct estates, grounded upon several contracts; whereas, in case of a contingent freehold remainder limited upon a preceding estate for life, the particular estate and the remainder is but as one estate in law, and is created by the livery.

5. Although a contingent freehold remainder requires a preceding freehold to support it, it is not necessary that the latter should remain actually vested in possession in the tenant. It is sufficient, if, being out of possession at the time when the remainder would vest, he still retains a right of entry. Otherwise, if he has a mere right of action; for this supposes that the title is uncertain, and depends upon the doubtful event of a suit, till the termination of which, another party has a title apparently good. Thus, where the tenant is disseized, as he may regain his estate by entry, the remainder is still good. But if the disseizor die, as the possession of his heirs can be defeated only by an action of the rightful owner, the remainder is destroyed. So, in England, where tenant in tail, with contingent remainders, makes a feoffment in fee, and dies; inasmuch as his issue are driven to an action to regain their estate, the remainders are defeated.(3)

6. The right of entry, to support a contingent remainder, must be a *present* right. It must also precede the happening of the contingency. If it commence at the same time as the latter, this is not sufficient.(4)

7. When once the right of entry is gone, the remainder is gone forever; and a new title of entry will not restore it. Thus, if there be tenant for life, with contingent remainder over, and the tenant for life make a feoffment upon condition, and the contingency happen before the condition is broken, or before entry for breach; the remainder is wholly destroyed, though the tenant for life should afterwards enter for condition broken, and regain his former estate.(5)

8. It would seem also, that, where the right of entry of the particular tenant is defeated by an *absolute* conveyance, the contingent remainder is destroyed, even though, *before* the contingency happens, the precedent estate is restored. Thus, in England, if A, a tenant in tail, with remainder to the right heirs of B, make a feoffment and die, and the issue of A recover the land by action before the death of B, so that, when the remainder would take effect by B's death, the prior estate is restored; still, it seems, the heirs of B cannot take.(6)

9. A remainder must be created by the same instrument which creates the particular estate.(7)

10. A woman being tenant for life, her husband devised the estate to the heirs of her body, if they reached fourteen years. Held, an executory devise, and not a contingent remainder.(8)

11. A was tenant for life by marriage settlement, remainder to his

(1) 2 Cruise, 288; Fearne, 285, 430.

(2) Corbet v. Stone, T. Raym. 150-1.

(3) Fearne, 286; Archer's case, 1 Rep.

66 b.

(4) Fearne, 289.

(5) 4 Kent, 254, 255.

(6) See Fearne, 464; 2 Cruise, 296.

(7) Fearne, 302.

(8) Snow v. Cutler, T. Raym. 162.

wife for life, remainder to his sons by that marriage in tail. A's father, the reversioner, by will reciting the settlement, devised the lands to A's sons conformably to it; and if A should die without such issue, to A's sons by any other wife in tail male; and if A should die *without issue*, to his grandchildren in fee. Held, even if the words *without issue* gave the heirs of the body of A an estate by implication, A would not take an estate tail; for nothing was devised to him, and the devise could not be tacked to his estate for life, so as to produce the effect of one entire limitation.(1)

12. A, being an owner in fee, and having previously limited a life estate to B, conveys to the use of himself for life, and after the death of B, and A her husband, to the use of C, son of A, for life. Held, inasmuch as these limitations were made by distinct deeds, C did not take a contingent remainder, as he otherwise would; but it was a conveyance to C of a subsisting remainder, or reversion expectant upon B's death, and the mention of this event merely indicated the time when C should have possession, and did not make a contingency.(2)

13. The legal estate of *trustees* is sufficient to support contingent remainders, without any preceding trust of freehold.(3)

CHAPTER XLV.

REMAINDER—AT WHAT TIME IT SHALL VEST.

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| <p>1. Remainder must vest during, or immediately upon termination of, the prior estate.</p> <p>5. Subsequent revival of prior estate does not render valid the remainder.</p> | <p>6. Remainder void, though a prior estate for years continues.</p> <p>9. Posthumous child.</p> <p>12. Vested remainder not affected by defeat of prior estate.</p> <p>13. Remainder may become void <i>in part</i>.</p> |
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1. THE principle has been already alluded to, that a remainder, in order to take effect at all, must vest either during the continuance, or immediately upon the expiration, of the preceding estate. Thus, if a conveyance be made to A for life, and, upon A's death and one day after remainder to B; the remainder is void. We have seen that this rule is founded in feudal principles, and in the inconveniences of an abeyance of the freehold. (Ch. 2.)

2. A remainder will be good, if it is to vest immediately upon the termination of the preceding estate.(4)

3. Limitation to A for the life of B, remainder to the heirs of the body of B. The remainder is good.(5)

4. Limitation to A and B for their joint lives, remainder to the heirs of him who shall first die. The remainder is valid.(6)

5. If the preceding estate is terminated at the time when the con-

(1) Fearn, 301-2; Moore v. Parker, 4 Mod. 316; Doe v. Fonnereau, Doug. 486.

(2) Weale v. Lower, Pollerfen, 66.

(3) Fearn, 303. See ch. 46.

(4) Fearn, 310; 4 Kent, 248.

(5) Co. Lit. 298 a.

(6) Ib. 378 b.

tingency happens, though it be afterwards restored, the remainder cannot take effect.(1)

6. The termination of a preceding *freehold*, before the remainder can vest, defeats the remainder, though a preceding estate for years still continue.

7. Conveyance to A for years, remainder to B in tail, remainder to the heirs of A. This gives a contingent remainder to A's heirs. Hence, if B die without issue before A, inasmuch as the preceding freehold estate terminates before the remainder can vest, the latter becomes void.(2)

8. A testator devises to his wife for life, remainder to A, his son, for ninety-nine years, if he should so long live; after the deaths of the wife and A, to the heirs of the body of A, with a power to A of appointing to all his children. The wife dies, leaving A. Held, the limitation to the children of A was thereby defeated.(3)

9. In conformity with the principle above stated, it was formerly held, that, under the limitation of a remainder to the children of the particular tenant, a *posthumous child* could not take, not being in existence at the termination of the preceding estate. But a decision to this effect, made by the Court of Common Pleas and the Court of King's Bench, (Lord Somers dissenting,) in the case of a will, was reversed by the House of Lords, all the judges dissenting. Afterwards, the Statute 14 Wm. III, c. 14, provided, that, where an estate is limited by any *settlement* to a child or children of any person, remainder over, (a) a posthumous child shall take.(4)

10. It is the established principle of American law, that a posthumous child shall take both by descent and express limitation, equally with others.(5) It was early held in New York,(6) that, although the Statute of William is not in force in that State, having been expressly repealed, yet, independently of this act, the English law is settled in favor of the claim of a posthumous child. On principles of natural justice, such child has the same rights with others. The civil law never makes a distinction, and the common law very rarely. Thus, a posthumous child takes a share under the statute of distributions, and by descent. So, the birth of such child, (with marriage,) revokes a will. Independent of the Statute of William, the decision of the House of Lords, which was the determination of the highest tribunal of the English law, must be considered as prescribing the rule at *common law*; and, inasmuch as the old technical rule, which requires a remainder to vest at the very instant when the preceding estate terminates, was founded on feudal reasons not now in force, this furnishes an additional ground for adhering to the later doctrine.

11. A posthumous child is entitled, under the statute, to the profits

(1) Fearn, 464.

(2) Jenk. 248; 2 Rolle's Abr. 418. See Festing v. Allen, 12 Mees. & W. 279.

(3) Doe v. Morgan, 3 T. R. 763.

(4) Thellusson v. Woodford, 4 Ves. 342; Reeve v. Long, Salk. 227; Burdet v. Hopegood, 1 P. Wms. 486.

(5) 4 Kent, 248.

(6) Stedfast v. Nicoll, 3 John. Cas. 18; Swift v. Duffield, 5 S. & R. 38; Marsellis v. Thalhimier, 2 Paige, 35; Dingley v. Dingley, 5 Mass. 535; Burke v. Wilder, 1 M'Cord's Ch. 551; Armistead v. Dangerfield, 3 Mun. 20; Aik. Dig. 94.

(a) But for a remainder, the children would take *by descent*. This, it seems, is the reason for limiting the provision to cases of remainder.

of the estate accruing since the father's death. The act provides, that he shall take as if born before the parent's death; and this distinguishes the case from that of an heir, who does not thus take. The same construction necessarily arises from the provision in the statute, that trustees, to preserve contingent remainders, shall not be necessary. The estate is held to vest in the person next entitled after the father's death, and upon the birth of a child to divest, *by relation*; as in the case of the enrolment of a deed, which *relates* to the making. Hence the child may either maintain ejectment, laying the demise from the father's death, which the defendant will be estopped to deny; or bring a bill in equity for an account, as against a trustee.(1)

12. A vested remainder is not necessarily avoided by the defeating of the preceding estate. Thus, A conveys to B for life; and afterwards, having disseized B, makes another conveyance to C for the life of B, remainder to D. B enters and avoids the estate of C. D's remainder is not thereby defeated. So, where the preceding estate is limited to an infant, and, on coming of age, he disaffirms it; a remainder limited after such estate is still good.(2)

13. Where the preceding estate is limited to several persons, if a part of them die before the contingency happens, the remainder will be in part defeated. On the other hand, where the remainder is limited to persons not *in esse*, if some only are born during the particular estate, the remainder as to the rest will be void. Thus, in case of limitation for life to A, remainder to the heirs of B and C; if B dies before A, and C survives A, the heirs of B shall take; but not those of C. This principle, however, it seems, is not applicable to devises and uses.(3)

CHAPTER XLVI.

REMAINDER. REMAINDER BY WAY OF USE.

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| <p>2. Since the statute of uses, a freehold trust necessary to support contingent remainders.</p> <p>4. Preceding trust must continue till the contingency happens.</p> | <p>6. Resulting trusts sufficient to support remainders.</p> <p>7. Contingent uses arise out of seizin of trustees—discussions upon this subject—Chudleigh's case, &c.</p> <p>14. Springing and shifting uses.</p> |
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1. REMAINDERS may be limited by way of *use*, and are indeed more often limited in this mode than in any other.

2. With respect to remainders by way of use, a very material alteration in the law was effected by the statute of uses. Before this statute, if a freehold legal estate was vested in trustees, although the preceding or particular trust estate were less than freehold, the legal freehold of the trustees was sufficient to support contingent remainders. Thus, a limitation would be good to trustees and their heirs to the use of A for years, remainder to the right heirs of B. But after the statute of uses,

(1) Basset v. Basset, 8 Vin. Abr. 87; 3 Atk. 203.

(2) Co. Lit. 298 a; 4 Kent, 234-5.

(3) Gilb Ten. 252; Fearn, 310; Ib. 312; Co. Lit. 9 a; Matthews v. Temple, Comb. 467; 2 Cruise, 302.

the effect of which is immediately to divest the estate of the trustee, such a limitation as to the heirs of B would be void.

3. A conveys by lease and release to trustees and their heirs, to the use of himself for years, remainder to the use of trustees for years, remainder to his heirs male. Held, the last remainder was void.(1)

4. Upon the same principle, a freehold estate in trustees is insufficient to support a contingent remainder, where the particular estate in trust terminates before the contingency happens.

5. A, and B, his wife, levy a fine of B's land to the use of the heirs of the body of A on B begotten, remainder to the use of A's right heirs. They had issue, which died; then B died, then A. Held, the limitation to A's heirs was void; that, inasmuch as the land belonged to B, no use resulted to A; and though B might have a resulting freehold use, which would support the remainder to the issue, yet, as she died living A, such freehold would not support the remainder to A's heirs, since he could have no heirs during his life.(2)

6. But where a freehold estate *results* to the party who makes a limitation to uses, it seems to be as effectual to support remainders, as if expressly limited to a third person.(3)

7. On the other hand, it seems that a prior freehold limitation of a use is not sufficient to sustain a subsequent contingent use; upon the principle, that *a use cannot arise out of a use*. Thus, although, as has been seen, a limitation to A for life, remainder to the heirs of B, creates a valid contingent remainder, supported by A's life estate; yet, if the limitation were made to A in fee, to the use of B for life, remainder to the use of the heirs of C; such remainder would not be supported by B's life estate, but must rest upon the estate of the trustee.

8. Upon the question, in what manner future contingent uses are supported and carried into effect by the estate of the trustees, Lord Hardwicke remarks, in *Garth v. Cotton*, (Dickens, 183,) that "the judges entered into very refined and speculative reasonings, some of which (I speak it with reverence) are not very easy to comprehend." These reasonings, in the connection in which they were used, had a practical bearing; because they involved the question, as to the power of trustees to *destroy* contingent remainders—a subject which will be considered in the next chapter. But, supposing no act to have been done by the trustees to destroy the remainders, their validity, as having a sufficient preceding estate to support them, does not appear to have been questioned.

9. Chancellor Kent gives substantially the following account of the controversy referred to.(4)

10. Before the statute of uses, the feoffees to uses were seized of the legal estate; and, if disseized, no use could be executed, until by entry they had regained their seizin, for the statute only executed those uses which had a seizin to support them. After the statute of uses, it was difficult to ascertain by what estate contingent uses were to be supported. Some held, that the estate was vested in the first *cestui que use*, subject to the uses which should be executed out of his seizin;

(1) *Adams v. Savage*, Salk. 679.

(2) *Davies v. Speed*; Show. Parl. C. 104; Salk. 675 n.

(3) *Penkay v. Hurrell*, 2 Freem. 258; 2 Cruise, 308.

(4) 4 Kent, 237–45. (See *Garth v. Cotton*, Dickens, 183; *Hales v. Risley*, Pollexfen, 385.)

but this opinion was untenable, for a use could not arise out of a use. It was again held, the seizin to serve contingent uses was *in nubibus* or *in custodia legis*, or had no substantial residence anywhere. Others were of opinion, that so much of the inheritance as was limited to the contingent uses, remained actually vested in the feoffees until the uses arose. But the prevailing doctrine was, that there remained no actual estate, and only a possibility of seizin, or *scintilla juris*, in the feoffees, or releasees to uses, to serve the contingent uses as they arose. This doctrine was first started in Brent's case,(1) in 16 Eliz. In Manning and Andrews' case,(2) the judges were equally unsettled in their notions respecting the operation of the statute on contingent uses. Some of them thought a sufficient seizin remained in the trustees to support the future uses; while others held, that no seizin remained in them, but that the statute drew the confidence out of them, and *reposed it upon the land*, which rendered the use to every person entitled in his due season. In a few years, *Chudleigh's case*(3) arose, which is the leading case upon this subject. A minority of the judges here held, that the notion of a *scintilla* remaining in the trustees was as imaginary as the Utopia of Sir Thomas More; that their original seizin was sufficient to serve the future as well as present uses; and that the future uses were *in the preservation of the law*, till they became vested. But a majority of the judges held, that the statute could not execute any uses that were not *in esse*; that not a mere *scintilla* remained in the feoffees, but a sufficient estate to serve the future uses, unless their possession was disturbed, and their right of entry lost. From these several cases the doctrine has been deduced, that future uses cannot be executed without a remaining right or estate in the feoffee. The estate in the land is supposed to be transferred to the *person* who has the estate in the use, and not to the *use*; and it is inferred, that no use can become a legal interest, until there shall be a person in whom the estate may vest.

11. But this view of the subject has been opposed by very distinguished writers upon Real Property,—Mr. Fearne and Mr. Sugden. The latter takes the ground, that the doctrine of a *scintilla juris* was never judicially decided, but has been deduced from extra-judicial dicta; that the statute draws the whole estate in the land out of the feoffees, and the prior estates take effect as legal estates, and the contingent uses take effect, as they arise, by force of the original seizin of the feoffees. If there are any vested remainders, they take effect, subject to open and let in contingent estates, when the contingency occurs. Thus, in a conveyance in fee to A, to the use of B for life, remainder to his unborn sons in tail, remainder to A in fee; the statute immediately draws the whole estate out of A, vesting it in B and C respectively, which exhausts A's entire seizin. The estate to the sons of B is no estate, till they are born; and the statute did not intend to execute contingent uses, but the contingent estates are supported, by holding that the interests of B and C are vested only *sub modo*, with a liability to open. A retains no *scintilla*, but the contingent uses, when they arise, take effect, *by relation*, out of the original seizin.

12. Mr. Preston is of opinion, that limitations of contingent uses give

(1) Dyer, 340 a; Brent's case, 2 Leon. 14.

(2) Manning, &c., 1 Leon. 256.

(3) 1 Co. 120; Dillam v. Frain, 1 And. 309.

(The latter report said to be indisputably the best.) 4 Kent, 239 n.

contingent interests, and that the estate may be executed *to the use*, though there is no person in whom it can vest. The statute passes the estate of the feoffees in the land to the estates and interests in the use, and apportiones the former estate accordingly. No *scintilla*, or the most remote possibility of seizin, remains with the trustees.

13. Mr. Cornish asserts, that the doctrine of *scintilla juris* rests on paramount authority.

14. Remainders limited by way of use may be vested in favor of one person, and afterwards, on the birth of another person, or the happening of some other event, divested wholly or in part, and vested in new parties. This point has been already adverted to under the title of Uses and Trusts. Some of the cases, which will be mentioned in illustration of the principle, are not strictly instances of *remainder*, but they are not distinguishable in reason from those which are.

15. In the first place, where a remainder is limited by way of use to several persons, or to a class of persons, who become capable of taking at different times, though it vests wholly in one, it will become divested in part, and let in the others to a proportional share. In this respect, however, uses seem not to differ from legal estates created by devise.

16. Limitation to the use of A for life, remainder to the use of B, his wife, for life, remainder to all their issue female. Upon the birth of a daughter, the remainder vests in her; but, upon the birth of a second daughter, the latter also shall take a share of the estate.(1) (See p. 528.)

17. Another class of future uses are those limited to arise *in futuro*, without any preceding estate to support them; or uses which change from one person to another by matter *ex post facto*, though the first use were limited in fee. These, of course, are not strictly remainders.

18. Limitation to the use of one, and of such wife as he shall afterwards marry. Upon his marriage, the wife takes with the husband.(2)

19. A, in consideration of love and affection to B, his brother, and of £100 paid by him, granted, released and confirmed to B, then in possession as lessee for a year, in tail, after the death of A. Held, good as a covenant to stand seized, though void as a lease and release, and that the estate vested in B after A's death, as a springing use.(3)

20. Where the conveyance to uses operates without any change of possession, the springing use arises out of the seizin of the covenantor; where there is a change of possession, out of that of the first grantee to uses.(4)

21. The class of uses already referred to are called *springing* uses. A few cases will be mentioned of *shifting* or *secondary* uses; which are defined, as uses limited so as to change by matter *ex post facto*.(5) The distinction, however, between the different classes of future contingent uses, seems to be very nice, and not always accurately observed by

(1) *Mathews v. Temple*, Comb. 467; *Sussex v. Temple*, 1 Ld. Raym. 311; *Doe v. Martin*, 4 T. R. 39, acc.

(2) *Mutton's case*, Dyer, 274 b; *Woodliff v. Drury*, Cro. Eliz. 439.

(3) *Roe v. Tranmer*, 2 Wils. 75.

(4) 2 Cruise, 311.

(5) 2 Cruise, 311.

writers of authority. Chancellor Kent says, springing uses arise on a future event, where no preceding estate is limited; while shifting or secondary uses take effect in derogation of some other estate.(1)

22. A conveys to the use of B and his heirs, till C shall pay B £40, then to the use of C and his heirs. Upon payment of this sum, held, C should have the estate. The only doubt was, whether the right of entry belonged to C himself, or to the feoffee to uses.(2)

23. So A may convey to trustees and their heirs to their own use; but, unless they pay a certain sum in a certain time, to the use of A, with remainders over. Upon non-payment, the estate vests in A, and the remainders take effect.(3)

24. Conveyance of two estates, S and T; of the former to the use of A in fee, and of the latter to the use of B in fee, until A should be evicted from S by B's wife; then T to the use of A, till his loss should be satisfied from the profits of T. Held good.(4)

25. A, tenant for life, and B, the reversioner, covenant to levy a fine to the use of A in fee, unless B pay A 10s. at a certain time; if he should pay it, to the use of A for life, remainder to B in fee. A has a fee till payment of the money.(5)

26. A and B, sisters, in consideration of £4,000 paid to A, and of a marriage proposed between B and C, convey to trustees in fee, to the use of C for life, remainder to B for life, remainder to the children in tail, remainder to C in fee; but if both B and C should die leaving no issue, and the heirs of B should, within twelve months from the death of the survivor of them, pay the heirs or assigns of C £4,000, the remainder in fee to C and his heirs to cease, and the premises to remain to the use of the heirs of B. Held, a good shifting use.(6)

27. Where there is any preceding estate to support a future use, it will be construed as a contingent remainder, and not a springing or shifting use.(7)

28. The remark already made (s. 18) as to the seizin, out of which a springing use arises, is equally applicable to shifting uses.(8)

29. But such use cannot arise out of the seizin of the prior *cestui que use*. Conveyance to A to the use of B in fee; and if C pay B a certain sum, B to stand seized to the use of C in fee. This is a void limitation as to C (9)

(1) 4 Kent, 296-7.

(2) Bro. Abr. *Feoffment al Use*, pl. 30.

(3) Harwel v. Lucas, Moo. 99; Brice-bridge's case, 1 Leo. 264.

(4) Kent v. Steward, 2 Rolle's Abr. 792; Cro. Car. 158.

(5) Spring v. Caesar, 1 Rolle's Abr. 413.

(6) Lloyd v. Carew, Show. Parl. Cas. 137.

(7) 2 Cruise, 315.

(8) Ibid.

(9) Chudleigh's case, 1 Rep. 137, a.

CHAPTER XLVII.

REMAINDER—HOW DEFEATED.

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|---|--|--|------------------------------|
| <ol style="list-style-type: none"> 1. By destroying the particular estate. 2. Whether by a mere <i>change</i> of estate. 3. Where the particular estate and a subsequent remainder unite, whether contingent remainders destroyed. | <table border="0"> <tr> <td style="vertical-align: top;"> <ol style="list-style-type: none"> 10. Remainder by way of use, how destroyed; whether actual seizin necessary, &c. 19. American opinions and cases. </td> <td style="vertical-align: top; padding-left: 20px;"> <p>Distinction of cases.</p> </td> </tr> </table> | <ol style="list-style-type: none"> 10. Remainder by way of use, how destroyed; whether actual seizin necessary, &c. 19. American opinions and cases. | <p>Distinction of cases.</p> |
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1. INASMUCH as a remainder must take effect either before or immediately upon the determination of the preceding estate; it follows that any act, which destroys such estate before the contingency happens, will destroy the remainder also. Hence, in England, where a tenant in tail or tenant for life, with remainders over, makes a feoffment, or suffers a fine and recovery, or a recovery without fine or feoffment; as by these acts his estate is divested, the remainders also become void. The same effect follows from a surrender, to the owner of the reversion or a vested remainder, by tenant for life; or a conveyance to him of the reversion or a vested remainder, whereby his life estate is extinguished. But not from any such conveyance by tenant for life, as will pass only the estate which he has; such as a bargain and sale, or lease and release. It has already been stated (ch. 4) as the general rule of American law, that no conveyance by a particular tenant will be effectual to pass more than his own estate. Hence, it seems, such conveyance will not in any case operate to defeat contingent remainders. But perhaps the English law as to the effect of a *surrender* remains unchanged.(1)

2. How far any mere *change* in the preceding estate will operate to defeat contingent remainders, seems to be an unsettled point. Mr. Fearne supposes that the change must be one of *quantity*, not merely of *quality*. Thus, where the preceding estate was limited to two persons, a release from one to the other was held not to destroy the remainders. But, on the other hand, where the particular estate descended to parceners, who made partition, it was held, that the remainders were defeated.(2)

3. The alterations in the estate preceding a contingent remainder, above referred to, are those made by the act of the particular tenant himself. Such changes may also arise from the acts of third persons; and, upon this point, the following distinctions have been made.

4. Where the same conveyance, which creates the particular estate and the contingent remainder, creates also the subsequent vested remainder; or where the reversion in fee *descends*, from a testator who

(1) Chudleigh's case, 1 Rep. 135 b; Co. Lit. 252 a; Archer's case, 1 Rep. 66; Lloyd v. Brooking, 1 Ventr. 188; Hales v. Risley. Pollexfen, 389; Thompson v. Leach, 2 Salk. 427; Fearne, 468, 323; Purefoy v. Rogers, 2 Saun. 380; Reeve v. Long, 4 Mod. 284; Blossie v. Clanmorris, 3 Bligh, 62; Doe v. Gatacre, 5 Bing. N. 609; 7 Scott, 807; Hole v. Escott, 2 Keen, 444.

(2) 2 Cruise, 319; Fearne, 337; 4 Leon. 237; Harrison v. Belsey, T. Ray. 413; Purefoy v. Rogers, 2 Saun. 386. Partition between tenants in common determines an estate at will held under one of them. Big. Dig. 480.

limits such particular estate and contingent remainder, upon the particular tenant, there will be no merger, effectual to destroy the contingent remainder; but the two estates between which it is interposed will unite *sub modo*, and, when the contingency happens, will open or separate to let in the contingent remainder. Any other construction would manifestly defeat the intention of the party limiting the estates, both in regard to the particular estate, which would merge, and in regard to the contingent remainder, which would be destroyed, by the very act which created them.(1)

5. Limitation to A, and B his wife, for their lives, after their decease to their first issue male, &c., and for want of such issue, to the heirs male of the body of A. A and B take an estate tail, subject, however, to the condition, that upon the birth of issue male the estate shall open, and leave an estate for life in A and B, remainder to their issue in tail male, remainder to the heirs of the husband.(2)

6. Devise to A, the testator's eldest son, for life; if he should die without issue living at his death, then to B in fee; but if he should leave such issue, then to A's right heirs forever. Held, although the reversion in fee descended upon A, he was still tenant for life, with contingent remainders, which were not defeated. Nor could A's life estate merge in the remainder to his heirs, the latter being contingent.(3)

7. But where the particular tenant, upon whose estate contingent remainders are limited, acquires a remainder or reversion in fee, not by a limitation or a descent concurrent in time with the creation of his prior estate, but by a subsequent descent, though acting through the party who limited the estates; as the same reason does not operate to prevent a merger, which has already been stated in relation to the former case, such merger will take place and the contingent remainders be destroyed.

8. A was tenant for life, remainder to B, his son, for life, remainder to B's first son in tail, remainder to the heirs of the body of A. A dies before B has a son, and the estate tail descends upon B. The remainder to B's son is destroyed.(4)

9. Conveyance to the use of A and his wife for life, remainder to the use of B, the son of A, for life, remainder to B's sons in tail, &c., remainder to A in fee. A and his wife die, leaving B. Held, B's life estate was merged in the fee which descended upon him, and the remainders destroyed.(5)

10. With respect to contingent remainders, limited *by way of use*, how far they are liable to be destroyed by acts affecting the estates upon which they depend, is a point that has already been somewhat considered. The celebrated controversy, noticed in the last chapter, as to the *scintilla juris*, *Chudleigh's case*, &c., derives all or most of its *practical* importance from its connection with the question whether trustees have power to destroy contingent remainders. Upon this subject, the decided cases, as well as the statements and opinions of elementary writers, are exceedingly confused and contradictory; and there is great

(1) *Fearne*, 503.

(2) *Bowles' case*, 11 Rep. 79; *Archer's case*, 1 Rep. 66; *Hales v. Risley*, Pollexfen, 389.

Cruise, 321; 2 Bos. & P. 297.

(4) *Kent v. Harpool*, 1 Vent. 306; *T. Jones*, 76.

(5) *Hooker v. Hooker*, Rep. Temp. Hardw. 13; (*Duncomb v. Duncomb*, 3 Lev. 427.)

(3) *Plunket v. Holmes*, T. Raym. 28; 2

reason for the remark of Mr. Preston, that the doctrine requires to be settled by judicial decision.(1)

11. With respect to contingent remainders *by way of use*, Mr. Cruise makes a distinction(a) between those which arise *without any change of possession*, that is, by a *covenant to stand seized to uses*, or *bargain and sale*; and those created by a *change of possession*, or by a *feoffment or conveyance to uses*.(2) In the former case he says, that *actual seizin* is necessary to give effect to the remainders, and not a mere *right of entry*, as in case of legal estates; because the use arises out of the estate of the covenantor, and this, according to the language of the statute, must be a *seizin*. Hence, any act or transfer of the covenantor, by which his seizin is divested, defeats the subsequent contingent remainders.

12. A covenants to stand seized to the use of himself for life, remainder to the use of B for life, remainder to the use of C for life, remainder to the use of the first son of C in tail male, with the reversion in fee to A. A grants the reversion to D, without consideration, and reciting the uses; and afterwards makes a feoffment of the land. After A's death, B enters, and dies seized, C having died previously. It was held, that the contingent remainder to the son of C was not defeated by the grant and feoffment of A; that D took the reversion charged with the uses, and the feoffment could not defeat D's right of entry; and that the entry of B operated to revest D's estate, and restore a seizin which would support the contingent remainder. If A had made the feoffment before granting the reversion, as the law would not allow him to re-enter against his own deed, the entry of B would not enure to his benefit, and the contingent remainders would therefore be destroyed.(3)(b)

13. Mr. Cruise proceeds to remark,(4) that, where a limitation to uses is made by some conveyance which operates by a *change of possession*, the doctrine established in *Chudleigh's case* would lead to the conclusion, that any act which divests and turns to a right the particular, preceding estate, destroys the contingent uses, unless either the particular tenant or the feoffee to uses re-enters; for otherwise no possibility of entry or "*scintilla juris*," remains to constitute the seizin, out of which uses must arise. The doctrine of that case is, that the grantee to uses is considered the *donor* of all the contingent estates when they vest. This principle, however, has been strongly contested by Lord Ch. J. Pollexfen,(5) upon the grounds that it would place a dangerous power in the hands of those who are seized to uses, who are said to be generally "strangers and mean persons," and greatly endanger the security of titles; by enabling grantees to uses to deprive themselves, by their own unlawful acts, of a right of entry, and thus defeat all contingent estates limited by way of use. The same judge, and also Mr. Fearne,(6) urge the still stronger consideration, in opposition to this principle, that

(1) Prest. on Est. 184.

(2) 2 Cruise, 324-5.

(3) *Wegg v. Villers*, 2 Rolle's Abr. 796; *Lloyd v. Brooking*, 1 Vent. 188.

(4) 2 Cruise, 325.

(5) *Hales v. Risley*, Pollexfen, 383; Treat. of Eq. B. 2, ch. 6, sec. 1.

(6) Fearne, 300.

(a) I have been unable to find any case where this distinction is expressly recognized.

(b) These limitations and subsequent transfers were made by Lord Coke, for the purpose of enabling him to preserve or destroy the contingent remainder at his discretion, by producing the grant and destroying the feoffment, or the converse. But, it is said, he died before executing his plan.

it is in direct contradiction to the words and uniform construction of the statute of uses; according to which, the grantee to uses is a mere instrument or *conduit pipe*, all his estate being immediately taken and transferred out of him, as if never vested. The *cestui que use* is seized, "to all intents, constructions and purposes in the law,"¹ as a grantee to uses would be before the statute; and one of the legal qualities of a legal estate is, that where a particular tenant, though deprived of his estate, has left in him a *right of entry*, this is sufficient to support subsequent contingent remainders. Hence, where such right remains in the *cestui*, no divesting of the estate from the trustees would seem sufficient to defeat such remainders.

14. The doctrine that, where a limitation to uses operates by a *change of possession*, (although no peculiar effect seems to have been attributed to this circumstance,) contingent remainders may be defeated by the act of the trustees in transferring the estate, derives its great support from *Chudleigh's case*,⁽¹⁾ which has been already several times referred to. In this case, A enfeoffed several persons to the use of them and their heirs, during the life of B, remainder to the use of the first and other sons of B in tail. Before B had a son, the trustees conveyed to B in fee, without consideration, and with notice of the uses.^(a) B afterwards had a son. Held, the remainder to this son was destroyed by the feoffment of the trustees, which operated as a forfeiture of the particular estate.

15. Many other cases are to be found in the books,⁽²⁾ which settle substantially the same principle. These are generally cases of a *feoffment* made by the trustee or by the particular tenant, whereby the particular estate is defeated. The same principle is applied to *springing* or *shifting* uses, which are not strictly remainders, though hardly distinguishable from them. Thus, a devise of the land, from which such uses are to arise, will defeat them; though, it seems, a mere devise of portions from it will not.

16. A levied a fine to the use of himself and his heirs, till a marriage had between B, his son, and C, then to the use of A for life, remainder to B in tail, &c. The marriage took place, A, however, having previously devised portions from the land to his daughters, and died. Held, a devise of the land itself would have defeated the future use; but it was doubted whether a mere devise of portions from it had this effect.⁽³⁾

17. Whether a mere lease for years, or the grant of a rent from the land, will wholly defeat the future use, seems to be a doubtful point, though the weight of authority is that it will not. But such transfer has been held to bind the use when it arises, *pro tanto*. Even this point, however, was disputed by Fenner, J., in *Wood v. Reignold*,⁽⁴⁾ who said, "the same freehold remains, and the use is annexed to the lease, and there-

(1) 1 Rep. 120; Dillon v. Fraine, Poph. case, Dyer, 340 a; Brent's case, 2 Leon. 14.
70.

(3) 2 Cruise, 328.

(2) Biggot v. Smyth, Cro. Car. 102; Brent's (4) Wood v. Reignold, Cro. Eliz. 854.

(a) In another case, (*Wood v. Reignold*, Cro. Eliz. 764,) though recognizing the general doctrine, that contingent uses may be defeated by the feoffee, upon the grounds, that the use ought to arise out of the estate which the covenantor had at the time of the covenant, and at the statute executes only vested uses or those *in esse*, leaving contingent uses as at common law; it is intimated that, according to the very reason of the rule last named, a party taking the land, without consideration or with notice, is chargeable with the contingent use when it arises.

fore the lease shall not disturb nor bind it." So, in *Bould v. Winston*,⁽¹⁾ where the party covenanting to stand seized, remained seized of the reversion in fee, and afterwards made a long lease to defeat the contingent remainder; it was held, that the lease should take effect out of the reversion, and not in such way as to defeat the remainder. In another case,⁽²⁾ a lease was held wholly to defeat the contingent use.

18. The cases in which a conveyance made by a feoffee or covenantor to contingent uses, has been held to defeat such uses, are said to be very unsatisfactory, and to be contradicted by others of equal authority, one of which was decided by the House of Lords.⁽³⁾

19. Chancellor Kent says,⁽⁴⁾ in equity, the tenant for life of a trust cannot, even by a fine, destroy the contingent remainder dependent thereon; and it will only operate on the estate he can lawfully grant. A court of equity does not countenance the destruction of contingent remainders. So, any conveyance of a thing *lying in grant* does not bar a contingent remainder; nor a conveyance deriving effect from the statute of uses; because neither of these passes anything more than the grantor has a legal title to. There are also some acts of a tenant for life, which, though amounting to a forfeiture, and authorizing an entry by a subsequent vested remainder-man, do not destroy the contingent remainder, unless such entry or other equivalent act be made or done. The same author also remarks,⁽⁵⁾ that *Chudleigh's case* is a strong authority to prove that a feoffment without consideration, and even with notice in the feoffee of the trust, will destroy a contingent remainder. It is a doctrine flagrantly unjust, and repugnant to every settled principle in equity, as now understood.

20. Very few cases have occurred in the United States, in which the question, as to the power of the particular tenant to defeat contingent remainders, has arisen. In an early case in Pennsylvania,⁽⁶⁾ a tenant for life, with contingent remainders depending upon his estate, had suffered a common recovery; and the judges were divided in opinion as to the effect of this proceeding upon the remainders. Ch. J. Tilghman, who was of opinion that the remainders were destroyed, remarks as follows:—The great Hamilton estate, near Philadelphia, was tied up, by the late Gov. Hamilton's will, to a number of life estates, with contingent remainders depending on them; but he omitted to appoint trustees for preserving the contingent remainders. Under the direction of very able counsel, common recoveries were suffered, for the purpose of destroying the contingent remainders, and many estates were sold for valuable and full considerations, on the faith of the common law, which had never been altered, either by act of assembly or judicial decision. The objection, that the law of forfeiture is founded on feudal principles, is of no weight. Those principles are so interwoven with every part of our system of jurisprudence, that to attempt to eradicate them would be to destroy the whole. They are massy stones worked into the foundation of our legal edifice. Most of the inconveniences attending them have been removed, and the few

(1) *Bould v. Winston*, Cro. Jac. 168; Noy, 122.

(2) *Barton's case*, Moo. 743.

(3) 2 Cruise, 332; *Smith v. Warren*, Cro. Eliz. 688.

(4) 4 Kent, 253–4.

(5) 4 Kent, 252, n.

(6) *Dunwoodie v. Reed*, 3 S. & R. 447–8.

that remain may easily be removed, by acts of the legislature. In that way, the future may be provided for, without injuring the past. But should this court undertake to shake a principle which has become a rule of property, the mischief would be incalculable. I doubt very much, whether it be not the policy of this country to facilitate the destruction of contingent remainders, (as well as of estates tail.) They tend to prevent the free enjoyment and alienation of land; whereas, the spirit of our constitution and laws has a direct contrary tendency. They tend to throw large estates into one hand; but the object of our laws is to divide them among many.

21. On the other hand, in the same case, (1) Gibson, J., says, entailment and contingent remainders stand on different ground. Indefinite restriction on alienation is contrary to the genius of our laws; but restriction to a reasonable extent is tolerated. Land ought not to be transmissible like chattels. Convenience, and the state of society in this country, begin to require a more complex settlement and disposition of real property than has hitherto prevailed. This, it is said, may be effected, and these contingent interests secured, by interposing trustees to preserve contingent remainders. But this is a form of limitation rarely thought of, especially where the disposition of property is the last act of a man's life.

22. In the case of *Carver v. Jackson*, (2) it seems to have been taken for granted, that the confiscation of a preceding estate for life will defeat contingent remainders depending upon it. And in South Carolina a feoffment, with livery of seizin, by tenant for life, bars contingent remainders. (3)(a)

(1) *Dunwoodie v. Reed*, 3. S & R. 457.
(2) 4 Pet. 1.

(3) *Dehon v. Redfern*, Dudl. Eq. 115. See
Brewer v. Hardy, 22 Pick. 376.

(a) In Virginia, it is said, the law on this subject has been essentially changed by statute, and the policy of the legislature has been, to place contingent remainders beyond the reach of accident to the particular estate. Trustees to preserve contingent remainders are no longer in much use. 1 Lom. 457, 463. In Massachusetts, no expectant estates shall be barred (except in case of entailments) by any act of the immediate owner, or any destruction of his estate by disseizin, forfeiture, surrender or merger. Rev. St. 405. Devise to A, for life, remainder to B and C to preserve contingent remainders, remainder to the issue of A in tail male. If A renounce or disclaim the life estate, B's and C's remainders take effect, and preserve the contingent remainder. *Webster v. Gilman*, 1 Story, 499.

CHAPTER XLVIII.

REMAINDER. TRUSTEES TO PRESERVE CONTINGENT REMAINDERS.

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| <ol style="list-style-type: none"> 1. Origin and history. 3. Trustees take <i>an estate</i>. 4. May destroy the remainders; but it is a breach of trust. 5. Exceptions—remote relations may be barred. 7. If remainder-men join; no breach of trust. | <ol style="list-style-type: none"> 8. Chancery sometimes directs a conveyance in favor of mortgagees, creditors, &c. 12. But generally will not interfere. 16. Trustees cannot safely defeat the remainders. 17. Power and duty in case of waste. |
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1. FROM the rule, that the alienation or forfeiture of a preceding estate for life would defeat contingent remainders limited upon such estate, the practice arose, of limiting an intermediate estate to trustees, to take effect upon the termination of the life estate before the death of the tenant, and continue during his life. The invention is ascribed to Sir Orlando Bridgeman and Sir Geoffrey Palmer, who, during the civil wars, devoted themselves to the business of conveyancing. Such trustees are called trustees to preserve contingent remainders.(1)

2. Lord Hardwicke remarks, that the practice in question arose from the decision of two great cases, reported by Lord Coke, viz: *Chudleigh's case* and *Archers' case*, though it was several years after those cases before that light was struck out; and it was not brought into general use till the time of the usurpation, when probably the providing against forfeitures for what was then called treason and delinquency, was an additional motive to it.(2)

3. It was formerly questioned, whether trustees to preserve remainders, after a prior limitation for life, took any *estate* in the land, or merely a right of entry upon the forfeiture or surrender of the tenant for life; by reason that the limitation, being only during his life, could not commence or take effect after his death. But it was settled in *Cholmondeley's case*, and *Duncomb v. Duncomb*, that they take a vested remainder. And this is *a fortiori* the case, where the prior estate is only for years, because the first freehold is then in the trustees. It has also been argued, that the interposition of trustees to preserve, &c., was not intended to alter the legal rights of a preceding tenant for life, or of the ultimate remainder-man in fee. But the court held, that such interposition was designed to abridge the legal rights of both these parties; the right of the former to destroy the contingent use of the inheritance, while it remains contingent; and the right of the latter to destroy it, by accepting a surrender.(3)

4. A trustee to preserve contingent remainders has the power to defeat them, by joining in a conveyance with the preceding tenant. Such trustee has been called *honorary*, as signifying a discretionary power in this respect. But this act is a plain breach of trust, and a grantee, without consideration or with notice, will take the land charged with the trust. It is said, that should the court hold it to be no breach

(1) 2 Cruise, 336-7.

(2) Garth v. Cotton, Dickens, 183.

(3) Garth v. Cotton, Dickens, 183; 2 Co. 5 a; Duncomb v. Duncomb, 3 Lev. 437.

of trust, or pass it by with impunity, it would be making proclamation, that the trustees in all the great settlements in England were at liberty to destroy what they had been entrusted only to preserve. In case of a conveyance for consideration or without notice, the trustee will be decreed to purchase other lands of equal value, and hold them upon the same trusts.^(a) These principles were first solemnly settled in the great case of *Mansell v. Mansell*, which was decreed by Sir J. Jekyll, at the Rolls, and afterwards by Lord King, assisted by Lord Raymond and Lord Ch. Baron Reynolds. Lord Raymond said, it was strange in natural reason to say, that where a man hath created a trust to preserve his estate, the trustees may break that trust and give away the estate with impunity.⁽¹⁾

5. This rule, however, seems to have been established, chiefly for the protection of the immediate parties to a settlement or their issue; and not to have been extended to the relief of remote collateral heirs. The former are regarded in law as purchasers; the latter as mere voluntary claimants, not entitled to the aid of a court of equity.

6. A settlement was made in consideration of a marriage and a fortune, for the purpose of settling the lands in the name and blood of the husband. Limitation to trustees, in trust for the husband for ninety-nine years, if he should so long live, remainder to trustees during his life to support, &c., remainder to the sons of the marriage, remainder to the heirs of the body of the husband, remainder to his right heirs. After the marriage, the husband and wife and trustees to support, joined in a fine and conveyance, with different limitations from those stated, providing a jointure, and giving the ultimate remainder to strangers. Husband and wife having died without issue, the heirs of the former brought a bill to set aside the latter conveyance. Held, they were not entitled to relief.⁽²⁾

7. If the party to whom a remainder is limited join the trustees in their conveyance, this will be no breach of trust. And upon a similar principle, where such remainder is limited *to the heirs of the body* of A, and is therefore contingent, if the eldest son or heir apparent of A join the trustees in a conveyance, and afterwards die, Chancery will not set aside the conveyance on application of a second son of A, during his father's life, because it is uncertain whether he will survive his father, and therefore come under the designation of *heir*.⁽³⁾

8. A court of chancery, under some circumstances, will direct trustees for preserving contingent remainders, to join in conveyances made for the purpose of barring such remainders. Thus, where a mortgage was made of the land, before the settlement by which the remainders are limited, and after such settlement the party who made it contracts for a sale of the equity of redemption; and the proposed purchaser files a bill against the settler and the trustees, praying that

(1) *Woodhouse v. Hoskins*, 3 Atk. 22; *Pye v. Gorge*, 1 P. Wms. 128; *Mansell v. Mansell*, 2 P. Wms. 678; For. 252; 2 Abr. Eq. 747.

(2) *Tipping v. Pigot*, 1 Ab. Eq. 385.

(3) *Else v. Osborn*, 1 P. Wms. 387.

(a) Lord King said (2 P. Wms. 678) that though these points had not been before judicially determined, yet it seemed to the court in common sense, reason and justice, to be capable of no other construction; Lord Harcourt, (1 P. Wms. 128,) that if, as was said, there was no precedent, he would make one; and (*Tipping v. Pigot*, 1 Ab. Eq. 385,) that it would be dangerous for any trustees to make the experiment, and if it should ever come in question, he thought the court would set aside such a conveyance.

they may join in a conveyance to him, averring that there are no issue for whose benefit the trust was created, and that the mortgagee will foreclose unless the mortgage is redeemed, which the settler is unable to do; and the defendants by their answers submit to the direction of the court: the conveyance prayed for will be decreed, the trustees being indemnified, and the wife of the settler, one of the objects of the settlement, being privately examined to ascertain her consent.(1)

9. So, also, Chancery will decree that trustees join in a conveyance, where the first remainder has become vested, and it is for the interest of this remainder-man to make the conveyance, although subsequent remainders are limited. If there is a subsequent remainder-man *in esse*, it seems the trustees will be required to give security for his interest; if not, the fact that the parents, to whose future children subsequent remainders are limited, are still living, will not be regarded. The most common case in which such decree is made, is where the first remainder-man is about to contract an advantageous marriage, and a new settlement of the estate becomes necessary for this purpose; more especially if the effect will be to preserve the estate in the family.

10. A was tenant for ninety-nine years, if he should so long live; remainder to trustees and their heirs for his life, to support contingent remainders; remainder to his first and other sons in tail male; remainder to trustees for years, to raise portions for daughters, if there were no issue male. A having a son, who was of age and about to marry, and also a daughter, and the mother being still alive, the father and son brought a bill in equity, to have the trustees join in making an estate, in order that a recovery might be had, for the purpose of making a marriage settlement. Decreed, that the trustees should join in the recovery, upon giving security for the daughter's portion.(2)

11. So, also, it is said, Chancery will order trustees to join in defeating contingent remainders, upon the application of creditors, where such remainders were limited by a voluntary settlement.(3)

12. There are many cases, however, where the Court of Chancery has refused to order trustees for preserving contingent remainders to join in barring them. And it may refuse so to order, although, if the trustees actually joined, they would not be chargeable with a breach of trust; because, in settling this point, the reasons and motives only of the trustee would be taken into view.(4)

13. Lands were limited to husband and wife for life, remainder to a trustee to preserve, &c., remainder to their first and other sons in tail. Twelve years after the marriage, having had no children, the husband and wife brought a bill, praying that they might be enabled to sell the land for payment of the husband's debts. The trustee did not object, upon condition of being indemnified. Held, the court would still regard the possibility that children might be born, and the application was refused.(5)

14. Limitation to A for ninety-nine years, if he should so long live, remainder to trustees for his life, to preserve, &c., remainder to his wife, remainder to the first and other sons in tail male. The wife

(1) *Platt v. Sprigg*, 2 Vern. 303.

(2) *Frewin v. Charlton*, 1 Abr. Eq. 386; {

(3) *Winnington v. Foley*, 1 P. Wms. 536.)

(4) *Fearne*, 331; 2 Cruise, 342-3.

(5) *Woodhouse v. Hoskins*, 3 Atk. 22.

(6) *Davies v. Weld*, 1 Abr. Eq. 386.

having died, and there being two sons, B and C, A and B (who was of age) covenanted with D, to whom A had mortgaged the land, that they would suffer a recovery, and procure the trustees to join. The latter refused. Upon a bill by D against A, B and C, praying specific performance, and that the trustees might join; the bill was dismissed, because C did not consent, and the conveyance would operate, not to preserve the estate in the family, as in some other cases, but to pass it to strangers.(1)

15. A father devised to A, his eldest son, for ninety-nine years, if he should so long live, remainder to trustees during A's life, to preserve, &c., remainder to A's first and other sons in tail male, remainder to B, a second son, for ninety-nine years, (as above,) remainders over. The will empowered his sons to revoke these uses, and appoint new uses, provided they limited them to their sons for ninety-nine years, and in strict settlement; with other powers and directions, tending to preserve the estate in his family. A died without issue, and B came into possession of the estate, and had an only son, C, who was of age. B borrowed money, for which B and C became bound; and afterwards B and C covenanted to convey the estate to the creditors, in trust to sell, pay their debts, and restore the surplus to B. The creditors bring a bill against B and C for specific performance, and against the heir of the surviving trustee to preserve, &c., praying that he might join in conveying. Held, the power of revocation in the will showed the testator's intent to make a strict settlement, and keep the estate in his family; that the inconveniences of having an estate for years instead of a freehold vested in B, as tending to a perpetuity, were balanced by the advantage of preventing an alienation by B, in which, if he had the freehold, he might compel the son, who was of course greatly under his control, to join; that the probable object of thus limiting the estate was to avoid the danger of the son's becoming bound for the father's debts; that the proposed conveyance was not designed to effect a marriage settlement, or pay the debts of C, or justified by any peculiar misfortune in the family; and that C, being only a remainder-man, with no vested freehold, was not to be considered owner of the estate, with power over the rights of other remainder-men.(2)

16. It is said that it would be a dangerous experiment for trustees in any case to destroy remainders, which they were appointed to preserve. In a late case,(3) Lord Eldon remarked, that the act which they were decreed to do, should be such as they ought to do. The proposition, that trustees are never to join without direction of the court, is the result of great caution, but amounts to this, that the judges of the Court of Chancery are the trustees to preserve all the contingent remainders in the country, and no one could say what was to be done, till a decree had been obtained. But this principle cannot be sustained.

17. Trustees to preserve a contingent remainder, limited after the death of the particular tenant, during his life, are tenants *pour autre vie*. Hence, they cannot maintain an action for waste, which lies only for the owner in fee. But, on the other hand, as their office is to *pre-*

(1) *Townsend v. Lawton*, 2 P. Wms. 379.

(2) *Woodhouse v. Hoskins*, 3 Atk. 22; *Barnard v. Large*, Amb. 774; *King v. Cotton*, 2 P. Wms. 674, n.)

(3) *Pye v. Gorge*, 2 P. Wms. 684; *Moody v. Walters*, 16 Ves. 283.

serve the contingent estates, they are bound to preserve the inheritance as entire as possible; which inheritance consists of the land, timber and mines. Hence they may undoubtedly bring a bill in Chancery, for an injunction to stay waste; and, if they consent to the felling and sale of timber, join with the tenant for years, and the ultimate remainder-man in fee, in an agreement therefor, by which the proceeds are to be equally divided between them, and expressly covenant to bring no bill for an injunction; they are clearly liable for a breach of trust, as for an alienation of part of the inheritance. The tenant for years and remainder-man in fee are also liable, having notice of the breach of trust and reaping the benefits of it. If it is a breach of trust, and the trustees convey the estate, a court of equity is not to sit still, and let others profit by the spoil.(1) And these parties are equally liable, whether the trustee commits any positive act, or is merely guilty of *laches* in not performing the trust, and bringing a bill for injunction.

18. Upon these grounds, where waste has been committed by the particular tenant and the remainder-man in fee, and the timber sold, and after the death of the former the estate vests in his son, to preserve whose remainder trustees were appointed; the son may maintain a bill in equity against the remainder-man in fee for restitution of the amount which he received from the sale, although the waste was committed when the plaintiff had neither *jus in re* nor *jus ad rem*, before he was *in rerum natura*. If timber were blown down by accident, or cut by a stranger or by the tenant for life alone, it seems, the property of it would vest in the remainder-man in fee. This is a legal right, with which equity will not interfere. But wherever a legal right is acquired or exercised by fraud or collusion contrary to conscience, equity will enjoin it or decree compensation. Hence, in this case it will interfere, on account of the mutual agreement between the tenant for life and the remainder-man.(2)

CHAPTER XLIX.

REMAINDER—DOCTRINE OF ABEYANCE.—CONDITION OF THE FEE, IN CASE OF CONTINGENT REMAINDERS.

1. Limitation to uses—use results.
4. Limitation by devise.

10. Limitation by common law conveyance.

1. WHERE a remainder of inheritance is limited in contingency by way of use, the inheritance, in the meantime, if not otherwise disposed of, remains in the settler or grantor till the contingency happens. This point has been already considered to some extent, under the head of *Uses and Trusts*.(3)

2. A feoffment was made to the use of the feoffor for life; afterwards, of such tenants to whom he should demise any part of the land for

(1) Per Lord King, *Mansell v. Mansell*, 1 P. Wms. 678; 2 Abr. Eq. 747.
(2) *Garth v. Cotton*, Dick. 183.

(3) 2 Cruise, 385; Sir Edward Clere's case, 6 Rep. 18 a.

years or for life; afterwards to the use of the performance of his will, and of the devisees of any estate in the land; after such performance, to the use of successive tenants in tail; and lastly, to the use of him and his heirs. Held, nothing vested till the death of the feoffor, because he had power to devise even in fee.(1)

3. Feoffment in fee, to the use of A in tail, remainder in fee to the right heirs of B, who is living. The fee-simple is neither in abeyance nor in the feoffee; but the use in it results to the feoffor, and remains in him till the death of B.(2)

4. So, where a contingent remainder is *devised*, the fee descends to the heir; and even though a precedent estate for life is given to him, he takes such estate and the fee distinctly, in relation to the contingent remainder-man, so that when the contingency happens, the heir's estate opens to let in the remainder.(3)

5. So, where a contingent remainder in fee is devised to the heirs of the testator, preceded by other contingent remainders, one of which is in fee, the heirs take the inheritance by descent.

6. A testator devised to his wife for life, if she should have a son, and call it by his name; then he gave the inheritance to such son; and, if he died under twenty-one, then to his own heirs. The heir of the testator conveyed in fee to the testator's widow. Held, as the fee was not in abeyance, but descended to the heir, the contingent remainder to the son was hereby destroyed.(4)

7. The doctrine above stated, however, has been denied in some cases. Thus, Sir J. Jekyll remarked, that though, in case of a devise for life, remainder to the heirs of one still living, the remainder in fee is in abeyance, yet there is a *possibility* left in the heir. That this was plain even in case of a grant, where a possibility is left in the grantor, entitling him to enter for a forfeiture by the particular tenant, which terminates his estate as much as his death; and that it was absurd that a tenant for life should have power by an unlawful act, in destroying the contingent remainder, himself to acquire the fee. It was like the possibility that was upon a grant at common law to a man and the heirs of his body; for there, though the grantor had no reversion, he might enter upon failure of issue.(5)

8. The decision of Sir J. Jekyll, in the case referred to, was reversed on appeal by Lord Parker. He remarked, that the only possible ground for treating the fee as in abeyance, or "*in gremio legis*," was the preservation of the contingent remainder; whereas the effect of this principle was, not to preserve, but to destroy it, by enabling the particular tenant to make a wrongful conveyance, which would defeat the remainder, if contingent.

9. In another case, however, Lord Talbot seemed to recognize the principle, that the fee is in abeyance, where a contingent remainder is limited by devise. The question having arisen, whether two persons, to whom an estate was devised, *and to the heirs of the survivor*, in trust to sell, could make a good title, the remainder in fee being contingent; it was proposed that the devisor's heir at law should join in the deed. But Lord Talbot remarked, that this would be of no avail, except as

(1) Leonard, &c., 10 Rep. 78.

(2) Davis v. Speed, Carth. 262.

(3) 2 Cruise, 386; Fearne, 525.

(4) Purefoy v. Rogers, 2 Saun. 380; Carter v. Barnardiston, 1 P. Wms. 511.

(5) Carter v. Barnardiston, 1 P. Wms. 511.

supplying a want of probate of the will, because *the fee was in abeyance*.(1) But Mr. Fearne attaches little weight to this incidental opinion, and thinks the contrary doctrine is now firmly established by a series of cases.(2)

10. Where a contingent remainder in fee is limited neither by devise nor by way of use, but by *common law conveyance*, the opinion has prevailed, that although the fee does not vest in any grantee, yet it passes out of the grantor, leaving him no estate whatever. It has been sometimes held, however, that although the grantor retains no *estate*, yet there remains in him *a possibility of entry*, by which, upon a forfeiture by the particular tenant, he may regain his title. Mr. Fearne is of opinion, that nothing passes out of the grantor, except the particular estate, until the contingency happens. Thus, where a conveyance is made to A, remainder to the right heirs of B, and A dies before B; the remainder becoming void, the grantor's estate reverts in him.(3) But Chancellor Kent says,(4) that though the good sense of the thing, and the weight of liberal doctrine, are strongly opposed to the ancient notion of an abeyance, the technical rule is, as at common law, that *livery of seizin* takes the reversion or inheritance from the grantor, and leaves him no tangible or disposable interest. Instead of a reversion, he has only *a potential ownership*, subsisting in contemplation of law, or *a possibility of reverter*. Mr. Preston(5) and Mr. Cornish(6) also are of opinion, that the common law rule is still in force, and the latter remarks, that it was never shaken or attacked, until Mr. Fearne brought against it the weight of his eloquence and talents.

11. Chancellor Kent expresses the opinion,(7) that as conveyances in this country are almost universally *by way of use*, the question as to the abeyance of the fee will rarely occur; in other words, they are subject to the same rule, already stated as applicable in England to those conveyances, which are nominally or ostensibly made to uses; and that portion of the estate, limited as a contingent remainder, continues in the grantor till the contingency happens. But in New York, where by the Revised Statutes all conveyances are to be deemed *grants*, which is a common law mode of transfer, Chancellor Kent is of opinion that the doctrine of abeyance is in force. How far the latter remark is applicable in other States, and whether conveyances by deed, though designated by names which in England denote limitations to uses, such as bargain and sale, &c., are to be treated as such in effect; or whether, as is often expressed, they are to be regarded as a substitute for *feoffment*, and in most respects to have the same operation with the latter; are questions which may be considered hereafter.(a)

(1) *Vick v. Edwards*, 3 P. Wms. 372.

(2) *Fearne*, 525.

(3) Co. Lit. 342 b; 1 P. Wms. 515; *Fearne*, 526; 2 Rolle's Abr. 418; Vin. Abr. Remainder.(1)

(4) 4 Kent, 259.

(5) 1 Prest. on Est. 255; 2 Prest. on Abst. 103-6.

(6) *Cornish*, 117.

(7) 4 Kent, 257, and n.

(a) See *Deed, Feoffment*.

CHAPTER L.

REMAINDER.—ALIENATION, ETC., OF CONTINGENT REMAINDERS.

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| 1. Vested remainders alienable, &c.
2. Contingent remainders said to be descendible and devisable. | 10. Cannot be conveyed at law, but may be in equity, and may pass by <i>estoppel</i> .
15. Transfer to creditors.
16. General remarks. |
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1. It has been already stated, that vested remainders are for the most part subject to the same rules of law as vested estates in possession. Like the latter, they are transmissible, either by act of law or by act of the remainder-man himself. Thus, a vested remainder descends to heirs, may be conveyed or devised, and is in general liable to be taken by creditors.

2. With regard to contingent remainders, the general principle laid down by elementary writers is, that all contingent estates of inheritance, *where the person to take is certain*, are transmissible by descent, and devisable. To this point, so far as it relates to heirs, Mr. Cruise cites the following cases.⁽¹⁾

3. A made a feoffment to the use of himself for life; after the death of himself and his wife, to the use of B, his son, for life, then to the wife of B, and her issue by him; remainder over; remainder to the heirs of B. B, having issue a daughter, leased for a long term, made a fine to the lessee for the same term, and died in the lifetime of A. Held, though A took but a contingent remainder, yet this descended to his heir, so far that the latter, after the contingency happened, was bound by the fine.^{(2)(a)}

4. So a contingent use descends to heirs. Thus, it is laid down in *Shelley's case*, that where A covenants with B, that, upon a certain contingency, he will stand seized of certain land to the use of the latter, who dies, and then the contingency happens; although B had neither a right, title, use nor action, but only a possibility of an use, which could neither be released nor discharged, yet his interest descended to his heir.⁽³⁾

5. But where the circumstances seem to make the existence of the contingent remainder-man a part of the contingency itself, upon which the remainder is to vest; his interest will not pass to his heirs.⁽⁴⁾

6. Conveyance by husband and wife of her lands, to the use of her for life, remainder to him for life, if they should have any issue that should so long live, remainder to all such children in fee, as tenants

(1) 4 Kent, 261; Fearn, 459; 2 Prest. on Abstr. 119; 2 Cruise, 296-8; Goodtitle v. Billington, Doug. 753; Lawrence v. Bayard, 7 Paige, 76; Varick v. Edwards, 1 Hoffm. 383; Jackson v. Waldron, 13 Wend. 178; Fortescue v. Satterthwaite, 1 Ired. 570; Turner v. Patterson, 5 Dana, 295; Shelby v. Shelby, 6 Dana, 60; Birst v. Dawes, 4 Strobb. Equ. 37.
 (2) Weale v. Lower, Pollexfen, 54.
 (3) Wood's case, 1 Rep. 99 a.
 (4) Fearn, 364.

(a) This case directly decides, rather that a contingent remainder may be barred as against the heir, even if it does descend, than that such remainder is actually descendible.

in common; if the wife should die without issue, or all such issue should die under twenty-one, then, as to one moiety, to the husband in fee. The husband died before the wife. Held, nothing passed to his heirs.(1) So the children of one who has died, and whose interest in a devise was contingent, to take effect upon the death of a co-devisee, cannot take anything upon the death of such co-devisee, occurring after the death of their ancestor.(2)

7. The principle above stated, both in regard to the descent and devise of contingent remainders, is recognized in the case of *Roe v. Griffiths*,(3) where Lord Mansfield remarks, that in all contingent, springing and executory uses, where the person who is to take is certain, *so that the same may be descendible*, they are also devisable. So, in the case of *Barnitz v. Casey*,(4) in the Supreme Court of the United States, it is said that a contingent remainder or executory devise descends to heirs, but with the qualification, that it shall vest in him who is heir to the first devisee when the contingency happens.(a) So, in *Driver v. Frank*,(5) although the point seems to be treated as if it were or had been doubtful, Ch. J. Gibbs says, "it cannot be disputed, that generally a contingent remainder is transmissible."

8. A devised in trust for his son B, and, if he should die without issue, under age, then that all his estate should go to C, his heirs and assigns. C afterwards devised all his estates in possession, remainder or reversion, and died, living B, who subsequently died under twenty-one, and without issue. Lord Chancellor Northington said, "I have never had any doubt, since I was twenty-five years old, that these contingent interests are devisable, notwithstanding some old authorities to the contrary."(6)(b)

9. A covenanted with B, that his son should marry the daughter of B, and, if not, that A and his heirs would stand seized of certain land to the use of B and his heirs, until £100 should be paid. B died, and the marriage never took place. Held, the heir of B should have the land.(7)

10. In England, though a contingent remainder will not pass by a legal conveyance, yet it may pass by estoppel,(c) fine or recovery, so as to bind the heir, when the contingency happens, after the death of the original remainder-man. And such remainder is assignable in equity.(8)(d)

11. Thus, in *Weale v. Lower*, (*supra*, sec. 3,) it being decided, that the remainder, whether vested or contingent, came to the heir of A *by descent*, not as a purchaser; it was further held, that as the heir would have been bound by the lease *by estoppel*, upon the vesting of

(1) *Moorhouse v. Wainhouse*, 1 Bl. R. 638.

(2) *Dehoe v. Lowen*, 2 B. Mon. 616.

(3) 1 Black. R. 605.

(4) 7 Cranch, 469.

(5) 6 Price, 53.

(6) *Moor v. Hawkins*, 1 H. Bl. 33-4.

(7) Rector of Cheddington's case, 1 Rep. 155 b.

(8) 2 Cruise, 393; *Doe v. Martyn*, 8 Barn. & Cr. 516.

(a) See *Reversion, Descent*.

(b) A testator devised all the hereditaments to which he might be entitled at his death, and died, having a contingent interest in fee, by shifting use and a limitation in default of his brother's issue. Held, this interest did not pass. *Honywood v. Honnywood*, 2 Y. & Coll. Cha. 471.

(c) A *feme covert*, not being bound by estoppel, cannot convey such remainder. *Den v. Demarest*, 1 N. J. 525.

(d) In Michigan, (Rev. St. 266,) any contingent estate which would pass by descent, is also subject to devise and conveyance.

his estate, supposing it to have been contingent when the lease was made, so his heir was bound in like manner.

12. Devise to A for life, remainder to his first and other sons in tail. A, and B his eldest son, joined in suffering a recovery, and declaring uses of the estate. Afterwards B died, and C, a second son, undertook to create a charge upon the land, by a deed reciting his contingent and reversionary estate therein. A died, having devised to B a life estate in the land. Held, although at the time of attempting to charge the land, C had no interest in it, yet his interest, subsequently acquired under the will, was bound by his deed, by estoppel.(1)

13. Upon a marriage settlement, a rent was created to the use and intent, that the heirs of the body of the wife and their heirs should receive such rent; and subject thereto, the land was limited to the husband and his heirs. There were two sons of the marriage, who, living the father and mother, conveyed the rent by deed. The estate was the father's. Held, the sons had not, at the time of selling, an actual possibility; the rent might never arise, or, if it did, the sons might not be heirs of the mother's body at her death. Nothing, therefore, passed by the deed. A fine would have operated by estoppel.(2)

14. In a late case,(3) it is said, by Bayley, J., that a fine by a contingent remainder-man passes nothing, but leaves the right as it found it; that it is, therefore, no bar when the contingency happens, in the mouth of a stranger, against a claim in the name of such remainder-man; that it operates by estoppel, and by estoppel only, and that parties or privies may avail themselves of that estoppel, but parties or privies only. But the same learned judge, in a still later case,(4) qualifies his former opinion by saying, that such fine, besides operating by estoppel, has an ulterior operation when the contingency happens; that the estate, which then becomes vested, feeds the estoppel, and the fine operates upon it as though it had been vested when the fine was levied.(a)

15. In England, a contingent remainder may be validly transferred to creditors. It may still be defeated by the particular tenant; but, if the original remainder-man afterwards regains an interest in the estate by the act of such tenant, the Court of Chancery will subject it to the claim of the creditors.(5)

16. The concurrent opinions of elementary writers, and the cases to which they refer, seem to settle the principle, that contingent remainders are both descendible and devisable. It will be perceived, however, that the establishment of this doctrine at once destroys a very important, perhaps the most important, distinction between vested and contingent remainders. There is but one other point of view, in which the question would be likely to be raised for judicial decision, whether a remainder was vested or contingent; and that is, the power of a pre-

(1) *Bensley v. Burdon*, 2 Sim. & Stu. 519.

(2) *Whitfield v. Faussett*, 1 Ves. 391. (But see *Wright v. Wright*, 1 Ves. 411.)

(3) *Doe v. Martyn*, 8 Barn. & Cr. 527.

(4) *Doe v. Oliver*, 10 Ib. 187.

(5) *Noel v. Bewley*, 3 Sim. 103.

(a) But where one to whom an estate was limited, by way of executory devise, having a vested right to a share of the same property, conveyed all her "right, title and claim to the land," with a covenant against all claims arising under her, before the contingency occurred, and the executory devise afterwards became vested; held, she was not estopped by her covenant from claiming the land conveyed by it. *Hall v. Chaffee*, 14 N. H. 215.

ceding tenant to destroy the latter and not the former. Many of the numerous cases upon this subject have turned upon this latter question ; but I think it will be found, on examination, that many others have turned upon the point, whether a remainder had or had not passed, or might or might not pass, to the representatives of the remainder-man after his death ; and that this question has been treated, as involving, or involved in, the further inquiry, whether the remainder was vested or contingent. In other words, it has been *taken for granted*, that if a remainder is transmissible, it is, of course, vested ; if not transmissible, it is, of course, contingent. One of the cases already cited, viz. *Barnitz v. Cusey*,(1) although recognizing the doctrine, that a contingent remainder descends, yet, by stating *in what manner* it descends, seems to negative or greatly qualify the general proposition ; for such remainder passes, not to the heir of the contingent remainder-man at his death, but to the person who is heir to him at the time the contingency happens.(a) This remark, of course, can have no possible applicability to a vested estate or a vested remainder, which, upon the death of the owner in fee, must pass at once to his *then* heirs. So, in the leading case already cited, of *Smith v. Parkhurst*, Chief Justice Willes, in his elaborate opinion delivered to the House of Lords, urges as one of the most convincing reasons for regarding the remainder, limited to trustees *and their heirs*, as vested and not contingent ; that, upon the latter construction, it could not descend to heirs, though they were expressly named.(b) So, in the case of *Doe v. Provoost*,(2) the decision, that the remainder actually vested in the children of A, during her life, was founded in part at least upon the consideration, that otherwise it could not descend to grandchildren, and thus the testator's intentions in their favor would be defeated. The same ground of decision is recognized in the case of *Wager v. Wager*.(3) So in *Jackson v. Durland*, it is said, "B had a vested interest in possession on the death of the widow. B was the object of the testator's bequest ; and he never meant that the remainder should be contingent until he came of age, so that, if he married in the meantime and died, *his children could not inherit*." And in *Doe v. Perryn*,(4) Buller, J., assigns as the strong reason for construing a remainder to be vested, if possible, that otherwise, where it is limited to children, it would not pass after their death to grandchildren. The same ground is recognized in *Boraston's case*, and in several others, which it is needless to enumerate.(c) I trust that those cited will excuse me from the charge of presumption, when I express my surprise, that the *transmissibility* of contingent remainders by descent (to say nothing of devises) has been stated by so many distinguished writers, as a well settled and clear point. Nor does it seem to me, that the conflict of

(1) *Supra*, s. 7.(2) *Supra*, ch. 42, s. 51.(3) *Supra*, ch. 42, s. 53.

(4) 3 T. R. 494-5.

(a) Thus, a life estate is limited to A, with a contingent remainder to B and his heirs ; B dies, living A, and leaves two nephews, C and D, his heirs at law. C dies, leaving children, and then A. D, upon A's death, takes the whole estate, and C's children nothing.

(b) The manner of the Chief Justice's argument upon this point is confident, sarcastic, almost scornful. "Will any one say that anything can descend to the heir, that did not vest in the ancestor ? So that, if nothing vested in the trustees, the limitation to them *and their heirs is nonsensical*."

(c) *Being a vested remainder*, it descended by force of the statute to his father, as his heir, and he is now entitled to that share. *Ballard v. Ballard*, 18 Pick. 44.

authorities is fully reconciled, by the qualification ordinarily annexed to the statement of this rule, viz., that such remainders descend "*where the person to take is certain.*" It would seem a self-evident proposition, that where the person to take is *uncertain*, a remainder cannot descend. Thus, where a conveyance is made to A for life, remainder to the right heirs of B, this is a contingent remainder by reason of *the uncertainty of the person.* In other words, *there is no person*, answering to the description of "heirs of B." "*Nemo est hæres viventis.*" Unless, therefore, a kind of personalty is given to *nemo*, it is idle to say that such remainder cannot descend, since the law recognizes no one who can stand in the capacity of ancestor. Still, some of the cases may perhaps be explained by the circumstance, that, although the remainder was contingent, yet the person who should take was ascertained; or, in the language of Wilde, J., in the case of *Clapp v. Stoughton*,⁽¹⁾ that there was "*a vested right subject to a contingency*, which was transmissible to heirs, and became vested in possession in them on the forfeiture of the estate" by the prior tenants. This seems to be substantially a repetition of Chief Justice Willes' doctrine already referred to, of a distinction between contingent remainders which do vest, and contingent remainders which do not vest.^(a)

CHAPTER LI.

REMAINDERS IN NEW YORK.

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| 1. Expectancies. Remainders vested and contingent. | 13. Remainder not barred by destruction of prior estate. |
| 6. Fee upon a fee. | 14. Not void for improbability. |
| 7. Remainder after estate tail. | 15. Remainder to heirs. |
| 8-18. Remainder after estate for life or for years. | 16. Contingency may abridge prior estate. |
| | 17. Limited application of the statute. |

1. IN New York, *expectancies* are divided into *future estates*, or those which are to commence at a future day, and *reversions*. A future estate may be limited, either without any precedent estate, or after the termination of such estate. In the latter case, it may be called a *remainder*.⁽²⁾

2. A remainder is defined to be "an estate limited to commence in possession at a future day, on the determination, by lapse of time, or otherwise, of a precedent estate created at the same time."⁽³⁾

3. A *vested* remainder, is when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. Or it is where the person

(1) 10 Pick. 468. (*Supra*, ch. 42, sec. 48.) | (3) 1 N. Y. Rev. St. 723.
 (2) 1 N. Y. Rev. St. 723. |

(a) In Maine, (Rev. St. 372,) any contingent remainder, which would pass by descent, may also be conveyed or devised. In Massachusetts, by a recent decision, it has been settled that contingent interests are assignable. *Winslow v. Goodwin*, 7 Met. 363.

In New Jersey, they are made subject to conveyance and descent, but not to execution. N. J. Sts. 1851, 282.

is in being and ascertained, who will, if he lives, have an absolute and immediate right to possession, upon the ceasing or failure of all precedent estates, provided the estate limited in remainder continues; or, where a remainder cannot be defeated by third persons, or contingent events, or failure of the condition precedent, if the remainder-man lives and the estate limited to him continues, till all the precedent estates are determined.

4. A remainder is *contingent*, whilst the person to whom, or the event upon which, it is limited to take effect, remains uncertain. Or it is, where there are other uncertainties, besides the remainder-man's living and the continuance of his estate, though he be living and ascertained at the time. But a remainder is not contingent, where it is limited to a whole class in being, though accompanied with a power of appointment to a part of such class; until such appointment is made, it vests in the whole.(1)

5. A remainder is contingent, where, before it can take effect, trustees are to make an appointment with reference to moral character, at the time of vesting in possession.(2)

6. A contingent remainder in fee may be limited on a prior remainder in fee, to take effect in case the first remainder-man dies under age, or upon any other contingency by which his estate may terminate before he comes of age. So, a fee may be limited upon a fee, upon a contingency, which must happen, if at all, within the period of two lives in being at the creation of the estate.(3)

7. Remainders may be validly limited upon every estate which, under the English law, would be adjudged an estate tail. These take effect as conditional limitations upon a fee, and vest in possession on the death of the prior tenant, leaving no issue.(4)

8. No remainder, except a fee, can be created upon an estate for the life of any other person or persons, than the grantee or devisee of such estate; nor can a remainder be created upon such estate in a term for years, unless it be for the whole residue of such term; nor can a remainder be made to depend upon more than two successive lives in being; and if more lives be added, the remainder takes effect upon the death of the first two persons named.(5)

9. A contingent remainder cannot be created on a term for years, unless the nature of the contingency is such, that the remainder must vest in interest during not more than two lives in being at the creation of the remainder, or upon the termination thereof.(6)

10. No estate for life can be limited as a remainder on an estate for years, except to a person in being at the creation of such estate.(7)

11. A freehold estate, as well as a chattel real, (to which these regulations equally apply,) may be created to commence *in futuro*; and a life estate may be created in a term of years, and a remainder limited thereon: and a freehold or other remainder, either contingent or vested, may be limited upon an estate for years.(8)

12. When a remainder on a life estate or a term for years is not limited on a contingency defeating or avoiding the prior estate, it shall

(1) Ibid.; Hawley v. James, 5 Paige, 318.

(2) Ibid.

(3) 1 R. St. 723-4.

(4) Ib. 722.

(5) Ib. 724.

(6) Ib.

(7) Ib.

(8) Ib.

be construed as intended to take effect only on the death of the first taker, or the natural expiration of the term.(1)

13. No expectant estate shall be defeated or barred by any alienation or other act of the prior tenant, or by any destruction of the prior estate by disseizin, forfeiture, surrender, merger or otherwise, unless in some mode authorized by the party who created the estate.(2)

14. No future estate, otherwise valid, shall be void, on the ground of the probability or improbability of the contingency on which it is limited to take effect.(3)

15. Where a remainder is limited to the heirs or heirs of the body of a person to whom a life estate is given, the persons who, on the termination of the life estate, are the heirs of the tenant for life, take as purchasers.(4)

16. A remainder may be limited upon a contingency, which operates to abridge or defeat the prior estate; and such remainder shall be construed as a conditional limitation.(5)

19. The provisions above-named do not affect vested rights, or the construction of deeds or instruments, which took effect prior to January 1, 1830.(6)

18. Upon a devise to A for fifty years, as an absolute term, remainder to B for life if he should marry C, remainder to the children of such marriage; the remainder to B is contingent, but cannot vest after his death, and fails by that event if it happen within the term. The ultimate remainder must vest, if ever, within the period of one life in being at the testator's death. The first child would, upon its birth, take a vested interest in the ultimate remainder in fee, subject to open and let in after-born children.(7)(a)

(1) Rev. St. 725.

(2) Ib.

(3) Ib. 724.

(4) Ib. 724.

(5) Ib. 725.

(6) 1 N. Y. Rev. St. 750.

(7) *Marsellis v. Thalkimer*, 2 Paige, 35; *Hawley v. James*, 4 Kent, 251, n.

(a) New York and Wisconsin are almost alone in detailed legislation upon the subject of remainders. In Mississippi and Michigan, acts provide that no remainder shall be affected by an alienation, or union with the inheritance, of the particular estate. *Missi. Rev. C. 458*; *Mich. Rev. St. 258*. In Maine, by any conveyance, disseizin, &c. *Me. Rev. Sts. 372*. See *Mass. Rev. St. 405*.

In Indiana, a remainder may be validly limited upon a contingency, which may shorten the preceding particular estate. It cannot be limited for more than a life or lives in being; except on the contingency of the first remainder-man's dying under age. *Ind. Rev. Sts. 201*.

In Wisconsin, successive life estates shall not be limited except to lives in being. *Wis. Rev. Sts. ch. 56*.

A remainder, limited on the life of a person not the grantee, &c., must be in fee.

A remainder, limited upon an estate for the life of a third person, shall be for the residue of the term.

A remainder upon more than two lives, not the grantees, &c., shall take effect on the death of two.

A contingent remainder in a term of years, shall not be limited in more than two lives.

An estate shall not be limited as a remainder, on a term of years, except to one in being at the time.

A contingency of death, "without heirs," "issue," &c., shall be understood as referring to heirs, &c., living at the death of the ancestor.

Chattels real are included in the above provisions.

A freehold may be created to begin *in futuro*.

There may be alternative future estates.

Posthumous children shall take in case of a limitation to heirs, to take effect in future.

No expectant estate shall be defeated by a conveyance.

A remainder shall not be defeated by the determination of the precedent estate, before the happening of the contingency in which the remainder is to vest.

Expectant estates are alienable, and subject to inheritance.

Expectant estates may commence *in futuro*, without the support of a particular estate.

CHAPTER LII.

REVERSION.

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| <ol style="list-style-type: none"> 1. Definition and principle of the estate. 3. An incorporeal hereditament. 4. After conditional fee, &c. 5. After base fee. 6. After estate for years. 7. May belong to a particular tenant, who underlets. 8. Created by act of law. | <ol style="list-style-type: none"> 9. Subject to same rules with estates in possession. 10. Actions by reversioner for injuries to the land. 21. Rights of reversioner in case of adverse possession. 27. Reversion, how far liable for debts. 34. Transfer of reversion—when set aside. 45. Miscellaneous provisions. |
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1. A REVERSION is either the residue of an estate left in a grantor, to commence in possession after the termination of some particular estate which he has conveyed; or the residue of an estate which descends to heirs, subject to some particular devise, or some temporary interest created by act of law. Thus, if the owner in fee grant an estate for life, the reversion of the fee is, without any special reservation, vested in him by act of law. So, if an owner in fee devises an estate to one for life, or if the owner's widow is endowed from his land, his heirs are owners of the reversion.(a)

2. This estate is founded upon the principle, that where the owner of land creates a limited or particular estate therein, he retains all the interest in the land, which he has not expressly parted with. Thus, if one convey to A, remainder to B, with any number of remainders over, less than a fee; he retains the fee himself, as a reversion.

3. A reversion is said to be an *incorporeal* hereditament, and therefore, in England, may be conveyed by grant, without livery of seizin. The more usual method of transfer is a lease and release, or bargain and sale.(1)

4. At common law, where a man conveyed a *conditional fee*, no reversion or actual estate remained in him, but the grantee took the entire estate, leaving only a *possibility of reverter* in the grantor, upon failure of the condition. But it is now settled, though once doubted, that an *estate tail* is a *particular* estate, carved out of the fee-simple, and leaves a reversion in the grantor.(2)

5. No reversion remains upon a *base* or *qualified fee*; because no valid remainder can be limited upon such estate.

6. It is said, that where the owner in fee makes a lease for years, he has no reversion till the lessee enters, upon the ground that before entry the lessee does not complete his estate. But when an estate for years is created by any conveyance deriving effect from the statute of uses, as the lessee immediately has the legal possession, a reversion im-

(1) 4 Kent, 354 and n.

(2) Willion v. Berkley, Plow. 248; Lit. secs. 18, 19.

(a) See Hitchman v. Walton, 4 Mees. & W. 409. By the English law, the two incidents to a reversion are *fealty* and *rent*. The former is unknown in the United States. The latter, though incident to the reversion, is not inseparably incident, but may be excepted by the reversioner from a transfer of his estate.

mediately vests in the lessor. This subject has been already considered under the title of *Estate for Years*. (Page 177.) (1)

7. Where one having a limited or particular interest in land, conveys to another a smaller interest than his own, he thereby acquires a reversion to himself. Thus, where tenant in tail leases for life, or a tenant for ninety-nine years, for this period, less one day, he becomes a reversioner. So, in England, where land is taken by the legal process of *elegit*, &c., to be held by the creditor till his debt is satisfied, the debtor has a reversion. (2)

8. A reversion is never created by deed or writing, or by *act of party*, but always arises from construction of law. And where an estate is expressly limited, though under the name of *remainder*, in the same way in which it would pass by law as a *reversion*; it will be construed as the latter, not the former interest. Thus, if one conveys for life or in tail, remainder to *his own right heirs*; he still retains the reversion in fee. So, if one conveys in fee, to the use of himself for life, then to the use of A in tail, then to the use of his own right heirs, a reversion in fee remains in him by way of resulting use. (3)

9. A reversion, like a vested remainder, though not to take effect in possession *in presenti*, but only *in futuro*, is still an immediate fixed right of future enjoyment; and subject to most of the rights and liabilities incident to estates in possession. Hence, many of the following remarks may be regarded as alike applicable to reversions and to vested remainders.

10. A reversioner may maintain an action for any injury done to the inheritance. Thus, where an action was brought by a reversioner for obstructing his lights, Lord Mansfield held, that the tenant might sue, and the reversioner also, as the injury would affect the price of the estate, if the latter should be disposed to sell it. (4)

11. So, one having a reversionary interest in real property, may maintain an action against one who wrongfully removes fixtures therefrom.

12. A, being the owner of a factory and the machinery in it, gave bond to B, to convey them to him on payment of certain notes given by B for the price; B to have possession of the property until he failed to pay the notes at maturity. Possession was delivered accordingly. Before maturity of the first note, a creditor of B attached the machinery, and the officer removed it, having notice of A's title, and afterwards sold it upon execution. A brings an action against the officer, declaring both in trover and in case. Held, although, if B had himself removed and sold the machinery, this might have been regarded as so putting an end to the contract, and revesting the possession in A, as to justify an action of trover against the purchaser; yet the attachment made by the creditors of B, being *in invitum*, might not have the same effect: but that the action of trespass on the case was clearly sustainable. (5) (a)

(1) Co. Lit. 46 b; 2 Cruise, 300.

(2) Co. Lit. 22 b.

(3) Co. Lit. 22 b; *Rochell v. Tompkins*, 1

| *Strobb. Equ.* 114.

(4) *Jesser v. Gifford*, 4 Burr. 2141.

(5) *Ayer v. Bartlett*, 9 Pick. 156.

(a) In this case, the amount of damages recovered was three times the sum for which the property was sold by the officer. Held, the verdict should not be set aside for excessive damages.

13. Where, as was the case in New York, a statute gives to a reversioner or remainder-man "an action of *waste* or *trespass*, notwithstanding any intervening estate for life or years;" this does not authorize a plaintiff to bring either of these actions at his election, but merely to bring that form of action which is appropriate to the particular case that occurs—that is, waste against the tenant himself, and trespass against a stranger.(1)(a)

14. A reversioner may bring an action on the case *in nature of waste* against a stranger, for ploughing up his ground and carrying away the turf thus obtained. Unlike a bare wrongful entry on land, or mere outrage on the possession of the tenant, for which he might be compensated in the action of trespass, these are permanent injuries, and entitle the reversioner to damages. And these damages he is not bound to recover from the tenant; but may have his action against the wrong-doer himself.(2)(b)

15. For acts which merely affect injuriously *the possession* of the land, a reversioner can maintain no action.(c) There must be some tangible injury to the reversion. Hence the declaration, in an action brought by a reversioner, must either expressly allege the act to have been done to the injury of his reversion, or must state an injury of such permanent nature as to be necessarily prejudicial to the reversion.(d)

(1) *Livingston v. Haywood*, 11 John. 429. | (2) *Randall v. Cleaveland*, 6 Conn. 328.

(a) With regard to the form of action to be brought by a reversioner, it would seem that *trespass* cannot be maintained, except in the single case, where the actual tenant of the land is a tenant at will or at sufferance. See *Reynolds v. Williams*, 1 Texas, 311; *Tilghman v. Cruson*, 4 Harring. 341; *Knetzer v. Wysong*, 5 Gratt. 9. It has indeed been suggested in Massachusetts, (11 Mass. 526,) that even in case of a lease for years, for any act which is principally injurious to the lessor, such as cutting down the trees or overturning the buildings, this form of action might lie; but the prevailing doctrine is as above stated. Even if the occupant of the land is a tenant at will, some authorities hold, that the reversioner can maintain only an action on the case. *The King v. Watson*, 5 E. 435-7; *Campbell v. Arnold*, 1 John. 511; *Tobey v. Webster*, 3, 468; *Biddeford v. Onslow*, 3 Lev. 209; 3 Woode, 193. But very ancient cases and opinions favor the action of trespass, and the same rule has been adopted in Massachusetts. 2 Rolle's Abr. 551; Yr. Bk. 19 H. 6, 45; *Starr v. Jackson*, 11 Mass. 519; *Hingham v. Sprague*, 15 Pick. 102. So, in Connecticut, where the owner of a building leases at will the rooms therein, though they constitute the chief parts of the building, he is not thereby put out of possession, so as to preclude him from suing in trespass for the destruction of the building, or such an injury to it as to render it untenable. *Curtiss v. Hoyt*, 19 Conn. 154. By the operation of the Rev. Sts of Mass., however, which require three months' notice to terminate an estate at will, it seems *case* and not *trespass* is now the proper form of action. *French v. Fuller*, 23 Pick. 104. See *Lunt v. Brown*, 13 Maine, 236; *Rowland v. Rowland*, 8 Ohio, 40; *Anderson v. Nesmith*, 7 N. H. 167. A tenant at will may himself maintain trespass against one who cuts trees on the land. *Howard v. Sedgely*, 2 Shepl. 439. So, a tenant for life may have a proceeding for damages done to her estate by the construction of a railroad, without joining the remainder-man. *Railroad v. Boyer*, 1 Harris, 497. By the New York Revised Statutes, (2, 339,) a reversioner or remainder-man may maintain the action of waste or trespass for any injury to the inheritance, notwithstanding an intervening estate for life or for years.

(b) The owner of land held by a tenancy at will may bring an action on the case for the obstruction of a way appurtenant to the land, if damage is thereby caused to him, though neither the reversion is affected nor the rent reduced. *Cushing v. Adams*, 18 Pick. 110.

But a lessor at will cannot maintain an action against a stranger, for entering upon the land, demanding rent from, and making a lease to, the tenant, if the reversion sustains no actual damage therefrom. *French v. Fuller*, 23 Pick. 104.

(c) The landlord and tenant do not stand in the relation of *principal* and *agent*. *Stark v. Miller*, 3 Misso. 470.

(d) Upon the same principle, a declaration against an owner of land for a nuisance to the premises of his neighbor, by means of neglected drains, must allege either that the defendant was the occupier of the drains, or that the nuisance is a continuing one. *Russell v. Shenton*, 2 G. & Dav. 573. A reversioner cannot maintain an action for obstruction of a

16 The plaintiff declared as reversioner of a yard and part of a wall occupied by his tenant, and that the defendant placed on said part of the wall quantities of bricks and mortar, and thereby raised it to a greater height than before, and placed pieces of timber on the wall, overhanging the yard, by which the plaintiff during all the time lost the use of said part of the wall, and also by means of the timber, &c., overhanging the wall, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and said part of the wall have been injured, without stating that his reversion was injured. The judgment was arrested after verdict.(1)

17. Where, by virtue of special provisions in a lease, the lessee has the right to do certain acts in relation to the land, which would otherwise be a ground of action against him by the lessor, it seems the lessor can maintain no action against a stranger for doing such acts, or at most can recover only nominal damages.(2)

18. A demised land to B for years at an annual rent, with liberty to dig half an acre of brick earth annually. B covenanted that he would not dig more; or, if he did, that he would pay a certain increased rent, being after the same rate that the whole brick earth was sold for. A stranger dug and took away brick earth, and the lessee brought trespass, and recovered full damages against him. Held, B was entitled to retain the whole damages. Chief Justice Mansfield remarked, that the terms of the lease gave the lessee the same right as the lessor, a right to dig and sell the brick earth. The lease amounted to an absolute sale of the whole brick earth, though the tenant was not to pay for the whole, unless he used it. The lessor could take none of it. For all that he took, the lessee might recover full damages. And the lessor could not, it seems, have an action of waste against the lessee, but might sue him upon the covenant, as if the brick earth had been expressly sold, it having been taken with the lessee's knowledge. He proceeds to remark, "it is not necessary to prejudge the question, whether the lessor can sue in this case. But I have great difficulty in finding out how the lessor can be injured. If he has any right, it must be for mere nominal damages." Heath, J., remarked, that the lessor could not recover damages for the removal of the soil, for that is sold to another; but only for any damage possibly done to the inheritance, if such there be, in the manner of the excavation. Chambre, J., dissented, on the ground that the right of the lessee was executory merely; that he acquired no freehold in the soil, till he himself elected to become a purchaser of it; and till such election, he had a mere possessory right, his interest being the difference between the value of the earth

(1) *Jackson v. Pesked*, 1 M. & S. 234; *Baxter v. Taylor*, 4 B. & Ad. 72; *Tucker v. Newman*, 11 Ad. & El. 40.

(2) *Attersoll v. Stevens*, 1 Taunt. 182.

way, unless permanently injurious, or involving a denial of his right. *Hopwood v. Scofield*, 2 Carr. & K. 34. The plaintiff demised a cottage, without exception of mines. Held, he might maintain an action on the case against a third person for an injury to the cottage by an excavation of coal, though it did not clearly appear, whether this was caused by excavation under the cottage or under the adjoining house, occupied by the plaintiff himself. *Raine v. Alderson*, 4 Bing. N. 702. Where land, subject to a nuisance, is leased by the owner, and the nuisance kept up subsequently; the reversioner cannot maintain a bill in equity, without joining the lessee as plaintiff. *Ingraham v. Dunnell*, 5 Met. 118. In Massachusetts, a reversioner cannot maintain such bill, unless the injury is irreparable, or the remedy at law insufficient. *Ibid*.

taken by the defendant, and the price that the lessee must have paid for it if he had taken it himself, and all the remaining interest being in the reversioner, who might bring an action on the case against the wrong-doer.

19. Where a third person does acts which are in their nature permanently injurious to the estate, as, for instance, by cutting down trees, but by the license of the lessee; he is not *a stranger*, within the meaning of the New York Statute, which gives to a reversioner, &c., an action of trespass for an injury to his estate done by strangers. The mere want of privity of contract between the wrong-doer and the lessor, does not constitute the former a stranger; because this construction would authorize an action against every servant or laborer, in the employment of a tenant, who should do an act injurious to the lessor. The general rule is, that in a case of this kind, both the lessor and lessee may bring their respective actions; but in this instance the latter could not sue, having expressly authorized the act. The lessee would be answerable in an action of waste. Every act that would be a trespass in a stranger, is not necessarily waste in the tenant. If the servant of the tenant were liable in trespass to the lessor, he might sometimes be made liable for acts which the lessee might do with impunity. He must therefore be allowed to make the same defence, which the lessee could make to an action of waste. The difficulty, which would inevitably result from treating such person as a stranger, could not be avoided, without confounding the actions of trespass and waste.(1)(a)

20. But it has been held in New Hampshire, that an action on the case for waste, lies in favor of a reversioner against a third person, who has cut timber upon the land by virtue of a sale to him by the lessee; the title of the trees, when cut, in all cases remaining in the reversioner; and the tenant being empowered to cut and use them for specific purposes only, but not to sell them.(2)

21. A remainder-man or reversioner, not having any right to immediate possession of the land, cannot lose his title by means of a disseizin, or adverse possession, by a stranger. He either cannot, or, if he can, is not bound to, enter during the particular estate, to defeat the wrongful title.

22. Judge Kent thus states the law upon this point. Neither a descent cast, nor the statute of limitations, will affect a right, if a particular estate existed at the time of the disseizin, or when the adverse possession began; because a right of entry in the remainder-man cannot exist during the existence of the particular estate; and the *laches* of a tenant for life will not affect the party entitled. An entry, to avoid the statute, must be an entry *for the purpose of taking possession*; and such an entry cannot be made during the existence of the life estate.(3)

23. So it is said, that where there is a right to *curtesy* in land

(1) *Livingston v. Mott*, 2 Wend. 605.

(2) *Elliot v. Smith*, 2 N. H. 430.

(3) *Jackson v. Schoonmaker*, 4 John. 402.

(a) A lessee having mortgaged his interest and become bankrupt, the assignee removed certain fixtures. Held, the mortgagee might maintain an action against him, although the lease contained a covenant to deliver up all fixtures to the landlord; that the mortgagor, while in possession, stood as a *tenant*, leaving the reversion in the mortgagee; and that he was entitled to recover the full value of the fixtures. *Hitchman v. Walton*, 4 Mees & W. 409.

descended, no right of entry descends to, or can vest in, the heir, during the continuance of that estate.(1)

24. The statute does not run against reversioners, &c., during the continuance of the particular estate, even though the latter did not exist at the time the disseizin took place; provided it was immediately preceded by disabilities, such as *infancy*, &c., which prevented a legal entry. The subject of *disabilities* will be considered hereafter.(2)(a)

25. A tenant for life was disseized, and the disseizor, and those claiming under him by two successive descents, visibly occupied the land for forty years. Held, upon the death of the tenant for life, the reversioner might still assert his title to the land.(3)

26. In Massachusetts, although, as in New York, a reversioner, &c., is not *bound* to enter during the continuance of the particular estate; the language of the court implies that he *may* enter. Thus, in a case of alleged forfeiture by the particular tenant, Judge Wilde remarks,—“as to the objection of forfeiture, it is sufficient to remark, that the demandants do not claim a right of entry arising from forfeiture. If a forfeiture were incurred, they were not bound to enter; and if the right to enter for that cause is now barred by the statute of limitations, this does not affect the right of entry, arising afterwards, on the death of tenant for life. If there be two rights of entry, one may be lost without impairing the other.”(4)(b)

27. In England, a reversion, expectant upon an estate for years, is present assets for payment of debts. Thus, it is now settled, though there are old precedents to the contrary, that an heir holding such reversion cannot plead the estate for years in delay of execution, upon a suit against him on his ancestor's bond, but must confess assets. The grounds of this doctrine are, that an estate for years, at common law, was an interest not recognized by the law; and that, although an execution may issue upon the judgment against the heir, yet the lessee may defend against an ejectment by the title of his lease.(5)

28. A reversion, expectant upon an estate for life, is *quasi assets*. The heir of such reversioner may plead specially the intervening estate, but the plaintiff may take judgment of it *quando acciderit*, or a judgment to recover the debt and damages, to be levied when the reversion shall *fall in*; and a special writ shall issue accordingly.(6)(c)

(1) Jackson v. Sellick, 8 John. 269.

(2) Jackson v. Johnson, 5 Cow. 74.

(3) Wallingford v. Hearl, 15 Mass. 471.

(4) Stevens v. Winship, 1 Pick. 327; Miller v. Ewing, 6 Cush. 34.

(5) 2 Cruise, 302; Smith v. Angel, 1 Salk.

354; 2 Ld. Ray. 783; 7 Mod. 40; Osbaston v. Stanhope, 2 Mod. 50; Villers v. Handley,

2 Wils. 49; Murrell v. Roberts, 11 Ired. 424.

(6) Ibid.; Dyer, 373 b; Barton v. Smith, 13 Pet. 464.

(a) See Vol. II.—*Disabilities; Disseizin*.

(b) The same principle is adopted by statute in Maine. Me. Rev. St. 621. In Wisconsin, (Rev. Sts. 584,) a reversioner may defend a suit brought against the particular tenant. If he make default or give up, and judgment be rendered against him; at the termination of the particular estate, the reversioner may recover. A recovery by agreement against a tenant for life is void against the reversioner, unless he appeared. *Ib*.

(c) In most of the cases upon this subject, the bonds, of which payment was claimed, were entered into by the person who had been once seized in fee in possession, who had afterwards created the limitations of the estate, and had also died last seized of the fee; so that the heir, in claiming the reversion on the determination of the particular limitations,

29. The question, how far a reversion in the hands of heirs is regarded as an actual estate, with respect to its liability for debts as well as in other respects, will be considered hereafter under the title of *Descent*. A single case only, and a few general observations upon the subject, will be here given.

30. A devise was made to one for life, afterwards the estate to be distributed as if no devise had been made. A, one of the heirs of the testator, dies during the continuance of the life estate. The question arose, whether A's heir, after the life estate was determined, inherited to his father or to his grandfather, the testator, and whether A's debts were upon his death to be paid from this reversion, now become possession. Held, at common law, A had a share of the reversion, and might aliene it, or, by an obligation binding *his heirs*, might render the estate assets in their hands. So, if judgment should be rendered against him before his death, execution might issue against the estate after his death. But still, none of these things having taken place, on the determination of the life estate, A's son takes as heir of the testator, and not as heir of A. Therefore, by the common law rule, the reversion would not be liable for A's debts; but by Statute 1783, c. 36, and following acts, reversions are made liable in Massachusetts for debts, under the general denomination of *real estate*. Hence the administrator of A might take the estate as assets.(1)

31. A very important, perhaps the leading American case, upon this subject, is that of *Cook v. Hammond*,(2) in the United States Circuit Court. In the course of his learned and able opinion, Judge Story makes the following general remarks.(3)

32. Where the estate descended is a present estate in fee, no person can inherit who cannot, at the time of the descent cast, make himself heir of the person last in the actual seizin thereof; that is, as the old law states it, *seisina facit stipitem*. But of estates in expectancy, as reversions and remainders, there can be no actual seizin during the existence of the particular estate of freehold; and, consequently, there cannot be any mesne actual seizin, which of itself shall turn the descent, so as to make any mesne reversioner or remainder-man a new stock of descent, whereby his heir, who is not the heir of the person last actually seized of the estate, may inherit. The rule, therefore, as to reversions

(1) *Whitney v. Whitney*, 14 Mass. 88. | (2) 4 Mas. 467.
See *Rich v. Waters*, 22 Pick. 563. | (3) *Ib.* 484.

was obliged to derive title from the original debtor. But it has been also held, in some cases, that such reversion is liable to the bond debts of an intermediate tenant for life, who becomes entitled to the reversion. It is said, the obligor had actual seizin of the reversion by his seizin as tenant for life. He might have sold it, and therefore might charge or incur it; though, strictly speaking, his bond was no charge upon the reversion, but only upon the heir, in respect of such reversion descending. And this reversion was properly, the instant it vested in the heir, assets by descent in his hands, though, before, only dormant, potential assets. *Smith v. Parker*, 2 Black. 1230.

The doctrine above stated, however, has been questioned; and it has been contended, that, as one who claims a reversion by descent must make himself heir to the donor, and not take as heir to any of the intermediate heirs, because they never had actual seizin; such reversion in his hands is assets of the donor, but not of the intermediate heirs. *Tweedale v. Coventry*, 1 Bro. 240; 2 Saun. 8, n.; *Doe v. Hutton*, 3 B. & P. 651; 4 Vin. Abr. 451; 1 Ves. 174.

and remainders expectant upon estates in freehold is, that unless something is done to intercept the descent, they pass, when the particular estate falls in, to the person who can then make himself heir of the original donor, who was seized in fee and created the particular estate, or, if it be an estate by purchase, the heir of him who was the first purchaser of such reversion or remainder. But, while the estate is thus in expectancy, the mesne heir, in whom the reversion or remainder vests, may do acts which the law deems equivalent to an actual seizin, and which will change the course of the descent, and make a new stock. Thus, he may, by a grant or devise of it, or charge upon it, appropriate it to himself, and change the course of the descent. In like manner, it may be taken in execution for his debt during his life, and this in the same manner intercepts the descents. But, if no such acts be done, the rule above stated prevails, and the heir of the donor shall take the estate, though he be not heir of the reversioners, &c. Thus, in case of an estate in dower or by the curtesy, after the death of the last owner in fee, the heir only takes only a reversion. But, it is a misnomer to call it a case of *suspended descent*; for the reversion descends and vests absolutely in the heir; he may sell it, incumber it, devise it, and it is subject to execution as part of his property during his life.

33. A reversion expectant on *an estate tail* is said not to be assets during the continuance of the latter, being deemed of no value, by reason of the power of the tenant to bar the entailment by a common recovery. But such reversion is assets, when it falls into possession; and liable to the judgments recovered against all who were ever entitled to it. Also, to all conveyances, charges and leases made by such persons, and the covenants contained in them.(1)(a)

34. In regard to contracts and conveyances made by those holding expectant interests, the law, regarding them as from the nature of their estates peculiarly liable to imposition, has established peculiar rules for their protection. *An heir* has, in strictness, neither a reversion nor remainder, (except in case of a contingent remainder, limited expressly to the heirs of one living; and to this the rules in question are not applicable, because a contingent remainder cannot be conveyed.)(b) He has a mere *expectancy*, wholly subject to the disposition of his ancestor. But,

(1) 2 Cruise, 303; Gifford v. Barker, 4 Vin. 451; Symonds v. Cudmore, 4 Mod. 1; Shelburne v. Biddulph, 6 Bro. Parl. 356.

(a) Statute 3 Wm. & Mary, ch. 14, rendered a devise of lands fraudulent and void as against creditors of the deviser. Before this act, there was no method, either at law or in equity, to subject lands devised to payment of debts. The reason was, that the ancestor by his specialty bound only the heir, and not even him, unless he was named, and never beyond the extent of the assets which came to him. It has been held under this statute, that where the heir of an estate tail, and of the reversion in fee expectant upon it, devises the estate and then dies without issue, whereby the devisee acquires a fee-simple in possession, the estate is liable in the hands of the latter for debts of the ancestor of the deviser, who made the settlement in tail. The heir is regarded, not merely as a representative of the debtor, but as himself a debtor within the words of the statute. Kynaston v. Clarke, 2 Atk. 204.

In Massachusetts, a reversion expectant upon an estate tail is a vested interest, devisable, and which will pass under a general residuary clause. Steel v. Cook, 1 Met. 281.

If limited by way of executory devise, upon the contingency of issue by a future marriage of one of the tenants in tail, the residuary devisee of the reversion may grant it to a third person, subject to the executory devise. Ib.

(b) As to the distinction between *contingent interests*, such as executory devises, &c., which are assignable, and mere *possibilities*, such as the expectancy of an heir, or the prospect of a legacy; which are not—see Fortescue v. Satterthwaite, 1 Ired. 566.

inasmuch as all expectant interests, with respect to the principle now to be considered, stand upon substantially the same foundation; it seems not inappropriate to present a general view of the subject under the present title.

35. The general principles of law upon this subject are thus stated by Parsons, Ch. J., in the case of *Boynton v. Hubbard*.⁽¹⁾ When an heir gives a bond, on receiving a sum of money, to pay a larger sum, exceeding legal interest, upon the death of his ancestor, if the heir shall be then living; if there is only a reasonable indemnity for the hazard, it may be enforced at law. But, if his necessities are taken advantage of, he is relieved as against an unconscionable bargain, on payment of principal and interest. So, when one having a reversion or remainder, contracts to sell it, on becoming possession, for money paid at the time of the bargain, a similar rule is adopted. Here there may be a computation of the risk, as involved in the continuance of the preceding estate; and the bargain, like that before mentioned, may be relieved against, if unconscionable. If the reversion or remainder be actually conveyed, equity alone can give relief, unless there were absolute fraud. But a contract, made by an heir, to convey on the death of his ancestor, living the heir, a certain undivided part of what shall come to the heir by descent, distribution or devise, is a fraud upon the ancestor, productive of public mischief, and moreover in the nature of a *wager*, without furnishing any means of computing the risks, &c., as to the amount of property and the value of the inheritance, and is, therefore, void both in law and equity.

36. It has been since held, however, in the same State, that such a contract is valid, if made with the ancestor's consent, for a valuable consideration, and without imposition upon the heir.⁽²⁾

37. Judge Story remarks, that relief has been constantly granted in equity, in what are called *catching bargains*, with heirs,⁽³⁾ and, in modern times, reversioners and expectants, in the life of their parents or other ancestors, or during the continuance of prior, particular estates. Many, and indeed most of the cases have been compounded of all or every species of fraud; there being sometimes proof of *actual* fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting; weakness on one side, usury on the other, or extortion or advantage taken of that weakness. Generally, there has been deceit upon third persons; the father or other ancestor has been kept in the dark, and thereby misled and seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand. The doctrine is founded, in part, upon the policy of maintaining parental and *quasi* parental authority, and preventing the waste of family estates; as well as of guarding distress and improvidence against calculating rapacity. Equity treats parties in this situation almost like *infants*, incapable of contracting; and, although formerly undue advantage must be shown to have been taken, it now requires the purchaser to *make good the bargain*, that is, not merely to show the absence of fraud, but payment of a full consideration. The court will relieve, upon the general principle

(1) 7 Mass. 119-22. See *Wheeler v. Smith*, 9 How. 55; *Hallett v. Collins*, 10, 174.
(2) *Fitch v. Fitch*, 8 Pick. 480.

(3) 1 Story on Eq. 327-33; *Chesterfield v. Janssen*, 2 Ves. 157. See *Newton v. Hunt*, 5 Sim. 511.

of mischief to the public, without requiring any particular evidence of imposition, unless the contract is shown to be above all exception. Years do not seem to make much difference in the case of expectant heirs; since the aim of the rule is principally to prevent imposition upon ancestors. And the same rule applies, it seems, to reversioners and remainder-men, if necessitous, distressed and embarrassed.

38. The policy of this rule has been questioned, and it has been thought to have the effect of throwing necessitous owners of expectancies into the hands of those who are likely to take advantage of their situation; for no one can securely deal with them. It has also been doubted, whether the rule is strictly applicable, unless a reversioner also combines the character of heir. But the weight of authority seems to negative any such restriction or limitation.(a)

39. The rule above referred to, being founded in part at least, in the case of heirs, upon the ground of imposition practiced on the ancestor, is inapplicable, as has been seen, (sec. 36,) where the transaction was known and not objected to by him; and, *a fortiori*, if he expressly sanctions or adopts it, or the heir is of mature age. It seems there is the same exception to the rule, where the party is a reversioner, &c., and the bargain is known and not objected to by the prior tenant.(1)

40. Another reason of the rule creates another exception to it; namely, where the party is not dealing under the pressure of necessity. But, it seems, the rule is applicable, if either of the reasons on which it is founded, exist; and it is not necessary that both should concur.(2)

41. If the heir is dealing substantially for his expectations, although for a present obligation also, which it is hardly possible that he should discharge, or throwing in a present possession worth but a small proportion of the whole, equity will interpose; as where the heir received an annuity worth about one-sixth of the value of the reversion, though an interest in possession, amounting to £99 a year, was included in the sale.(3)

42. The rule in question, perhaps, is not applicable, where there is a fair though secret agreement among heirs themselves to share equally, and thus to cut off all attempts to overreach each other, and to prevent all exertions of undue influence.(4)

43. In relation to the contracts of heirs, &c., respecting their future estates, as they are not *void*, but only *voidable*; in general, any confirmation of them, after the party comes in possession, and the former unfair inducement has ceased, will render them valid. But it will be otherwise, if the former pressure or necessity still continues, or if the

(1) King v. Hamlet, 2 My. & K. 473-4.

(2) Ib.; Portmore v. Taylor, 4 Sim. 182.

(3) Earl, &c. v. Taylor, 4 Sim. 209-10. See

Potts v. Curtis, Younge, 543.

(4) 1 Story. 334.

(a) In South Carolina, it is remarked by Desaussure, Chancellor: "There is a distinction made between the cases of young heirs selling expectancies, and of others, which I am not disposed to support. It is said, that the former are watched with more jealousy, and more easily set aside than others, on principles of public policy. This was certainly true at first; but the eminent men who have sat in Chancery, have gradually applied the great principles of equity on which relief is granted, to every case where the dexterity of intelligent men had obtained bargains, at an enormous and unconscientious disproportion, from the ignorance, the weakness, or the necessities of others, whether young heirs or not." Butler v. Haskell, 4 Desau. 687-8. In New York, it is held, that the expectancy of an heir is not a subject of legal transfer. Tooley v. Dibble, 2 Hill, 641.

party acts under the belief that the original contract is binding upon him. It has been held in some cases, that if the contract is *illegal* or *usurious*, it is absolutely void, and not susceptible of confirmation.(1)

44. If the heir or other expectant, after being restored to his legal capacity, becomes opposed to the other party, and does any act, by which the rights or property of the latter are injuriously affected; upon the principle, which forbids a party to repudiate a dealing, and at the same time to avail himself fully of all the rights and powers resulting therefrom; the heir, &c., will not be allowed to rescind the bargain. So, if he dispose of the consideration received for his reversionary interest, in such way that it can never be restored to the other party in its original condition; he will not be allowed to rescind, unless he can show, that this disposition was made under a continuance of the original pressure.(2)(a)

45. In Maryland, the Chancellor may, after notice, order a sale of lands in the State belonging to any minor who resides out of the United States, or of any remainder or reversion dependent thereon, for payment of his debts. A subsequent act provides for the sale of any reversion belonging to a minor, dependent upon a life estate, and that, upon the assent of the tenant for life, the annual interest or a suitable part thereof shall be paid him for his life.(3)

46. In Maryland, it was formerly the practice to assess taxes upon land held by an estate for life, equally, half and half, upon the particular tenant and the reversioner in fee. But a statute provides that the whole shall be assessed upon the former as if he owned the fee.(4)

47. In New Jersey, Michigan, Mississippi and New York, it is provided, that a reversioner, &c., may be admitted to defend a suit brought against the tenant for life at any time before judgment; and that the former shall not be prejudiced by any default, surrender or giving up of the land by the latter.(5)

48. In New York, a process is provided, by which reversioners and remainder-men may annually call for the production or appearance of tenants for life, upon whose estates their expectancies depend, and whose residence is unknown or concealed.(6)

49. In Massachusetts, where a tenant for life recovers the land by action, and pays to the defendant the value of improvements made upon it by the latter, such tenant for life or his representatives, at the termination of his estate, may recover the value of the improvements, as they then exist, from the reversioner or remainder-man, and shall have a lien therefor upon the land, as if it were mortgaged for payment of such amount. The reversioner, &c., may also have a bill in equity to redeem, as in case of mortgage, if the amount is not agreed by the parties. He will not be limited to three years, but he shall recover no balance from the defendant, though the rents and profits

(1) 1 Story, 338-9, and n.

(2) *Ibid.*; *King v. Hamlet*, 2 My. & K. 456.

(3) 2 Md. L. 129; 5 *Ibid.*, ch. 154, sec. 13.

(4) Md. L. 1798, ch. 96.

(5) 1 N. J. Rev. C. 346; Mich. L. 223; Missi. Rev. C. 449; 2 N. Y. Rev. Stat. 339.

(6) 2 N. Y. Rev. St. 343.

(a) A reversion was purchased from A by B, at a gross discount from its value. C, having notice, ten years afterwards bought of B for a full price, A joining and confirming the sale. Held, A was still entitled to a decree for reconveyance to him, upon re-payment of the original price. *Addis v. Campbell*, 4 Beav. 401.

have exceeded the sum due for the improvements. The reversioner, &c., shall be considered as disseized at the termination of the prior estate, and the statute of limitation shall run against him accordingly.(1)

CHAPTER LIII.

JOINT TENANCY.

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| 1. Number and connection of the owners of real estate. | 16. Unity of time. |
| 3. Joint tenancy, how created. | 22. " " possession. |
| 5. " " in a remainder. | 23. Survivorship. |
| 8. " " for lives, and several inheritances. | 24. Exceptions to the rule of survivorship. |
| 12. Unities necessary to joint tenancy. | 34. Who may be joint tenants. |
| 13. Unity of interest. | 45. Not subject to charges made by one. |
| 14. " " title. | 46. Except by lease. |
| | 52. Severance of joint tenancy. |

1. WITH respect to the number and connection of the owners of real estate, it may be held, according to the English law, in four ways, viz. : in severalty, joint tenancy, co-parceny, and common. Upon the first of these kinds of tenancy, of course, it is unnecessary to make any remarks. In Ohio, it is said, that the three last named estates are reduced to one estate.(2)

2. Chancellor Kent says, that two or more persons may have an interest in connection in *the title* to the same land, as joint tenants or co-parceners, or in *the possession* of the same as tenants in common.(3)

3. Where lands are granted or devised to two or more persons, to hold to them and their heirs, for their lives, or for another's life; they all take a joint estate, and are called joint tenants.(4)

4. Joint tenancy can be created only by acts of parties, and never by acts of law.(5)

5. Joint tenancy may exist in *a remainder*. Thus, if a conveyance be made to two persons, and the heirs of their two bodies, remainder to them two and their heirs; they are joint tenants of the remainder in fee.(6)

6. Conveyance to two persons, and the heirs of one of them. They are joint tenants for life, and one of them has the fee. If this one die, the other shall hold the whole by survivorship for life. So, two persons may be joint tenants for life, and one of them have an estate tail. It seems, in each of these cases, the inheritance vests by way of remainder.(7)

7. Lord Coke says, that when land is given to two persons, and the heirs of one of them, he in remainder cannot grant away his fee-simple. Mr. Hargrave's construction of this passage is, that although in some respects the life estate and the remainder are vested in one person, as

(1) Mass. Rev. St. 615.

(2) Walk. 291.

(3) 4 Kent, 357.

(4) Lit. 277.

(5) 2 Cruise, 431.

(6) Co. Lit. 183 b.

(7) Lit. 285.

distinct interests, yet they are so far consolidated that the latter cannot be transferred separately, and as a remainder.(1)

8. Two men may have joint estates for their lives, and yet several inheritances, in the same land. Thus, if a conveyance is made to A and B, being both males or both females, and the heirs of their bodies, and both of them have issue; during their joint lives they hold as joint tenants; upon A's death, B will take the whole for his life; and, upon B's death, the respective issue of A and B will hold as tenants in common. It is said, however, that in case of a devise in this form, it is not the intention of the testator that the surviving tenant should turn out the issue of the other.(2)

9. So, a devise to A and B and their issue, and in default of such issue, to C, gives A and B a joint estate for life and several inheritances.(3)

10. A limitation to a man and woman and their issue, it seems, will not create several inheritances, because it will be presumed to contemplate their intermarriage together, and the birth of joint issue. But a limitation to two men and one woman, and the heirs of their three bodies begotten, will create several inheritances; because the chance of the woman's marrying both men, though possible, is a possibility upon a possibility. The same principle applies to a gift made to one man and two women; and also to parties whose relationship precludes the possibility of their legally marrying each other.

11. Lord Coke says, in all these cases there is no division between the estates for life and the several inheritances. The tenants for life cannot convey away the inheritance after their decease, because it is divided only in supposition and consideration of law; and to some purposes the inheritance is said to be *executed*.(4)

12. Joint tenancy requires the following points of *unity*, viz.: of *interest, title, time and possession*.

13. With respect to *unity of interest* it is said, that one joint tenant cannot be entitled to one period of duration or quantity of interest, and the other to a different one. This principle, however, seems to be only partially true, and the instances and illustrations, adduced in the books, show a discrepancy for which it is difficult to discover any satisfactory reason. Thus, a conveyance to two persons, to the one in fee and the other in tail, or to the one for life and the other for years, does not create a joint tenancy. So a reversion upon a freehold, or a right of action or of entry, cannot stand in jointure with a freehold and inheritance in possession. But, on the other hand, it has been seen, (sec. 6,) that a limitation to A and B, and the heirs of A, makes A and B joint tenants for life. So a right of action and a right of entry may stand in jointure.(5)

14. *Unity of title* requires that the estate of joint tenants be created by the same limitation or lawful act of party, or by the same disseizin or unlawful act.(a)

(1) Co. Lit. 184 b and n. 2.

(2) Lit. 283; Cook v. Cook, 2 Vern. 545; Wilkinson v. Spearman, 2 P. Wms. 530; Printed Cas. H. of L. 1705.

(3) Ib.

(4) Ib.; Co. Lit. 184 a.

(5) Co. Lit. 182 b.

(a) Persons joining in a disseizin are joint tenants. Hence, if one of them die seized, after peaceable possession for five years, no descent is cast, and the disseizee still retains his right of entry. Putney v. Dresser, 2 Met. 583.

15. Although some of the persons to whom an estate is limited take by common law, and others by way of use, they may still be joint tenants. Thus, where a fine was levied to A and B, to the use of A and B, and also to C; held a joint tenancy, though A and B were in by the fine, and C by the statute of uses.(1)

16. With respect to *unity of time*, the general principle is, stated to be, that it is necessary to a joint tenancy that the estate become vested in all the tenants at the same instant. Thus, if a conveyance is made to A for life, remainder to the heirs of B and C; upon the death of B, a moiety of the remainder vests in his heirs, and upon the death of C, the other moiety in C's heirs; and therefore these respective heirs are not joint tenants.(2)

17. This principle, however, does not apply to the learning of uses and executory devises.

18. It has also been held inapplicable to husband and wife. Thus, if a man convey to the use of himself and of any future wife; upon his marriage, the husband and wife become joint tenants, although their estates vest at different times. This, however, is a case of *use*, and may be sustained upon that principle alone.

19. So, where limitations take effect at different times, still, *if the root is joint*, as in case of limitations to successive children of one parent; there may be a joint tenancy. And in one case it is stated, generally, that a joint claim *by the same conveyance* makes joint tenants, and not *the time of vesting*. And in another, that if the parties claim *by one title*, though taking at different times, this is a joint tenancy.(3)

20. Devise to a woman and her children on her body begotten or to be begotten by A, in fee. Held, the woman and her children were joint tenants, though the estate vested in them at different times.(4)

21. Mr. Hargrave was of opinion, that these exceptions to the general principle are limited to conveyances by way of use and to devises. And some decided cases seem to favor this opinion. But Lord Thurlow appears to have rejected the distinction between limitations to uses and others.(5)(a)

22. With respect to *unity of possession*, joint tenants are said to be seized *per my et per tout*. Each of them has the entire possession of every part, and of the whole. Each has an undivided moiety of the whole, not the whole of an undivided moiety. Hence the possession and seizin of one is that of the other also.

23. The principal incident to an estate in joint tenancy, is the right of *survivorship*; by which, upon the death of one joint tenant, whether the estate is a fee, or a joint term for years, or a trust, his interest passes, not to his heirs or other representatives, but to the surviving co-

(1) 2 Cruise, 433; Co. Lit. 188 a.

(2) Watts v. Lee, Noy, 124.

(3) Co. Lit. 188 a; 4 Kent, 358; Gilb. Uses, 71; Blamford v. Blamford, 3 Bulstr. 101; Aylor v. Chep, Cro. Jac. 259; Earl, &c. v. Temple, 1 Ld. Raym. 310; 2 Prest.

on Abstr. 67; Matthews v. Temple, Comb. 467.

(4) Oates v. Jackson, 2 Stra. 1172.

(5) Co. Lit. 188 a, n. 13; Samme's case, 13 Co. 54; Stratton v. Best, 2 Bro. 233.

(a) In a late case of *personal property*, the old doctrine upon this subject was adhered to. Bequest to A for life, and after her death, to her children, when they become of age. A had two children, who lived to be of age. Held, they took as tenants in common, because the property vested in them at different times. Woodgate v. Unwin, 4 Sim. 129.

tenant or co tenants. And though one of two lessees for years dies before entry, the survivor shall take his interest.(1)

24. In some cases, however, joint tenancy may exist without the mutual right of survivorship.

25. Lease to A and B during the life of A. Upon the death of B, A takes the whole; but upon the death of A, B takes nothing.(2)

26. Although, as has been seen, trusts are subject to survivorship, yet the general principle is, that the right of survivorship is looked upon as odious *in equity*, being often attended with hardship and injustice. Hence, upon the death of one joint owner, his estate has been held to pass to his heirs.(3)

27. Thus, if one of two mortgagees, who have jointly advanced the mortgage-money, dies; his representatives shall have a share of the money when paid. This principle, however, seems to be limited to cases, where they advance unequal portions of the whole sum. If each advances a moiety, which appears by the deed, this is regarded as a joint purchase of the chance of survivorship. When the proportions are unequal, the mortgagees are regarded in law either as *partners*,—in which case, though the survivor take the whole legal estate, he becomes a trustee for the other; or as actual tenants in common, with no right of survivorship.(4)

28. Upon the same principle, where one of two joint purchasers of land lays out money in repairs and improvements, and dies; the expense is a lien upon the land in favor of his representatives.(5)

29. The doctrine above-stated has been broadly laid down by Sir Joseph Jekyll in this form; that the payment of money creates a trust for the parties who advance it, and an undertaking upon the hazard of profit or loss is in the nature of *merchandizing*, when the *jus accrescendi* is never allowed.

30. In this extent, the principle is by no means limited to conveyances in mortgage, or to liens arising from the laying out of money upon the land, or to unequal advances of money by the respective parties. Thus, where several persons agreed to drain certain overflowed lands, and a deed was made to them of the lands in consideration of a certain sum of money, and they proceeded to lay out money in prosecution of the undertaking; it was held, that the parties were tenants in common.(6)

31. Though the circumstance, that the consideration for a conveyance is advanced unequally by the several grantees, seems to have been regarded as important in determining the nature of their tenancy; yet the general rule is, that a deed given to several persons, and not designating their respective proportions, will pass to each an equal share of the land. The amount of consideration paid by each of them cannot be shown by parol evidence; and if one dissent to the conveyance, his share does not pass to the other grantees, but reverts in the grantor.(7)

32. The equitable principle, that where a purchase of land is made

(1) Lit. 280-1; Co. Lit. 46 b; Brompton v. Alkis, 2 Vern. 556; Cray v. Willis, 2 P. Wms. 530; Rex v. Williams, Bunb. 342.

(2) Co. Lit. 181 b.

(3) Bunb. 342; Gould v. Kemp, 2 My. & K. 309.

(4) Petty v. Styward, 1 Ab. Eq. 201; Rigden v. Vallier, 2 Ves 258.

(5) Aveling v. Knipe, 19 Ves. 441.

(6) Lake v. Craddock, 3 P. Wms. 158.

(7) Treadwell v. Bulkley, 4 Day, 395.

by two persons, with a view to expending large sums of money in the improvement of it, they shall be regarded as tenants in common, has been recognized in Pennsylvania. But the inequality of the sums, paid by the respective parties, seems to have been considered as an unimportant circumstance; and it is intimated that the principle is inapplicable, unless the case is clearly shown to be of a mercantile nature, and connected with a partnership in business.(1)(a)

(1) *Duncan v. Forrer*, 6 Bin. 193.

(a) Under the insolvent law of Massachusetts, if a surviving partner become an insolvent debtor, real estate purchased in the names, with the funds, and for the business of the partners, belongs to the assignee, who may, by a bill in equity, compel the administrator, widow and heirs of the deceased partner, to convey to the plaintiff such deceased partner's moiety of the land, for the benefit of partnership creditors. *Burnside v. Merrick*, 4 Met. 537. See *Tappan v. Bailey*, Ib. 529. In Ohio, in case of a partnership in the business of building, &c., the widow of a deceased owner cannot claim dower as against partnership creditors. *Sumner v. Hampson*, 8 Ohio, 328.

So, in Vermont, it is held that real estate, belonging to partnership funds, should follow the same law of distribution in Chancery, which is applied to personal property. *Rice v. Barnard*, 20 Verm. 479. The same rule is adopted in Tennessee. *Boyers v. Elliott*, 7 Humph. 204.

So, in New York, real estate, purchased with partnership funds, for the use of the firm, although the legal title is in a member or members of the firm, is in equity the property of the firm, for the payment of its debts, and for the purpose of adjusting the equitable claims of the co-partners as between themselves. *Smith v. Tarlton*, 2 Barb. Ch. 336; *Buchan v. Sumner*, 2 Barb. Ch. 165; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366. And the same rule applies to leasehold estate. *Day v. Perkins*, 2 Sandf. Ch. 359.

But real property purchased with partnership funds for partnership purposes, and which remains after paying the debts of the firm, and adjusting the equitable claims of the different members of the firm, as between themselves, is considered and treated as real estate. *Buckley v. Buckley*, 11 Barb. 43.

Upon the death of one, his legal title passes to his heirs. *Buchan v. Sumner*, 2 Barb. Ch. 165. And the surplus remaining, after settlement of the partnership affairs, is treated as real estate. Ib.

To constitute real estate partnership property, it must be purchased with partnership funds, and have been used for partnership purposes. *Cox v. McBurney*, 2 Sandf. 561.

Where land is purchased in the name of one partner, and not used for partnership purposes, the other partner has no interest therein, as survivor of the grantee, and no interest passes to his assignee in bankruptcy. Ib.

Though such land was paid for with the partnership funds, it could be reached only by the creditors of the partner not named in the deed, who were such at the time of the conveyance. Ib.

Where real estate was originally purchased by one of two partners, and paid for out of his individual funds, and the only interest of the partnership is on account of improvements made with its funds; the actual interest of such partner, at least his individual interest, is liable to be sold on execution. But, it seems, the partnership creditors have a claim, in equity, to have the whole value of the improvements applied to their debts, in preference to the separate creditors of the individual partner; the equitable interest in such improvements, chargeable with the debts of the partnership, will pass under an assignment made by the co-partners for the benefit of the partnership creditors; and upon such equitable interest, a judgment, obtained by a separate creditor against the partner who purchased, will not, as against the partnership creditors, be a lien. *Averill v. Loucks*, 6 Barb. 19.

In Maryland, it has been held, that, in the absence of any express agreement between partners, giving to their real estate the character of personality, the widow of a deceased partner may claim an allowance from the proceeds of partnership lands sold, in lieu of dower, if the partnership was solvent at the time of its dissolution. *Goodburn v. Stevens*, 5 Gill 1; 1 Md. Ch. 420.

But where real estate had been used by a partnership for many years in the manufacture of iron, and, upon the death of any partner, his heirs came into the partnership, and there was no proof of any articles of partnership; held, the whole partnership estate, whether consisting of real or personal property, was in equity a consolidated fund, to be appropriated primarily and exclusively to partnership debts. *Goodburn v. Stevens*, 5 Gill, 1.

In Louisiana, where an immovable is purchased by a commercial partnership, the partners

33. While the case of joint mortgagees has been held in England an exception to the rule of survivorship; in this country, where, as will be seen hereafter, joint tenancy is, for the most part, abolished, it is held, for peculiar reasons, still to subsist between parties of this description. (See ch. 54, sec. 20.)

34. Bodies politic or corporate cannot be joint tenants with each other, nor with individuals; because they take in their political capacity, and are seized in several rights, by several titles and capacities. But the mere designation of a grantee by his corporate character will not prevent his holding as joint tenant. Thus, if a conveyance is made to A, bishop of B, and C, to have and to hold to them and *their heirs*, they are joint tenants. So, the rule does not apply to the con-

become joint owners, and none of them can alienate it without the consent of the rest. *Weld v. Peters*, 1 La. Ann. R. 432.

Where immovable property belonging to a partnership is sold by one of the partners, for a consideration which enures to the benefit of the partnership, and the other partner, though informed of the sale, makes no objection to it; he will be considered as having ratified it. *Ib.*

Where real estate is purchased by one of two partners, and paid for out of his individual funds, and improvements are made thereon, with the partnership funds, between the time of the giving of a judgment by one of the partners as a security for future responsibilities, and the incurring of such responsibilities by the judgment creditor; the equitable interest of the other partner to be reimbursed his share of the funds, applied to such improvements, is prior to the lien of the judgment. *Averill v. Loucks*, 6 Barb. 19.

Where a lease, taken by a partner, demises the premises to him individually, it does not belong to the partnership; and parol evidence, that it was executed for their benefit, is inadmissible. *Otis v. Sill*, 8 Barb. 102.

So it is held, that an intention to bring real estate into partnership must be manifested by deed or writing placed on record; and that parol evidence is inadmissible, that real estate conveyed to two persons, as tenants in common, was purchased and paid for by them as partners, and was partnership property. *Ridgway's, &c.*, 3 Harris 177.

Where an entry was made on the books of a firm by one of the partners, charging them with a tract of land valued at a given price, as debtor to him, with the understanding that it should become partnership property; held, the land became partnership property, and subject to the prior lien of partnership, over individual debts. *Boyers v. Elliott*, 7 Humph. 204.

A and B, partners as nursery-men, owned land in common, which was planted with young trees, and, there not being land enough for their business, A agreed to the planting of the partnership trees on his own land. This piece A mortgaged; the mortgage was foreclosed, and the land purchased by C; at which sale B gave public notice that the trees belonged to the firm, and that he owned one half of them. B filed a bill to close up the partnership, and also prayed for a decree against C, declaring that half of the trees belonged to him. Held, the trees were the property of the firm, and liable for the partnership debts, and for any balance due B on a final adjustment of the partnership accounts; that neither the mortgagee nor the purchaser were entitled to protection as *bona fide* purchasers without notice; and that B could enforce his rights against them, to the same extent that he could have done against A. *King v. Wilcomb*, 7 Barb. 263. See *Warren v. Daveis*, *Ib.* 320.

Where land was purchased by a partnership, but not used by them in their business, and afterwards sold under execution against one of the partners; and it did not appear that the purchaser had notice that it was partnership property; held, the land was not liable for partnership debts. *Buck v. Winn*, 11 B. Mon. 320.

Articles of agreement were entered into between three brothers, which recited, that they had previously agreed to be equal sharers and partners in the product of their own labor and that of those under their care, and to bear equally the expense of carrying on a farm, raising stock, purchasing land, negroes, and other property, whether jointly or individually. The articles then provided for the continuance of the partnership, extended it to all business in which either of them might engage, and stipulated that, if either of them died before a final adjustment and division of the property, owned by them jointly or individually, the survivor or survivors should *heir* or inherit all the property, after paying all debts against all or either. Held, lands bought on joint account, or in the name of the brothers individually, enured to the benefit of the partnership; that, if one of them purchased lands in his own name, and sold them, taking a note to himself for the purchase-money, such note vested in the partnership, at least in equity; and that, upon the death of the payee, the surviving partners might file a bill in their own names for the enforcement of the lien. *Houston v. Stanton*, 11 Ala. 412.

veyance of a chattel real, because this cannot pass in succession. Hence, in case of a lease for years to a bishop and a natural person, they are joint tenants.(1)

35. An alien and a citizen may be joint tenants; but the interest of the former is subject to escheat.(2)

36. Husband and wife, being considered in law as one person, cannot take by moieties, as joint tenants, each an undivided moiety of the whole; but, upon a conveyance to them, each has the *entirety*; they are seized *per tout*, and not *per my*, and the husband can neither forfeit nor alien the estate. It will be seen hereafter that this rule is changed in some of the States.(3)(a)

37. Upon this principle, where a conveyance is made to husband and wife and a third person, the two first take one moiety, and the last the other.

38. The doctrine above stated was held in a very early case, where a husband, to whom with his wife an estate had been conveyed, was attainted and executed for high treason in the murder of King Edward II. The heir of the wife, after her death, claimed the land by petition to Edward III., against a stranger to whom the king had granted a patent therefor; and upon *scire facias* had judgment in his favor.(4)

39. The consequence of this principle is, that the husband has no power to convey or incumber the land, so as to bind the wife after his death. Neither of them can sever the jointure, but the whole must go to the survivor.(5)

40. The same principle has been held, where the limitation was made to the husband and wife, and the longer liver of them; and, after the death of the longer liver, to their right heirs forever.(6)

41. But it does not apply to a conveyance made to a man and woman not married at the time, but who intermarry afterwards. The tenancy originally created is not defeated by their subsequent connection.(7)

42. It has been held in Connecticut, that where husband and wife bring an action to recover a debt due her before marriage, and land is set off to them on execution in satisfaction of the judgment, they become joint tenants of such land, as they were joint tenants of the judgment.(8)

43. The widow of a joint tenant is not entitled to dower. The survivor comes in by a paramount title, which he may allege in pleading as derived directly from the grantor, without naming his companion.(9)

44. It was formerly held, that where lands were given to two women and the heirs of their two bodies, the husband of one of them deceased should be tenant by the curtesy, the inheritance being executed. Lord Coke says, that Littleton has cleared up this doubt, by showing that the inheritance is not executed, and therefore that there is no curtesy.(10)

(1) Co. Lit. 190 a.

(2) Co. Lit. 180 b, n. 2.

(3) Lit. 291; Co. Lit. 187 a; ch. 54, sec. 15; Harding v. Springer, 2 Shepl. 407; Gibson v. Zimmerman, 12 Mis. 385.

(4) Co. Lit. 187 a.

(5) Back v. Andrews, 2 Vern. 120; Green

v. King, 2 Black. R. 1211; Doe v. Parratt, 5 T. R. 652.

(6) Green v. King, 2 Black. R. 1211.

(7) Co. Lit. 187 b.

(8) Hammick v. Bronson, 5 Day, 290.

(9) Lit. 45; Co. Lit. 37 b.

(10) Co. Lit. 30 a; 183 a; 2 Cruise, 335.

(a) But a grant to husband and wife, to hold as tenants in common, makes them such. Co. Litt. 187 b; 1 Steph. 315, n.

45. One joint tenant, as has been already intimated, cannot charge or incumber the estate to bind the other who survives him; as, for instance, by a rent-charge or recognizance. So, if one joint tenant suffers a judgment to be entered up against him, and dies before execution of it, no execution can be had; but an execution sued in his life binds the survivor. And all charges bind the party himself who makes them, during his life; or, if he survive the other, absolutely.(1)(a)

46. An exception to this rule, however, is a *lease*. A joint tenant may bind his fellow by a lease for years, even though limited to commence only after his own death. Even in such case, it is said to be an immediate disposition of the land.(2) But, where one of two joint tenants for life leased for years his own moiety, to commence from the death of the other, and the other moiety by the same instrument to commence from his own death, and died; held, the whole was void, because he had no power to lease his companion's share, and the lease of his own, over which he had power, was not to commence till the other's death.(3)

47. Although a joint tenant cannot charge or incumber the estate, so as to affect the right of survivorship, yet he may convey his whole interest; and in this way, as will be presently seen, *sever* the tenancy.

48. It is said, that in consequence of the intimate union of interest and possession between joint tenants, they are obliged to join in many acts, such as *fealty*, in England. But, on the other hand, there are many cases, where the act of one is regarded in law as that of the whole. Thus, the entry of one, and the seizin thereby acquired, enure to the benefit of all. So, in case of a joint lease by them, a surrender to one is a surrender to both. So, if one commit waste, the others forfeit the land, though he alone is liable to treble damages.(4)

49. The possession of one joint tenant being in law that of the other also, one cannot disseize another but by actual ouster. Thus, in England, a fine levied by one of the whole land is no disseizin.(5)

50. Joint tenants, having one entire and connected right, must in general join and be joined, in all actions respecting the estate.(6)(b)

(1) Co. Lit. 184 a, 185 a; Lit. 286; Ld. Abergavenny's case, 6 Rep. 78.

(2) Co. Lit. 185 a; Clerk v. Clerk, 2 Vern. 323; Gould v. Kemp, 2 My. & K. 310.

(3) Whitlock v. Huntwell, 2 Rolle's Abr. 89; (*Infra*, sec. 59.)

(4) Co. Lit. 67 b; Ib. 49 b; Ford v. Grey, 6 Mod. 44; 2 Cruise, 337; 2 Inst. 302.

(5) Fisher v. Wigg, 1 Salk. 392; Reading v. Royston, 2, 423.

(6) 4 Kent, 359.

(a) In Connecticut, a joint tenant may charge his share with his private debts. Remington v. Cady, 10 Conn. 44. The common law rule that no title to *dower* attaches on a joint seizin, on account of the mere possibility that the estate may be defeated by survivorship, does not prevail in North Carolina, South Carolina, Indiana and Kentucky, or probably any other States, where the *jus accrescendi* is abolished. Lit. sec. 45; Ind. L. 183, p. 290; Reed v. Kennedy, 2 Strobb. 67; Weir v. Tate, 4 Ired. 264; 3 Blackf. 13, n.; Davis v. Logan, 9 Dana, 186; 4 Kent, 37, n.; Mayburry v. Brien, 15 Pet. 21. See Menifee v. Menifee, 3 Eng. 9; *supra*, ch. 11.

Where A and B jointly and equally erected houses in a block, afterwards made a parol partition, and each occupied, sold and received the price of his own portion; held, there was not sufficient proof of sole seizin to give a title to dower. Hamblin v. Bank, &c., 1 Appl. 66.

(b) In Mississippi it is expressly provided, that in real and mixed actions, a defendant may plead in abatement, that another person holds the land jointly with himself. Missi. Rev. C. 116. So in Virginia. 1 Vir. Rev. C. 237. In Rhode Island, a suit for the land may be brought by all the tenants, or any two of them, or one alone. R. I. L. 208. In Connecti-

51. Some other incidents of joint tenancy, common to this estate and to tenancy in common, will be considered hereafter.

52. It is said, that a joint tenancy may be severed, by the destruction of any of its constituent unities, except that of time, which, as it relates solely to the commencement of the estate, cannot be affected by any subsequent transaction.(1)

53. A joint tenancy is destroyed by destruction of *the unity of interest*, which may take place either by act of parties or act of law.(2)

54. It has been seen, that there may be joint tenants for life, remainder to the heirs of one of them; or, in other words, that one joint tenant may have a life estate and the other a fee. The whole interest being created at one time, the fee-simple cannot merge the jointure which had no previous existence. But, it is otherwise, where one of several joint tenants for life takes a conveyance of the fee, after the creation of the original joint estate; the jointure is severed by a merger of the life estate in the fee-simple. It is said, that if such tenant for life might purchase the reversion in fee, and still retain his life estate, he would have power to convey the reversion by itself, which, it has been seen, the law does not allow, where the two estates are joined by the *original limitation*.(3)(a)

55. So, where there are joint tenants for life, and a new conveyance in tail is made to them; the joint tenancy is severed.(4)

56. So a descent of the fee to one of two joint tenants for life severs the joint tenancy. Thus, where one devised to his two youngest sons for life, and afterwards the reversion came to one of them by descent from the eldest son; held, a severance of the jointure.(5) It would seem from analogy to the distinction stated in sec. 54, that if the devise were made for life to the *eldest* son and another, as the reversion and life estate must come to the former by the same event, the death of the testator, the joint tenancy for life would still exist.

57. Another mode of severance is by destroying *the unity of title*. Thus, if one joint tenant conveys his interest to a third person, inasmuch as this person claims title by conveyance from the joint tenant, and the remaining joint tenant claims title by the original conveyance, the jointure is severed.(6)

58. A conveyance by one joint tenant of his interest in the land destroys the unity of *possession* as well as of *title*. The remaining joint tenant and the grantee have several freeholds.

59. A lease for life by one joint tenant operates as a severance. And the severance applies to the reversion, as well as the particular estate. A lease for years operates as a severance *pro tanto*. So an under-lease by one of two joint tenants for years.(7)

(1) 2 Cruise, 338.

(2) *Ib.*

(3) Co. Lit. 182 b; Wisecot's case, 2 Rep.

80.

(4) Co. Lit. 182 b.

(5) Robert, &c., 2 And. 202.

(6) Lit. 292.

(7) Lit. 302; Co. Lit. 192 a. (*Supra*, sec. 46.)

cut, it has always been the practice for one joint tenant to sue alone. 1 Swift, 102. In Mississippi, one joint tenant may alone maintain a merely possessory action for the joint premises, the possession of one being in law the possession of all. *Rabe v. Fyler*, 10 S. & M. 440.

So, one may maintain forcible entry and detainer, to recover possession, the title not being involved. *Ib.*

(a) This distinction is analogous to that above mentioned, in regard to the destruction of contingent remainders.

60. It has been held, in equity, that a joint tenancy in a trust term may be severed by a mortgage made by one of the tenants. This is contrary to the general principle, that no *charge* upon the estate shall interfere with the right of survivorship.(1)

61. A conveyance, which is in law invalid, will not operate to sever a joint tenancy, even in equity; as, for instance, a conveyance made to the wife of the tenant, though immediately before his death, and for the purpose of providing for her.(2)

62. Whether mere articles of agreement may in equity operate as a severance of joint tenancy, seems to be a doubtful point, though the prevailing opinion is that they may.(3)(a) But when made by an infant, they do not have this effect. Being in their nature avoidable by the party, it is in the discretion of the court of equity either to give or refuse its assistance. It may model such a contract at pleasure. And, in the view of equity, a surviving joint tenant is not considered as a mere volunteer, but as claiming by title paramount, like the issue under an entailment. If the other tenant had died first, the infant might have avoided his act, and claimed by survivorship. Hence, to set up this act as a severance, would be manifestly unequal and unjust. Upon these grounds, articles of agreement, by which a female infant, upon her marriage, covenanted with her proposed husband and trustees to settle her lands, held in joint tenancy, upon the husband, were held not be valid in equity against the claim of the surviving joint tenant.(4)

63. A joint tenancy cannot be severed by *devise*.(b) A devise takes effect only by the death of the testator, which also vests the title by survivorship in the remaining tenant; and, the two claims being concurrent in time, the law gives priority to the latter.(5)

64. If a joint tenant makes a will, and then becomes solely seized by survivorship, the will does not operate upon the title so acquired without republication.(6)

65. A severance may be effected by the alienation of one joint tenant to another. It is said that this should be done in the form of a *release*, because both are actually seized of the estate before.(7)

66. If there are three joint tenants, and one of them releases to one of his companions, the latter holds one-third of the land in common, and he and the other tenant hold two-thirds as joint tenants. But if one release to all the others, they hold in law under the original conveyance, and not under the release; and therefore remain joint tenants as before.(8)

67. By accepting a release from his companion, a joint tenant recog-

(1) *York v. Stone*, 1 Abr. Eq. 293; 1 Salk. 158.

(2) *Moyse v. Giles*, Prec. in Cha. 124.

(3) *Musgrave v. Dashwood*, 2 Vern. 63; *Hinton v. Hinton*, 2 Ves. 634; *Rigden v. Vallier*, 2 Ves. jr. 257.

(4) *May v. Hook*, Co. Lit. 246 a, n. 1; *Durnford v. Lane*, 1 Bro. 112.

(5) Lit. 287; Co. Lit. 185 b; *Swift v. Roberts*, 1 Bl. Rep. 476.

(6) 4 Kent, 360; *Swift v. Roberts*, 3 Burr. 1488; Amb. 617.

(7) 2 Cruise, 342.

(8) Lit. 304; 2 Cruise, 342.

(a) A and B being interested in a fund as joint tenants, A, by letter to B, engages to secure to his family, in any way B may desire by his will, a moiety of the fund. Held, a severance of the joint tenancy. *Gould v. Kemp*, 2 Mylne & K. 304.

(b) An ancient statute in South Carolina, not now in force, provided otherwise.

nizes the validity of any previous charge upon the estate made by the releasor, which he might have avoided under the title by survivorship. Thus, if one joint tenant grant a rent-charge from the land, and afterwards release to the other and die; although, as between the two joint tenants themselves, the releasee holds not by the release but by the original joint conveyance, yet, as to the grantee of the rent, he claims under the release, and therefore his title is subordinate to the rent.(1)

68. Joint tenants may make a severance by voluntary partition. But such partition must be by deed.(2)

69. At common law, one joint tenant could not compel another to make partition. But by Statutes 31 Hen. VIII, c. 1, and 32 Hen. VIII, c. 32, joint tenants are enabled to make partition of their estates by means of compulsory legal process, called a writ of partition. And by St. 8 and 9 Wm. III, c. 31, this process is much simplified. The methods of obtaining partition in the United States, which are substantially the same in relation to joint tenants and tenants in common, will be particularly considered hereafter.

CHAPTER LIV.

TENANCY IN COMMON.

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|---|---|
| 1. Three forms of joint ownership in England. | 25. Trustees and executors. |
| 2. Co-parcenary; obsolete in the U. S. | 26. Statutes apply to vested estates. |
| 5. Tenancy in common, what. | 30. Legislative grants. |
| 6. Joint tenancy favored in England, but discountenanced in the U. S.; statutory provisions changing it into tenancy in common. | 34. Estate in common subject to the same rules with a several estate. |
| 15. Exceptions—husband and wife. | 37. But a tenant cannot convey by metes and bounds. |
| 20. Joint mortgagees. | 47. General rights and remedies of tenants in common, &c. |

1. BY the English law, as has been stated, (ch. 53,) there are three modes in which several persons may own real estate together; viz: *joint tenancy*, *co-parcenary* and *tenancy in common*. The first of these has been already considered.

2. The second mode of joint ownership—*co-parcenary*—always arises from *descent*. At common law, it took place when a man died seized of an inheritance, and left no male issue, but two or more daughters, or other female representatives. Co-parceners have distinct estates, with a right to the possession in common, and each may alienate her share. So one may release to another, with the same effect as in case of joint tenancy.(3)

3. Co-parceners, like joint tenants, have a unity of title, interest and possession. They are also said to be seized *per my et per tout*. But still there is no survivorship between them, and either may devise her estate.(4)(a)

(1) Co. Lit. 185 a; Abergaveny's case, 6 Rep. 78 b.
(2) 2 Cruise, 343.

(3) 4 Kent, 364.
(4) 4 Kent, 364.

(a) Parceners continue to hold *by descent*, even after the co-parcenary is dissolved by partition. Doe v. Dixon, 5 Ad. & Ell. 834.

4. The common law learning of partition, in respect to parceners, is called, by Lord Coke, *a cunning learning*, and is replete with subtle distinctions and antiquated erudition. But in the United States, as lands descend to all the children equally, whether male or female, the common law definition of co-parcenary has become inapplicable; and the English doctrines in relation to it are also of little importance, because the ownership of joint heirs is in some of the States expressly declared to be, and in all of them is in effect, a tenancy in common.^(a) The technical distinction between co-parcenary and estates in common may be considered as essentially extinguished in the United States.⁽¹⁾ The only peculiar incident of the former is, that partition may be made among parceners by the probate courts, to which the settlement of the estates of deceased persons appertains.⁽²⁾

5. *Tenancy in common*, by the English law, is where two or more persons hold lands and tenements by *several titles*, not by a *joint title*, and occupy them in common. The only unity required between such tenants is that of possession. It has already been seen, (ch. 53,) that a tenancy, which would otherwise be a joint tenancy, for the want of unity in interest, title or time, is held a tenancy in common.

6. The common law favored title by joint tenancy, by reason of the right of survivorship. Its policy was averse to the division of tenures, because it tended to multiply the feudal services, and weaken the efficacy of that connection. But it has been said, that the reason of that policy had ceased with the abolition of tenures, and that even the courts of law were no longer inclined to favor joint tenancy; and it has been seen, (ch. 53,) that survivorship is discountenanced by a court of equity. In the United States, where feudal tenures are unknown, upon the ground that tenancies in common are more beneficial to the commonwealth and consonant to the genius of republics,⁽³⁾ the old English doctrine upon this subject has been, not partially qualified or subjected to occasional exceptions, but actually reversed in nearly all the States. In England, where several persons own land together, they are joint tenants, unless there is some special reason for a different ownership; but in the United States, in the absence of such reason, they are tenants in common. Chancellor Kent remarks,⁽⁴⁾ that in this country the title by joint tenancy is very much reduced in extent, and the incident of survivorship still more extensively destroyed.^(b) Inasmuch as survivorship is the only important, *practical* incident, which distinguishes joint tenancy from tenancy in common, it is a question of no great consequence, whether one or the other of these forms is adopted in changing the old law.^(c)

(1) 4 Kent, 364.

(2) 1 Swift, 104. See *Drury v. Drury*, 1 Rep. in Chy. 26; *O'Bennon v. Roberts*, 2 Dana, 54; N. H. Rev. St. 242.

(3) *Shaw v. Hearsey*, 5 Mass. 522.

(4) 4 Kent, 361.

(a) It is recognized *by name* in some of the States. Prince, 541; Ky. Rev. L. 560. In Maryland, the children of parents who die intestate, seized in fee of lands, &c., take as co-parceners, and are so treated by the act of 1820, c. 191, sec. 5. *Hoffar v. Dement*, 5 Gill, 132.

(b) In the Plymouth Colony, in 1643, it was enacted by the general court, that survivorship should not apply to joint tenants. 4 Kent, 362, n.

(c) It seems, a limitation may be such as to constitute tenants in common, with benefit of survivorship. *Doe v. Abey*, 1 M. & S. 428. In South Carolina, survivorship is not abolished,

7. In Indiana,(1) joint tenancies are changed into tenancies in common. In South Carolina,(2) the death of one joint tenant operates as a severance, and his estate passes to his heirs, as in case of a tenancy in common.

8. In the States of Maryland and New Jersey, an estate in joint tenancy can be created only by an express declaration that the land is to be owned in this way.

9. In New York, Delaware, Michigan, Arkansas, Illinois, Wisconsin and Missouri, an exception is made from the same provision in regard to executors and trustees. In Massachusetts, Vermont and Pennsylvania, trustees alone. In some of these States, the phraseology is, that a joint tenancy shall not arise, unless it is declared that the parties are to hold as joint tenants, "and not as tenants in common;" but probably no particular significance is to be attached to this last expression.

10. In Tennessee, Mississippi, Illinois and Alabama, survivorship between joint tenants is expressly abolished by statute. In Connecticut, the doctrine was exploded in an early decision, and the law has never been since contradicted.

11. In Vermont, Massachusetts,(a) Maine, New Hampshire and Rhode Island,(b) there must be express words, or an intention to that effect, to create a joint tenancy; and, in Vermont, the statute is declared applicable to estates previously created, as well as those which might arise subsequently. The same provision is made in Wisconsin.

12. In Massachusetts, Maine, Wisconsin, Indiana and Michigan, another exception from the general provision is made in relation to *mortgages*; and in Massachusetts, Michigan and Vermont, conveyances to *husband and wife*. While in Rhode Island, on the contrary, conveyances to husband and wife are expressly declared not to constitute an exception.(3)(c)

13. In North Carolina,(4) there is no survivorship between joint tenants, except in the case of partners in business, and here only for the purpose of settling the joint concern. After such settlement, the survivor pays over the balance due, to the representatives of the deceased partner.

(1) Ind. R. L. 290; Rev. Sts. 201.

(2) 1 Brev. Dig. 435.

(3) *Phelps v. Jepson*, 1 Root, 48, A. D. 1769; 1 Swift, 104; 1 N. Y. Rev. St. 727; Md. L. 1822, 98; 1 N. J. L. 556; Del. St. 1829, 167; Rev. Sts. 286; Mass. Rev. St. 406; Illin. Rev. L. 130, 474; Misso. St. 119;

Aik. Dig. 129; 1 Smith's St. 136-7; Verm. L. 177; R. I. L. 208-9; Purd. 417; 4 Kent, 361; Mich. Rev. St. 258; Ark. Rev. St. 189; Me. Rev. St. 372; Verm. Rev. St. 310; *Kinsley v. Abbott*, 1 Appl. 430; Wisc. Rev. Sts., ch. 56, sec. 44; Ind. Rev. Sts. 201.
(4) 1 N. C. Rev. St. 258.

but joint tenants may devise their estates. 4 Kent, 361 n. In Delaware, persons occupying vacant land in mixed possession, prior to the act of 1843, become tenants in common under that act. *Tubbs v. Lynch*, 4 Harring. 521.

(a) It shall "manifestly appear from the tenor of the instrument." Substantially the same language in Maine and New Hampshire.

(b) Words "clearly and manifestly showing otherwise."

(c) A conveyance to husband and wife jointly, their heirs and assigns and the survivor of them, his or her separate heirs, &c., gives them a joint estate while she lives, and upon her death vests the fee in him. *Lewis v. Baldwin*, 11 Ohio, 352. In case of a mortgage to A. and B, if A dies, B is entitled to the mortgage and notes. If A has collected a part of the money, and dies insolvent, B may collect the balance, and retain enough for his own indemnity, as an equal owner. 1 Appl. 430.

14. In Virginia and Kentucky,(1) it is provided, that, of whatever kind the estate may be, it shall not pass to survivors, but shall descend, may be devised, and shall be subject to debts, charges, curtesy and dower, and be considered to every other intent and purpose in the same manner as if it had been a tenancy in common.(a)

15. From this recapitulation of the statutory provisions in the several States, it appears that, in some of them, joint tenancy has been unqualifiedly abolished, while in others it is still retained in certain enumerated cases, for which it is peculiarly adapted; as in case of husband and wife, of executors and trustees, and of mortgagees. Massachusetts, Wisconsin and Michigan, are the only States in which conveyances to husband and wife are expressly excepted from the general provision of the statute.(b) Rhode Island is the only one in which they are expressly included. But the prevailing rule of American law is, that the case of husband and wife is, *by implication*, not included in the general provisions upon this subject. The reasons for making this exception, equally applicable, it seems, in all the States, are thus stated by the court in Virginia.(2)

16. Though a jointure might be destroyed by various acts, yet, at the common law, there was no mode by which a partition might be compelled. To remedy this inconvenience, the Statutes of 31 and 32 Henry VIII were passed. These speak of *all* joint tenants; but they have never been supposed to reach the case of husband and wife. All the books agree, not only that husband and wife cannot enforce partition, but that they cannot make it even by mutual consent. It is a *sole*, and not a *joint* tenancy. They have no moieties. Each holds the entirety. Notwithstanding any act of the husband, the wife, upon his death, takes the whole; not by *survivorship*, which implies an accession of something not owned before, but by virtue of the original limitation; and, as if the land had been given to them during the lives of both, and, after the death of either, to the survivor alone. The expressions, *jointure*, *joint tenancy*, &c., are indeed often applied to the ownership of husband and wife; but only because these words approach nearer to a description of the estate than any others which could be used without circumlocution. This doctrine is said to have been settled for ages.(3) The law stood thus when the Virginia act was passed, being substantially a copy of the English statutes; and this act must be supposed to have recognized the established principle in relation to husband and wife. Hence, when it provides, that upon the death of *joint tenants*, their share shall not *accrue* to the survivors; the case of husband and

(1) 1 Vir. Rev. C. 31; 2 Ky. Rev. L. 876-7. | rington, 2 Hare, 54. Moore v. Moore, 12

(2) Thornton v. Thornton, 3 Rand. 183. | B. Mon. 651.

See Rain's Outl. 170; Warrington v. War- | (3) 5 T. R. 652.

(a) But it has been held in Kentucky, that a conveyance to trustees, in pursuance of a previous statute, and for the benefit of a literary seminary, vests the title in them, and their successors, though not named. Churchill v. Grundy, 5 Dana, 99.

(b) In Ohio, a decision has been made to the same effect. 2 Ohio, 306. In case of a conveyance to husband and wife, he may bring a suit for the land alone. Jackson v Leek, 19 Wend. 339. Conveyance to A B, and C D, and E his wife, and their heirs, as tenants in common, not joint tenants. A B takes one moiety; C D and E the other. Johnson v. Hart, 6 Watts & S. 319. Land was conveyed to a husband and wife jointly, which was owned by the wife equitably, and the legal title of which was in her guardian. Held, on the death of the wife, the husband was not entitled to the land. Moore v. Moore, 12 B. Mon. 651.

wife is not included in this clause, both because they are not joint tenants, and because between them there is nothing which can *accrue* from one to the other. Nor does the clause, "whether they be such as might have been compelled to make partition or not," vary this construction; because this clause is satisfied by the case of joint tenancy in personal property, or between a man and woman who afterwards intermarry, of which there could be no partition by law; and this application is favored by the mention of executors, &c. So the clause "of whatever kind the estate holden be," means merely to describe the *quantity* of the estate, as in fee, for life, &c.; not the *quality*, which had been already sufficiently expressed by the words *joint tenants*. The words, "if partition be not made" in the parties' lifetime, &c., imply that the case is one, where partition *might be made*, which is not the case as between husband and wife; not on account of this particular relation, but because each owns the whole estate. The statute intended to prevent the right of the deceased, which might have been disposed of in his life, from accruing to the survivor, and to devolve it upon the representative of the former; not to give a new right to his representatives, which he never had. But a purchaser from the husband would not hold as against the wife. A purchaser from a mere joint tenant would hold against the survivor; and, therefore, there was no necessity, to provide for his protection. But if the act applies to husband and wife, the heirs, &c., of the former are provided for, while a purchaser from him is not. This construction would vest in husband and wife new rights, and take away a vested right from the other; and such construction ought not to be given, when another may be, which will only tend to preserve existing rights by repealing a rule of law, which, if unrepealed, might give such rights, in one event, to another.

17. The same principle has been recognized in Kentucky, Massachusetts, Maryland and New York, upon substantially the same grounds.(1)

18. It has been said, that husband and wife holding lands by a conveyance to them must both join in a conveyance; that they are both necessary to make one grantor; and the deed of either without the other is merely void.(2) It is to be observed, however, in qualification of this remark, that the husband, of course, has the same right in the wife's interest, *as husband*, which he has in any other estate belonging to her; and may therefore convey or mortgage it for his own life (there being children.) But the land cannot be taken upon an execution against him.(3)

19. Conveyance to a husband for the joint benefit of himself and his wife, but with no words limiting a trust for her separate use, though expressly excluding him from power to sell. Held, the land might be taken by creditors of the husband for his life.(4)

19 *a*. Where a wife in her own right, and another person, whose interest was purchased by the husband in his own right, held the equitable title to a tract of land, by warrant, survey and possession, and a patent issued for the whole tract to the husband and wife; held, though under the patent the husband and wife each took, at law,

(1) *Ross v. Garrison*, 1 Dana, 35; *Rogers v. Grider*, Ib. 243; *Shaw v. Hearsey*, 5 Mass. 521; *Craft v. Wilcox*, 1 Gill, 504; *Jackson v. Stevens*, 16 John. 115-6.

(2) *Doe v. Howland*, 8 Cow. 283.

(3) *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175.

(4) *Stoebler v. Knerr*, 5 Watts, 181.

the entirety of the tract, with the chance of excluding by survivorship the heirs of the other, yet the wife's equitable estate in an undivided moiety was not defeated, but descended to her children at her death, subject to her husband's life estate as tenant by the curtesy; that it was not competent for the husband, by any act of his, to divest the equitable estate of his wife, and vest it in himself, either absolutely or contingently; that he held the legal title to the undivided moiety of his wife in trust for her heirs; and that, he having sold the land to *bona fide* purchasers without notice, equity would compensate the heirs of the wife out of the estate of the husband.(1)

20. It has been seen, that the Revised Statutes in Massachusetts except from the general provision in relation to joint tenancy the case of a *mortgage* made to two or more persons. The former statute upon this subject made no such exception; but yet it was held to exist by implication. Parsons, Ch. J., remarks, "as upon the death of either mortgagee, the remedy to recover the debt would survive, we are of opinion that it was *the intent of the parties*, that the mortgage should comport with that remedy, and for this purpose that the mortgaged estate should survive. Upon any other construction, but one moiety of the mortgaged tenements would remain a collateral security for the joint debt, which would be clearly repugnant to the intention of the parties."(2) In another case, Jackson, J., assigns as an additional reason, that either of the mortgagees, by releasing the debt, would release the mortgage, and destroy their joint title and estate in the land.(3)

21. But after foreclosure, that which was originally a joint tenancy becomes a tenancy in common. The land is then no longer a pledge, but the title is vested absolutely in the mortgagee. The foreclosure operates as a new purchase. The mortgage is no longer an incident to the debt; nor is it connected with it, any more than if the partners had received payment of the debt and laid out the money in the purchase of the land. The entry for condition broken gives them a new and different estate.(4)

22. It has been doubted whether the same principle could be applied where one of two joint mortgagees dies and the survivor forecloses; for that would be to turn the estate from a trust into a use by the mere act of foreclosure.(5)

23. In the Circuit Court of the United States, it has been denied that a mortgage given to several persons constitutes them joint tenants. This decision was made under a statute of Rhode Island, which was similar in its terms to that of Massachusetts. Judge Story remarks,(6) "the doctrine (held by Chief Justice Parsons) that a conveyance in mortgage to two persons, as tenants in common, becomes by the death of either no security, except for a moiety, cannot, in my judgment, be maintained in point of law. No authority is cited for it, and it seems to me irreconcilable with established principles. It cannot be deduced from the fact, that the debt vests by survivorship in one party, while the estate would pass to another. For, at the common law, upon the death of the mortgagee, the estate in the land vests in the heir, while

(1) *Norman v. Cunningham*, 5 Gratt. 63.

(2) *Appleton v. Boyd*, 7 Mas. 131.

(3) *Goodwin v. Richardson*, 11 Mas. 472.

(4) *Goodwin v. Richardson*, 11 Mas. 469.

(5) 3 Mas. 386.

(6) *Randall v. Phillips*, 3 Mas. 384.

the debt vests in the administrator. Upon the like argument, it ought to follow in such case, that by the death of the mortgagee the whole security in the land should be gone; and yet it is well established, that the heir takes the land by descent, subject to redemption, and that the debt belongs to the administrator. So if a mortgage were made to two persons expressly as tenants in common, as security for a joint debt, by the common law they would hold in common; and, upon the death of either, his share would descend to his heir as tenant in common, and the survivor would hold the other moiety as tenant in common, at the same time that the debt would vest solely in him by survivorship for the purposes of the remedy. So if a sole mortgagee dies, the land descends to his heirs as parceners, while the debt belongs to the administrator. Hence it follows that the estate is still a security for the debt, into whose ever hands it passes." Judge Story proceeds to remark upon the fact, so strikingly opposed to the doctrine which he controverts, and which we have already noticed (ch. 53,) that even in England the implication in case of a mortgage to several persons is in favor of a tenancy in common instead of a joint tenancy; thereby constituting an exception to the general rule, directly the reverse of that established by the court in Massachusetts.

24. In the case of *Randall v. Phillips*,⁽¹⁾ already referred to, Judge Story remarks, that, in the eye of a court of equity, it would make no difference, whether the legal estate survived to the surviving mortgagee or not, because he would hold in trust for the representative of the deceased. There seems no reason to doubt that this would be the case at law as well as in equity. There is no pretence that the survivor could retain *the whole debt*. And the very reason for holding to a survivorship in such case is, that the mortgage *follows the debt*.

25. With regard to trustees and executors, although for peculiar reasons they are excepted, in many of the States, from the general statutory provisions; yet, in the absence of any express exception, none will be implied. Thus, it has been held in Kentucky, that survivorship is abolished, as well in regard to trust estates as others.⁽²⁾

26. The American statutes, changing joint tenancy into tenancy in common, are almost universally made applicable by their terms to estates previously created, as well as those to be created subsequently. The objection has been raised, that in this particular such statutes are unconstitutional, as affecting rights and interests already vested; but it has always been overruled. It is said, the principle is correct, that the legislature cannot impair the title to estates, without the consent of the proprietors, unless for public objects, when an adequate consideration shall be provided. But there can be no objection to the operation of any legislative act retrospectively, which shall enlarge, or otherwise make more valuable, the title to any estate; for the consent of the holder may always be presumed to such acts. The new tenure is more beneficial than the old one to all the tenants; inasmuch as a certain inheritance in a moiety is more valuable than an uncertain right of succession to the whole. More especially is this principle to be applied, where both tenants have, by their acts, manifested an implied

(1) 3 Mas. 387.

(2) *Saunders v. Morrison*, 7 Mon. 54. See *Benedict v. Morse*, 10 Met. 223.

assent to the operation of the statute; as where each has brought a separate writ of entry for his undivided moiety against a stranger.(1)

27. The same principle has been recognised in Pennsylvania. The Court remark as follows:—The doctrine of survivorship was so little known to people in general, and so abhorrent to their feelings when known, that it was thought best to get rid of it at once. The courts had been long struggling against it, but were unable, without a dangerous prostration of established principles, to go as far as they wished. The aid of the legislature was therefore necessary. The operation of the act is no invasion of vested rights. Who should be the survivor, was in contingency; and in the mean time either joint tenant might have severed the estate by legal means without the other's consent. The act of assembly did for them at once, and without expense, (that) which ninety-nine in a hundred wished to be done. But if there were any joint tenants who desired the chance of survivorship, they might have it by an agreement for that purpose. By putting a limitation on the plain words of the law, we should do an irreparable injury to many, who, reading the words as they are written, have supposed a partition unnecessary, and therefore have died without effecting it. The act deprived no man of his property; but only placed the parties on an equal and sure footing, leaving nothing to chance.(2)

28. Upon the same principle, where the demandants in a real action were joint tenants when it was commenced, and afterwards, by operation of law, became tenants in common; held, this change of title was no defence to the action.(3)

29. In the statutes of some States upon this subject, a proviso is inserted, that they shall not affect estates already vested by survivorship. This would seem to be a superfluous caution; for the constitutional objection, already referred to, would undoubtedly prevent any such application of the statutory provisions.(4)

30. Independently of statutory provisions, it has been held in Massachusetts,(5) that a grant of land *by the legislature* to several persons created a tenancy in common, and not a joint tenancy, though the words used, if a private person were the grantor, would create the latter estate. It is said, a grant by the legislature is a *statute conveyance*, and the intent of the legislature in passing the resolution must govern. Most of the public lands, which were alienated by the late province, and also by the commonwealth, were passed by virtue of acts or resolutions of the legislature. Generally, the lands were granted in large parcels, to a great number of grantees, on condition of settlement, and for the purpose of forming towns. These grants have invariably, from the earliest settlement of the country, been held to create tenancies in common. From long use, the practice has acquired the force of law; and a decision repugnant to it would produce infinite confusion, and affect very many titles to land in the state. More especially is this construction to be given, where the legislative grant is made to certain persons upon their petition, as to the heirs of one who had before his death taken possession of the land. *As heirs*, they would not have

(1) *Miller v. Miller*, 16 Mass. 61; *Holbrook v. Finney*, 4, 568; *Annable v. Patch*, 3 Pick. 363.

(2) *Bombaugh v. Bombaugh*, 11 Ser. & R. 192.

(3) *Hills v. Doe*, 6 N. H. 328.

(4) 11 Ser. & R. 193; 3 Pick. 363.

(5) *Higbee v. Rice*, 5 Mass. 350.

taken in joint tenancy, and it cannot be presumed that the legislature intended they should so take *as grantees*.

31. So it has been held in New York, that where several patentees pay equal shares of the purchase-money, and execute deeds among themselves, which recite that they purchase as tenants in common; such tenancy is created, although the patent is made to them jointly. This case, however, was decided rather on the ground of a trust, than upon that of a grant from the State.(1)

32. The same doctrine has been recognized in Vermont. In the year 1781, the State granted a charter of a township to several persons, reserving one-seventieth part for the use of a seminary or college. The proprietors did not divide or assert their title to the lands, and the whole were occupied and settled by other persons. A college being afterwards instituted, the trustees were empowered to take possession of the lands reserved, and they brought an action for them against one who had for thirty-eight years adversely occupied. The question arose, whether proprietors of lands, constituting towns, were to be regarded as tenants in common. In answer to the objections, that such proprietors may do many things *by vote*—as making a division of their lands into severalty, voting to settlers the lots on which they live, in lieu of their drafts; and authorizing a division *by pitches*; and may gain a title by the statute of limitations, and that their possessions are considered as several; the court remark, that such proprietors are strictly tenants in common, and, where they differ from ordinary tenants in common, the difference has been created either by statute or by a course of decisions in our courts of law. In the grants or charters, certain civil and political corporate privileges are given to those who inhabit the township, but not to the proprietors, who may be wholly distinct from the former. Grants in this country have always been construed to create tenancies in common, which in England would make joint tenancies. Unless the proprietors take an estate in common, it is difficult to define the nature of their interest.(2)

33. But it has been held in Kentucky, that where a grant by the commonwealth was made to two persons, and one of them died before a patent was issued, (previously to the statute abolishing survivorship,) the survivor took the whole estate both in law and in equity.(3)(a)

34. The estate of a tenant in common is subject to the same dispositions, incidents and charges as an estate owned in severalty. Thus, it has already been seen, (see *Dower*,) that the widow of a tenant in common has *dower*, subject, however, to the qualification, that if partition has been made after marriage, her claim shall be restricted to that portion of the land which is allotted to the husband.(4)

(1) *Cuyler v. Bradt*, 2 Caines Cas. Err. 326.

(3) *Overton v. Lacy*, 6 Mon. 15.

(2) *University, &c. v. Reynolds*, 3 Verm. 543.

(4) *Sutton v. Rolle*, 3 Lev. 84; Co. Lit. 34 b, 37 b.

(a) It has been held, that persons joining in a disseizin are joint tenants. Hence if one of them die seized, after peaceable possession for five years, no descent is cast, and the disseizee still retains his right of entry. *Putney v. Dresser*, 2 Met. 583.

And, if one of the disseizors, in possession of land as tenants in common, abandon it, the rightful owner does not receive the benefit of such abandonment, but, as against him, the other disseizor holds the whole. *Allen v. Holton*, 20 Pick. 458.

But in a later case it is doubted whether, in Massachusetts, joint disseizors, entering without title, or color of title, are joint tenants, or tenants in common. *Fowler v. Thayer*, 4 Cush. 111.

35. So an estate in common is subject to *curtesy*; and the possession of one tenant in common is regarded as so far that of the other, that the husband of the latter shall be tenant by the curtesy.(1)

36. An estate in common passes to *heirs*; and it has been seen, that this is one principal point of distinction between this estate and a joint tenancy.

37. It is to be observed, however, that the transmission of an estate in common, to any party claiming under one of the tenants, passes nothing more than *the undivided interest* of such tenant, and has no effect to make a *severance* of the estate. Thus, the widow can claim for her dower only an undivided third of her husband's interest. Upon the same principle, a tenant in common may convey his estate to a third person, and the latter will hold in connection with the remaining tenant, merely taking the place in all respects of the grantor. But a tenant in common cannot convey any distinct portion of the land by metes and bounds.(a)

38. Thus, where one of two joint tenants, after a parol partition which was held void, conveyed a part of the land by metes and bounds to a stranger; held, the entry of the latter gave him no seizin, but he was a mere several occupant; that he could not be considered as a disseisor of the grantor, as he entered by his consent; nor of the other joint tenant, because one joint tenant cannot be disseized by a stranger of any particular part, unless all are disseized.(2)

39. In a subsequent case, Jackson, J., goes into a more minute examination of the law upon this subject. It is a general principle, that one joint tenant cannot prejudice his companion in estate, or as to any matter of inheritance or freehold; although, as to the profits of the freehold, as the receipt of rent, &c., the acts of one may prejudice the other. But a conveyance by metes and bounds by one tenant, would, in many cases, tend to the prejudice and even to the destruction of the interest of the other. The owner of a moiety of a farm thus circumstanced, instead of one piece of land conveniently situated for cultivation, would, on a partition, be compelled to take perhaps ten or twenty different parcels interspersed over the whole tract, and separated by the parts allotted to the several grantees. Suppose that two men hold, jointly or in common, land in a town sufficient only for two house lots, and that one of them could convey to ten persons his share in as many different portions of the land; the other original co-tenant would, on a partition, be compelled to take ten different lots or parcels not adjoining to each other, and each too small for any useful purpose, instead of one house lot, to which he was originally entitled as against the grantor. The restraint upon such conveyance by one co-tenant, and not the privilege of making it, is to be considered as a necessary incident to the estate. Each tenant was originally entitled to one moiety, for quantity and quality, to

(1) *Sterling v. Penlington*, 14 Vin. Abr. 511. *v. Benson*, 9 Verm. 138; *Blossom v. Brightman*, 21 Pick. 285; *Jeffers v. Radcliff*, 10 N. H. 242.

(2) *Porter v. Hill*, 9 Mass. 34; acc. *Smith*

(a) While, with regard to parties claiming an interest in the estate *after the death* of the tenant, joint tenancy and tenancy in common are subject to totally different rules, the principles which regulate the transfer of them during his life, either by his own act or act of law, are substantially the same, and therefore the following remarks may be received as alike applicable to both estates.

be assigned to him in the modes pointed out by law ; and this right, on the part of one, cannot be impaired by a separate act of the other. If one co-tenant has the right to convey a part of the land, the others of course have the same. Suppose then that three or more persons hold in common a township of wild land, and that each, without regard to the others, should divide the whole into such lots as he thought proper, and sell his share in each lot to different purchasers. As the lines of the lots would perhaps never coincide, a partition among the several grantees would be very difficult and inconvenient ; and, in case of a large number of owners, perhaps impossible. While the right in question may be thus injurious, the restraint upon it can rarely if ever be so. Thus, if one of two co-tenants of forty acres wishes to sell ten, he may convey one undivided fourth of the whole, and the grantee may obtain partition by legal process. And this he must have done, if the conveyance had been of a moiety of twenty acres taken out of the forty. There is, therefore, no additional trouble or expense, and the only difference is, that the grantor is prevented from selecting any particular part of the land, from which the grantee shall take his share ; which is a right he could never claim himself, while he continued the owner of the whole moiety.(1)

40. So, in a case decided in Connecticut,(2) Hosmer, Ch. J., remarks, in regard to the objection, that upon partition the whole of that portion of the land which is conveyed might be assigned to the co-tenant ; that it is no answer to this objection, that the purchaser on partition might have an equivalent share in other portions of the land assigned to him ; for in these he has no interest, and a partition, being a mere distribution and not a conveyance, is founded on an antecedent estate, and cannot communicate any new right.

41. Upon the same principle, the levy of an execution against one tenant in common, &c., upon any designated portion of the land, is void ; it being the general rule, that an execution can be extended upon such property only as the debtor might legally convey.(3)(a)

42. The principle above stated, imposing a restraint upon one tenant in common, &c., in regard to his power of alienation, is therefore applied not merely to a conveyance of a certain portion of the whole land by metes and bounds, but also to a conveyance of his whole undivided interest in a certain portion of the lands, designated by metes and bounds. Thus, supposing A and B to be tenants in common of twenty acres ; in the first place, A cannot convey to a stranger one of those acres by metes and bounds, so as to bind the co-tenant ; and, in the

(1) *Bartlett v. Harlow*, 12 Mass. 349.

(2) *Mitchell v. Hazen*, 4 Conn. 510.

(3) *Bartlett v. Harlow*, 12 Mass. 348 ; *Bald-*

win v. Whiting, 13, 57 ; *Webber v. Mallett*, 4 Shepl. 88 ; *Slainford v. Fullerton*, 6, 229.

(a) But in New Hampshire, it is provided by statute, (Rev. St. 393,) that an execution may be levied, after appraisal, upon the undivided interest of the debtor, he being a tenant in common, or a part thereof. If indivisible, upon his undivided interest, or by such division as the appraisers may think best. Similar provision in Maine. Rev. St. 384. See *Thompson v. Barber*, 12 N. H. 563 ; *Blevins v. Baker*, 11 Ired. 201.

One tenant is not bound to assert his title, by objecting to an unlawful conveyance by his co-tenant. U. S. Dig. § 852.

So, notice of a conveyance by one tenant of a part of the lands in severalty, will not prevent a party from purchasing the share of the other in the whole of the estate. Mere notice of an invalid conveyance cannot make it good. *Ib.*

second place, he cannot convey all his undivided interest in one acre, designating it by metes and bounds, so as to bind his co-tenant. The rule, as generally stated by the elementary writers, would seem literally applicable to the former alone of these cases. Thus Chancellor Kent says,(1) "one joint tenant, &c., cannot convey *a distinct portion of the estate by metes and bounds,*" &c. But most of the decisions do not fall within these terms; for, instead of attempting to convey *the whole* of any specific portion of the lands, the tenant conveys, or his creditors take upon execution, only his *undivided interest* in a specific portion. And the reasoning of the court seems to make no distinction between the two cases. Thus, in *Bartlett v. Harlow*,(s. 39,) the execution was levied upon an undivided interest in a specific portion of the land designated by metes and bounds; and the remarks of Judge Jackson, already cited, have a particular application to these circumstances. So, in *Baldwin v. Whiting*,(2) the execution was levied upon *three undivided fourth parts of a specific part of the land*, owned by the debtor in common with others. But although there would seem, at first sight, to be a distinction between the two forms of alienation referred to, yet on principle they rest on the same ground. The true meaning of the general proposition, that one tenant in common, &c., cannot convey by metes and bounds, is, not that he cannot convey his *co-tenant's share* in a designated portion of the land, or, by his own single act, without consent of the other party, *make severance or partition*, for this seems to be taken for granted; but that a conveyance of the whole estate in a part of the land will not pass *even his own share*. Thus, in *Porter v. Hill*, (s. 38,) Judge Sewall says, "one joint tenant cannot convey a part of the land by metes and bounds to a stranger. If he could, *his grantee would become tenant in common of a particular part with the other joint tenant*, who, in making a legal partition, might, notwithstanding, have the whole of the part thus conveyed, assigned as his party." Upon this principle, such grantee not only could not maintain a *real action* for the whole land, but he could not bring a *suit for partition*, claiming only a moiety; and it is in the latter form that the point has often been settled. In *Mitchell v. Hazen*, a case already cited, (s. 40,) the conveyance purported to pass only an undivided interest. In a later case,(3) in the same State, the deed purported to convey *so much land*, generally, by metes and bounds, making no reference to any undivided interest; and the remark of the court, in deciding the deed to be void, that it was an attempt *to make a partition of the property*, would seem directed against the claim that *the whole title* in the land conveyed passed by the deed. So, in a case in Tennessee,(4) where the same point was decided, the deed purported to convey the whole of a certain part of the land by metes and bounds. On the whole, it may be laid down as the true construction of the general proposition referred to, that the objection does not stand upon the form of a conveyance, purporting to pass the whole land; but equally precludes the tenant from conveying his own undivided interest in a part of the land, by a deed which purports to convey nothing more.

43. It is to be observed, that an alienation of the interest of one joint tenant, &c., either by deed or by legal process, is not for all pur-

(1) 4 Comm. 368.

(2) 13 Mass. 57.

(3) *Griswold v. Johnson*, 5 Conn. 363.

(4) *Jewett v. Stockton*, 3 Yerg. 492.

poses void; but will operate against him and all claiming under him *by estoppel*, whether he had notice or not, and can be avoided only by the co-tenant who is injured, or those claiming under him. The assignees of the latter have in this respect all the rights of their assignor. By the assignment, all his interest passes to them, without any entry upon the land. With regard to one claiming under the tenant whose share is alienated, if he also derive a regular title from the co-tenant, perhaps he might be allowed to waive his claim under the former, and avoid the alienation by setting up his title under the latter.(1)

44. It has been held in Ohio, by a majority of the court, that a tenant in common might lawfully convey a part of his undivided estate by metes and bounds, but it was admitted that the point was attended with considerable difficulty, for the reasons above referred to. Judge Burnet dissented.(2)

45. In Massachusetts, by the Revised Statutes, where the whole interest of a tenant in common is more than sufficient to satisfy an execution against him, it shall be levied upon an undivided portion of that interest, sufficient, according to appraisement, to satisfy the execution.(3)

46. Although a tenant in common cannot alienate absolutely his share in a part of the land, yet it has been held, that, where such tenant has been allowed to improve separately a certain portion of the land, he might *lease* this portion to a stranger, and the latter maintain an action for any disturbance by the other tenants.(4)(a)

47. At common law, one joint tenant in common had no remedy against another for the rents of the estate, except by charging him, under an express contract, as a bailiff or receiver. Statute 4 and 5 Anne, c. 16, gave an action of account in such case. This statute is re-enacted in New York, and Chancellor Kent presumes that it has been introduced in substance into the general law of this country.(5) Similar acts have been passed in Virginia, New Jersey, Mississippi, Vermont and Rhode Island.(6)

48. In Connecticut,(7) the action of account is provided between joint tenants, &c.; except in cases where two or more are sued by one, when a bill in equity must be brought.

49. In Massachusetts,(8) the action of account is abolished. But a

(1) *Varnum v. Abbot*, 12 Mass. 474; *Baldwin v. Whiting*, 13, 57. U. S. Dig. 1852, 14; *Howe v. Blanden*, 21 Verm. 315.

(2) *Lessee v. Sayre*, 2 Ohio, 110; acc. *Prentiss, &c.*, 7 Ohio, 129. The general rule is adopted in Tennessee; 3 Yerg. 492: but seems not to be in Maryland; *Reinicker v. Smith*, 2 Har. & J. 421. It has been held that a deed by one tenant of a certain number of acres in common, which is less than his whole share, is not void for uncertainty. U. S. Dig. 1852. The levy of an execution upon an undivided portion of a farm, such part being specified by metes and bounds, the whole of which farm was holden by the debtor as tenant in common, will, it seems, be valid, until the other co-tenant has obtained parti-

tion, and ousted the creditor from the part so levied upon; and therefore an action cannot be maintained to recover the amount of the judgment satisfied by the levy, until the creditor has been ousted of some part of the land. *Godwin v. Gregg*, 28 Maine, 1. 8.

(3) Mass. Rev. St. 464.

(4) *Keay v. Goodwin*, 16 Mass. 1.

(5) 4 Kent, 369; *McKim v. Odom*, 3 Bland, 411.

(6) 1 N. J. L. 156; *Missi. Rev. C.* 117; *Verm. L.* 142; *R. I. L.* 193; 1 *Vir. R. C.* 111.

(7) *Com. St.* 36.

(8) Mass. Rev. St. 500, 695; *Brigham v. Eveleth*, 9 Mass. 538; 9 *Pick.* 34. See *McMurray v. Rawson*, 3 *Hill*, 59.

(a) But one tenant cannot legally authorize a third person to cut timber, for the consideration of the *stumpage*. *Baker v. Whiting*, 3 *Sumn.* 476.

bill in equity lies in all cases. So *assumpsit*, on a promise by one tenant to another to pay the latter his share of rent received from a tenant. So also an action of *indebitatus assumpsit* lies by one joint tenant, &c., against another, who has actually received more than his share of the profits.(a) But unless he has thus received an undue proportion, he is not liable to an action merely upon the ground of sole occupancy, where the co-tenant has made no claim to possession; for if he were, as each tenant is seized *per my et per tout*, he would be liable in the same way, by reason of occupying any particular part of the land, which would be unreasonable and absurd.(1)(b)

50. It is said, that if there be two tenants in common of a dove-house,

(1) Sargent *v.* Parsons, 12 Mass. 149; McKinney, 6 W. & Serg. 78.
Brinsmaid *v.* Mayo, 9 Verm. 31; Gillis *v.*

(a) So in New York, 1 Rev. St. 750. Otherwise in Tennessee, 2 Yerg. 384. In Delaware, one tenant may bring an action for *use and occupation* against another. Rev. St. 286. A tenant in common who agrees with the wife of his co-tenant, that the co-tenant shall have the sole occupation of the land, and pay him a certain sum therefor; cannot maintain an action for such occupation, if he does not prove that the co-tenant had actual knowledge of such agreement, or that he authorized his wife to make it. Wilbur *v.* Wilbur, 13 Met. 494.

(b) Profits received by one tenant give the other an *equitable lien* upon the land. The claim is *personal* on both sides, to be paid from the personal estate of the former, and to the personal representative of the latter, not to his heir, devisee or grantees. 4 Paige, 336.

It seems, one tenant is liable to another, for his share of the expense of necessary repairs, made by the latter. Gibbons, 101. See Schrenen *v.* Joyner, 1 Hill, Cha. 260; *infra*, sec. 70. But where A, owning a chamber, repairs the roof of the house, he cannot claim contribution from B, the owner of the cellar, because, in view of the law, they own distinct dwellings. Loring *v.* Bacon, 4 Mass. 575. See Cheesborough *v.* Green, 10 Conn. 318. It has been held, that one tenant in common without express agreement cannot charge another on account of buildings or improvements placed upon the land by him. Thurston *v.* Dickinson, 2 Rich. Eq. 317; Taylor *v.* Baldwin, 10 Barb. 582. See *infra*, sec. 71. But also, that one tenant is not liable for such part of the rent which the premises would produce, as arises from such improvements. Thompson *v.* Bostick, 1 McMul. 75; Hancock *v.* Day, Ib. 69, 298; Holt *v.* Robertson, Ib. 475.

So where one tenant expends money in improvements, although such expenditures do not strictly constitute a lien, yet a court of equity, in making partition, will first direct an account and suitable compensation, or assign to such tenant or his grantee the portion on which the improvements have been made. Green *v.* Putnam, 1 Barb. 500; acc. Peyton *v.* Smith, 2 Dev. & B. 349. It is not necessary for him to show an assent to his making them, by his co-tenants, or a promise by them to contribute towards the expenses, or a request on them to join in making them, and a refusal. Ib.

Where there were two tenants in common, and a third person obtained a deed, covering the share of one, supposing he was acquiring a good title thereto, entered into possession of the entire premises and made improvements, and subsequently the other tenant brought ejectment against him for his share, and recovered; held, he was entitled to recover against the plaintiff in ejectment, the amount which the share of the land thus recovered had been improved by the betterments upon the entire tract. Strong *v.* Hunt, 20 Verm. 614.

In South Carolina, if one tenant in common buy in an outstanding title, he may claim contribution, on the ground, that in equity it enures to the benefit of both, and he cannot claim it for himself alone. Field *v.* Pelot, 1 McMul. 370.

A and B were tenants in common of an estate, for which B had paid his share of the purchase-money, and which they divided by partition. A died, and his heirs agreed that his widow should retain possession of A's part, which B afterwards leased from her. The former owner brought ejectment against B, for A's part of the purchase-money, which B paid. Held, he could hold the land as security for repayment of the purchase-money, but for no other debt, against the heirs of A. Leitch *v.* Little, 2 Harris, 250. One tenant in common may redeem land sold for taxes. Watkins *v.* Eaton, 30 Maine, 529.

After redemption and a release to him from the purchaser, a tender made by his co-tenant to the purchaser of his own proportion of the tax and expenses, though made within the time allowed by law for redeeming, is of no effect. Ib.

If one tenant redeem land sold for taxes, his co-tenant cannot maintain a writ of entry against him for his share of the land, without a previous tender of his share of the amount for which the land was sold. Ib.

and the one destroy the old doves, whereby the flight is wholly lost, the other may have an action of trespass against him. So, if one of two tenants in common of a park destroy all the deer. So where there are tenants in common of a mill and privilege, one may maintain trespass against another for the destruction of the mill. So where A and B own a mill, and B another, below, and B builds a dam whereby the water is made to flow back upon the former mill; A may bring an action against B.(1)

51. In Maine, one tenant in common may have trespass against another who prevents him from entering or occupying the land.(2) In the same State, if one tenant commit waste, without forty days' notice to the other, he is liable to treble damages in trespass. In Massachusetts and Michigan, there shall be thirty days' notice. The same penalty, for waste committed pending a process for partition. In North Carolina, one tenant may have an action on the case for waste against another, but not trespass, either against him or one claiming under him. In New Hampshire, one tenant may bring assumpsit for trees or other property injured by the other, or for keeping him out of possession.

52. It is said, if there be two tenants in common of a dwelling-house, and they severally furnish and occupy different apartments, one co-tenant has no right to disturb the other's occupation by removing his furniture; and trespass would clearly lie for such removal.(3)

53. In Illinois a statute provides, that for assuming and exercising exclusive ownership, taking away or destroying the common property, lessening its value, injuring or abusing it; one tenant in common, &c., may have trespass or trover against another.(4)(a)

54. It was held in an ancient case, that if there be two tenants in common of a wood, and the one leases his part to the other for years, if the lessee cuts down trees and does waste, he will be punished for a moiety of the waste, and the lessor may recover a moiety of the place wasted.(5)

55. But this doctrine seems to have been overruled in a subsequent case,(6) in which it was held, that such lessee cannot be regarded as standing in a less favorable light than he would have done if no lease had been made; that if one tenant in common misuse the common property, he is liable as for a misfeasance, but some injury must be done to the inheritance, as by cutting trees which are unfit to be felled. Otherwise he does nothing more than take the fair profits of the estate. In this case, the trees were proper to be cut, and, upon this ground, it was distinguished by counsel from the case in Moore, above referred to.

56. In many of the States, a remedy has been given by statute for

(1) Co. Lit. 200 a; Maddox v. Goddard, 3 Shepl. 218; Odiome v. Lyford, 9 N. H. 536.

(2) Maine L. 1837, 442.

(3) Keay v. Goodwin, 16 Mass. 3; 1 Smith's St. 137-8; Mass. Rev. St. 630; Anders v. Meredith, 4 Dev. & B. 199. See Causee v.

Anders, Ib. 246; Mich. Rev. St. 497; N. H. Rev. St. 358; Hubbard v. Hubbard, 3 Shepl. 198; Moody v. Moody, Ib. 205.

(4) Illin. Rev. L. 474.

(5) 2 Cruise, 356; Moo. 71, pl. 194.

(6) Martin v. Knowllys, 8 T. R. 145.

(a) In Vermont, one tenant in common cannot maintain trespass against another, unless actually expelled, or hindered from occupying. Booth v. Adams, 11 Verm. 156. So in Pennsylvania, where a tenant in common of land is actually ousted by a co-tenant, he may maintain trespass *quare clausum*. McGill v. Ash, 7 Barr, 397. It is no defence, to admit the right of the plaintiff, and offer to account. Ib.

one tenant in common against another, who commits waste upon the common property.(a)

57. In New Jersey,(1) when several sold lands held together, and none knows his or their several part, one may have a writ of waste against another; and when the suit comes to judgment, the defendant shall be required to take a certain part of the land to be assigned by the sheriff and jury, or give security that he will take nothing more from the land than the other tenants take. If the defendant elect to take his part in a certain place, an assignment shall be made to him in the place wasted, making no allowance for the waste done; but if he does not thus elect, or if the amount of waste exceed the value of his proportion of the land, the plaintiff shall recover damages.

58. In Rhode Island,(2) a tenant in common, &c., who commits waste, forfeits double the amount of the waste committed.(b)

59. The general rule is, that the possession of one joint tenant, &c., is that of the others also,(c) that is, the possession of one is not *adverse*

(1) 1 N. J. L. 209.

| (2) R. I. L. 199.

(a) As to the remedy in Massachusetts and Maine, see pp. 585-6. It also exists in New York,—2 Rev. St. 334; and Delaware,—Rev. Sts. 293. In Kentucky, it seems to be limited to parceners. 1 Ky. R. L. 562. So in Ohio,—St. 1831, 258. Waste may be prevented by an injunction in equity. *Twort v. Twort*, 16 Ves. 128. If the property is destroyed by the negligence of one tenant, he is responsible to the others. *Chelsey v. Thompson*, 3 N. H. 9. See *Durham, &c. v. Wawn*, 3 Beav. 119; *Maden v. Veevers*, 5. 503. Although, in special cases, one tenant in common may, on the application of the other, be enjoined from committing waste; the jurisdiction is sparingly exercised. *Obert v. Obert*, 1 Halst. Ch. 397.

A tenant of land may maintain assumpsit against a co-tenant, under the statute of New Hampshire, passed July 5, 1834, (entitled "An act relating to co-partners, co-parceners," &c.) for his proportion of damages caused by cutting, although the plaintiff has alienated his interest in the land after the cutting, but before the action was commenced. *Blake v. Miliken*, 14 N. H. 213.

Nor is it necessary that all the co-tenants at the time of the injury should join in the action; but each co-tenant may have his several action. *Ib.*

But it seems that they may join. *Ib.*

It seems, that it is not necessary in such an action to prove an actual title in the defendant. His entry, claiming title, is sufficient evidence to make a *prima facie* case against him. *Ib.*

Nor, it seems, could the fact that the plaintiff's grantors, before conveying to him, cut more than their proportion of timber, in any way affect his right to maintain the action. *Ib.*

On a bill for partition, by a tenant in common, owning a twentieth part of a farm of 200 acres, an injunction was granted against the tenant in common, in possession, restraining him from cutting timber. The answer of the defendant showed, that he was the owner of eight-twentieths, that he had made improvements to the amount of \$2,000, and that he only intended to cut the wood and timber from two acres near the barn, which he had commenced doing when the injunction was served; and he denied all intention to commit waste. The injunction was dissolved. *Obert v. Obert*, 1 Halst. Ch. 397.

(b) As to injuries by tenants in common, and the liability of one for another. See *Simpson v. Seavey*, 8 Greenl. 138.

(c) The giving up by a disseizor, to one tenant in common, of all his share in the land, reissues all in their title. *Vaughan v. Bacon*, 3 Shepl. 455. So, an entry by one, upon part of the land to which they have a title, will give a seizin in the whole, to all the tenants, according to their respective interests. *Thomas v. Hatch*, 3 Sumn. 170. See *Gilman v. Stetson*, 6 Shepl. 428; *Creswell v. Altenus*, 7 Watts, 565; *Watson v. Gregg*, 10, 296; *Hart v. Gregg*, *Ib.* 189. So, the possession of one co-parcener being that of all, none in possession of the whole can defend, under the statute of limitations, against the rest, without an actual disseizin or ouster. *Purcell v. Wilson*, 4 Gratt. 16.

Though a great lapse of time, with other circumstances, may warrant the presumption of such disseizin, it is matter of evidence for the jury, not of law for the court, upon a special verdict. *Ib.*

So, one tenant in common cannot, by the purchase of an outstanding title or incumbrance

to the title of the others, but *amicable* and in support of the rights of all. But still one tenant may by special acts *disseize* another, and by length of possession gain an adverse title.

60. Where one tenant in common received all the rents for twenty-six years, it was held, that this was a mere failure to account, and not an ouster or expulsion, which could be effected only by an actual *disseizin*.⁽²⁾

61. But where one tenant in common had sole and undisturbed possession for thirty-six years, without any account, or any claim or demand by the other, or any one claiming under him, Lord Mansfield left it to the jury to say, whether there was not sufficient evidence to presume an actual ouster, and they found a verdict for the defendant, which was sustained by the court. Lord Mansfield remarked, that the terms *actual force* did not imply real force, or a turning out by the shoulders. A man may come in rightfully, and hold over adversely, and such holding over is equivalent to actual ouster. The possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion, because it is not adverse, but in support of their common title; and, by paying him his share, he acknowledges him to be co-tenant. Nor is a refusal to pay sufficient, without denying his title; but if, upon demand of payment, the tenant in possession deny the other's title and claim the whole, the subsequent possession is adverse.⁽³⁾ A demand of possession, in order to furnish evidence of

(2) *Fairclaim v. Shackleton*, 5 Burr. 2604; *Clymer v. Dawkins*, 3 How. 674; *Dexter v. Arnold*, 3 Sumn. 152; *Harpending v. Dutch*, &c. 16 Pet. 455; *Taylor v. Cox*, 2 B. Monr. 435; *Liscomb v. Root*, 8 Pick. 376; *Buckmaster v. Needham*, 22 Verm. 617; *Whittington v. Wright*, 9 Geo. 23; *Anders v. Anders*, 9 Ired. 214.

(3) *Doe v. Prosser*, Cowp. 217; *Gause v. Wiley*, 4 S. & R. 567; *Terrill v. Murry*, 4 Yerg. 104; *Rickard v. Rickard*, 13 Pick. 251; *Allen v. Hall*, 1 McC. 131; *Galbreath v. Gal-*

breath, 5 Watts, 146; *Mehaffy v. Dobbs*, 9 Watts, 363; *Law v. Patterson*, 1 W. & S. 191; *Reading v. Royston*, 2 Salk. 422; *Snales v. Dale*, Hob. 120; *Davenport v. Tyrrell*, 1 Bl. R. 675; *Doe v. Hulse*, 3 B. & C. 757; *Leonard v. Leonard*, 10 Mass. 231; *Boyd v. Graves*, 4 Wheat. 513; *Drane v. Gregory*, 3 B. Monr. 622; *Mason v. Finch*, 1 Scam. 497; *Colburn v. Mason*, 25 Maine, 434; *Edwards v. Bishop*, 4 Comst. 61; 2 N. Y. Rev. Sts. 307.

acquire title to the whole, against his co-tenant, but such purchase will operate to the benefit of both, and the purchaser may claim contribution. *Jones v. Stanton*, 11 Mis. 433.

So, an heir cannot, in an action by his co-heir, prove that the ancestor had no title. *Corwin v. Corwin*, 9 Barb. 219.

But a purchase by one tenant in common, of a title to the land, does not enure to the benefit of the other, where it was bought in before the tenancy began. *Sneed v. Atherton*, 6 Dana, 278. A purchaser, from one of several co-tenants, of part of a tract of land, without reference to the title of the others, does not necessarily become a tenant in common, so as to prevent him from perfecting his title by adverse possession, under the statute of limitations; it being only necessary, in order to constitute adverse possession, that the land should be held as one's own. *Gray v. Bates*, 3 Strobb. 498.

Where two or more persons have a joint interest in property, they are under mutual obligation not to injure one another; but, where one party denies a joint interest, and is in possession under color of title in fee in himself, he can quiet his title by producing an adverse claim of title, without abandoning his own, even from one who claims to be a joint tenant with the purchaser. *Burhams v. Van Zandt*, 7 Barb. 91.

Where two tenants in common owned certain lands, subject to a mortgage, and, after long litigation, the joint interest was sold to a stranger, and one of the tenants purchased the existing mortgage at a great discount; held, he could hold it exclusively, and enforce it to the full amount. *Wells v. Chapman*, 4 Sandf. Ch. 312.

It is said, tenants in common do not stand in a relation to each other so analogous to that of landlord and tenant, as to come under the principle of *estoppel*. *Washington v. Conrad*, 2 Humph. 562. See *Weeks v. Weeks*, 5 Ired. Equ. 111.

ouster, must be a demand only of the party's share, not the whole land.(1)

62. It has been held in England, that where one tenant in common levied a fine of the whole estate, and took the rents and profits afterwards without account for nearly five years, this was no evidence upon which the jury should find an ouster at the time of the fine, against the justice of the case, and in aid of gross fraud; that the fine was no ouster, but the court might consider it as rightfully and legally made, and intended to operate only on the party's own share of the estate.(2)

63. But it has been decided in New York, that where one tenant in common undertakes to convey the whole land, the grantee shall not be understood to enter as a tenant in common, but the statute of limitations will run in his favor against the co-tenants.(a) By the Revised Statutes, without an actual ouster or total denial of right, ejectment cannot be maintained.(3)

64. With regard to suits brought by tenants in common against strangers for recovery of the land, the common law rule is, that, having several titles, they must bring separate actions. But, in Vermont, Connecticut and Virginia, they may sue jointly. In Kentucky, one joint tenant or tenant in common may sue for his share or the whole.(4)

(1) *Meredith v. Andres*, 7 Ired. 5.

(2) *Peaceable v. Reed*, 1 E. 568.

(3) *Clap v. Bromagham*, 9 Cow. 551; *Bradstreet v. Huntington*, 5 Pet. 444; *Bigelow v. Jones*, 10 Pick. 161; *Butler v. Phelps*, 17 Wend. 642; *Gillet v. Stanley*, 1 Hill, 121; *Sharp v. Ingraham*, 4, 116; 2 N. Y. Rev. St. 306-7.

(4) *McCreary v. Ross*, 7 Watts, 483; *Hicks*

v. Rogers, 4 Cranch, 165; *Verm. L.* 96; 1 *Swift*, 103; *Vir. L.* 1823, 27; *May v. Parker*, 12 Pick. 38; *Watson v. Hill*, 1 M'Cord, 161; *McFadden v. Haley*, 2 Bay, 457; *King v. Bullock*, 9 Dana, 41; *Chesround v. Cunningham*, 3 Blackf. 85. See *Starnes v. Quin*, 6 Geo. 84; *Lane v. Dobyns*, 11 Miss. 105; *Craig v. Taylor*, 6 B. Mon. 457.

(a) So in Massachusetts, a conveyance by one tenant in common of the whole land in fee, with covenants of seizin and warranty, followed by the entry and exclusive possession of the grantee, is a disseizin of the other. *Kittredge v. Locks, &c.*, 17 Pick. 246; *Parker v. Proprs.* &c 3 Met. 91. See *Ross v. Durham*, 4 Dev. & B. 54; *Thomas v. Hatch*, 3 Sumn. 170.

The owner of an undivided part of a parcel of land gave a deed of the whole lot, the grantee entered, and afterwards a creditor of the grantee levied upon the whole, and entered upon the levy, claiming to be sole owner. Held, the co-tenant of the grantor was disseized. *Bigelow v. Jones*, 10 Pick. 161. Upon the same principle, if a third person enter on the land, claiming against one tenant in common, and exclude him; this is a disseizin of all. *Price v. Lyon*, 14 Conn. 279.

By Stat. 3 and 4 Wm. IV, ch. 27, sec. 12, if a tenant in common is in possession of more than his share for his own benefit, or that of any one but the other tenant, such possession shall not be taken to be that of the other tenant. 1 Steph. 312, n. See *Doe v. Horrocks*, 1 Carr. & K. 566. A, one of tenants in common, conveys the whole land to B, with warranty. B enters, claiming the whole. C, the other tenant, requests him to relinquish one-half, but he refuses so to do, saying, he will sooner stand a law-suit. This is an ouster of C, who may maintain a suit for the land against B. *Marcy v. Marcy*, 6 Met. 360.

Where one of two joint tenants overflows the lands of the joint estate so as to appropriate them, it amounts to an ouster. *Jones v. Weathersbee*, 4 Strobb. 50.

A mortgage of the whole estate by one tenant in common, is not conclusive evidence of an ouster of his co-tenants. *Wilson v. Collishaw*, 1 Harr. 276.

If the tenant, on being notified by the demandant of his claim to be owner of one-fourth part thereof, merely admits that he is in possession of the demanded premises, and adds, "It is hard to pay twice;" this is not evidence of an ouster or disseizin. *Colburn v. Mason*, 25 Maine, 434.

A and B were tenants in common of land. C obtained possession of the land, claiming under B; but A knew nothing of his title, and ejected C by process of forcible entry and detainer. Held, that this was not an ouster of B by his co-tenant A. *Meredith v. Andres*, 7 Ired. 5.

A sale by one tenant, and a receipt of the price by him of the whole tract, does not render him trustee of his co-tenant for his share of the purchase-money. The legal title to his land remains in him, and his remedy is at law. *Milton v. Hogue*, 4 Ired. Eq. 415.

65. In Rhode Island, Maine and Massachusetts, all the tenants or any two may join, or any one sue alone. In Connecticut, if the plaintiff grounds on the title of all the tenants, he recovers for their benefit, and his possession will be theirs. If two join and one is non-suited, the other may recover the whole. In New York, all need not join, except when ejectment is brought as a substitute for a writ of right.(1)

66. In Missouri,(2) it is held that tenants in common cannot join in ejectment.

67. In Tennessee,(3) it is the uniform practice for tenants in common to declare in ejectment on a joint demise, and recover a part or the whole of the land according to the evidence. If they join in suit and one is barred by the statute of limitations, this is no bar to the rest.(a)

68. It has been already stated, that joint grantees of public lands hold as tenants in common. The question has been raised, whether, on account of their peculiar title, such grantees can, like other tenants in common, bring ejectment.

69. Although not distinctly decided, it is said that it may be assumed, that ejectment may be brought by one proprietor of lands granted by the State, when the others have actually taken possession and divided to themselves all the lands included in the limits of the grant; though this action would lie, only where the proprietors refuse to divide according to law, and after demand. But there is more difficulty in the application of these principles and extending this remedy to those who are directed, as agents or trustees, to take charge of the rights of land which are usually denominated *public rights*. The nature of their interest does not permit that it be enjoyed in common with other proprietors. In regard to them, it is only the *use* which is appropriated, and not the freehold. Statutes provide that such trustees may *lease* the lands. But it would be of little avail to them, to take possession of a fractional part of every lot or tenement in a town; and it would be impossible to lease them to any profit or advantage. Moreover, if such trustees are to be regarded as tenants in common, inasmuch as one of

(1) R. I. L. 208; 1 Swift, 103; Mass. Rev. St. 611; Me. Rev. St. 569-70; Verm. Rev. St. 216; Kellogg v. Kellogg, 6 Barb. 116.

(2) Wathen v. English, 1 Misso. 746.
(3) Barrow v. Nave, 2 Yerg. 228.

(a) Tenants in common may join in an appeal concerning a road, but parties having different interests must prosecute separate appeals. County, &c. v. Brown, 13 Illin. 207.

Where two tenants in common recovered land in ejectment against a third; held, they were also entitled to their joint action for *mesne* profits. Camp v. Homesley, 11 Fred. 211.

In an action of trespass *quare clausum*, for breaking, entering upon, and cutting and carrying away trees from land owned by tenants in common, each tenant is entitled to his several action; and it cannot be defeated by a subsequent payment to his co-tenants for the wood thus taken and carried away. Longfellow v. Quimby, 29 Maine, 196.

The general rule is, that tenants in common must join, in an action to recover damages for an injury to the common property; but, where there is no joint injury, and the tenants in common are not jointly interested in the damages, the remedy may be by a several action. Lothrop v. Arnold, 25 Maine, 136.

But if the action is several, when it should have been joint, and there is no plea in abatement, the objection cannot be taken by a plea upon the merits. Ib.

One tenant may give a release, which will bind the other, of their claim for a trespass. Bradley v. Boynton, 9 Shepl. 287. Recovery in ejectment against one tenant in common alone, does not justify dispossession of the others. Breeding v. Taylor, 6 B. Mon. 62.

Premises owned in common, by defendants in execution, may be sold thereon, in a body, unless some one claiming to be part owner require that the same be sold separately. Neilson v. Neilson, 5 Barb. 565.

such tenants, in Vermont, in a suit by himself alone, may recover the whole land ; and as public lands are excepted from the statute of limitations ; it would follow, that although the other tenants were barred by the statute, the trustees might still recover the whole land, in part for the benefit of the others, and not merely their own share. Upon these grounds, no action of ejectment can be maintained by such trustees, until a division or allotment is made. But when there is no actual location, ejectment will lie to recover the public lands.(1)

70. One joint tenant, &c., can compel the others to unite in the expense of necessary repairs to a house or mill ; but not of repairs made upon other things—as, for instance, a fence. The writ *de reparatione facienda* lay at common law in such cases, by one tenant against others. To sustain the action, there must be a request and refusal to join, and the expenditures must have been previously made.(2)

71. If one tenant make or authorize *new erections*, though with the knowledge of the other, he cannot claim to hold them exclusively, till reimbursed.(3)(a)

72. It has been held in Kentucky, that where a suit is brought to recover land from several tenants, and only one of them permanently resists it, and finally prevails ; he has a lien against the rest for costs and expenses.(4)

CHAPTER LV.

TENANCY IN COMMON, ETC.—PARTITION.

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| 1. Methods of partition ; partition in equity. | 15. Illinois. |
| 2. Statutes of the several States concerning. | 16. Indiana. |
| 3. In the New England States. | 17. Missouri. |
| 9. New York. | 18. Kentucky. |
| 10. Pennsylvania. | 19. Ohio. |
| 11. New Jersey, Alabama and Mississippi. | 20. Virginia. |
| 12. Maryland. | 21. North Carolina. |
| 13. Delaware. | 22. South Carolina. |
| 14. Tennessee. | 23. Georgia. |

1. SOME remarks have already been made, in regard to the severance of a joint tenancy, &c., by the acts of the parties themselves. Partition may also be obtained by application to the legislature, or by legal process.(b) It is to be presumed that the old English statutes

(1) *University, &c. v. Reynolds*, 3 Verm. 554—5—6.

(2) 4 Kent, 369—70 ; 9 Pick. 31. See *supra*, sec. 49, n.

(3) *Crest v. Jack*, 3 Watts, 238.

(4) *Shepherd v. McIntire*, 5 Dana, 576.

(a) There is a peculiar provision in Virginia, that joint tenants, &c., may give a *single joint vote* where the whole estate entitles to a vote, but a share does not. Vir. St. 1830, 16, 17.

(b) It is said, tenants in common have an absolute right in law to have their estate divided. *Ledbetter v. Gash*, 8 Ired. 462. Partition will not be granted, upon the application of parties who own *the whole land*. *Swett v. Bussey*, 7 Mass. 503. (Otherwise in Delaware. See sec. 136.)

already referred to, (ch. 53, sec. 69,) providing a writ of partition, have been generally re-enacted or adopted in this country. In practice, however, these remedies are, to a great extent, superseded, by the more summary and convenient methods of *petition* to the courts of common law, of Chancery, or of probate. The jurisdiction of Chancery upon the subject is well established by a long series of decisions. But equity does not generally interfere, unless the title be clear, and never where the title is denied or suspicious, until opportunity has been had to try the title at law.(1)(a)

2. The statutory provisions of the several States, in regard to partition, are very precise and numerous. With a general similarity, there are still points of difference among them, which require a distinct summary view of the law, in each State. It will be seen that in Kentucky, and in the three States of Alabama, Mississippi and New Jersey, there are respective peculiarities deserving of special notice. The methods of partition among *co-parceners* or heirs, which, however, have very little to distinguish them from that between other joint owners, will be more particularly referred to under the title of *Descent*.

3. In Massachusetts,(2) joint tenants, &c., may have partition by

(1) 4 Kent, 364; 1 N. J. L. 89; Homey v. Goings, 13 Illin. 95; Hanbury v. Hussey, 5 Eng. L. & Eq. 81; Bowra v. Wright, 3 Ib. 190.

(2) Mass. Rev. St. 618–20; St. 1842, 222.

(a) By St. 3 and 4 Wm. IV, ch. 27, the writ of partition is abolished, and the only remedy is a bill in equity. In Wisconsin, (Rev. Sts. 570,) partition may be obtained in all cases by bill in equity. But a remainder-man cannot file such bill.

Courts of equity have jurisdiction to award partition of estates, whether corporeal or incorporeal. Bailey v. Sisson, 1 Rhode Island, 233.

A decree for partition cannot be made, unless all the persons interested are made parties, Burhans v. Burhans, 2 Barb. Ch. 398.

A decree for partition, by a court of equity, assigning the portions of the distributees, amounts to no more than an ordinary conveyance. Anderson v. Hughes, 5 Strobb. 74.

In South Carolina, interests in real or personal property may be severed by the Court of Equity, and the share of each owner ascertained and set off, where the subject matter is not susceptible of division. The justice or practicability of any mode of partition, is a matter for the commissioners; and if, in their judgment, no division can be made without manifest injustice, they may recommend a sale, and the court will judge of the propriety of confirming such return. Steedman v. Weeks, 2 Strobb. Eq. 145.

Partition of *standing timber* will be ordered, without regard to the character of the estate of either party, or the difficulty of executing the commission. Ib.

A court of equity is not restricted to a partition or sale of the whole lands; but, when it is necessary to prevent prejudice, and can be done without prejudice, may allot their respective shares of land to some, and direct a sale of the residue. Haywood v. Judson, 4 Barb. 228.

So, if one tenant has transferred his interest; in the mode of division, regard will be had to the equities of the purchasers. Story v. Johnson, 2 Y. & Coll. 586. A way over one portion of the land may be assigned to the party taking another portion. Lister v. Lister, 3 Ib. 540.

On a bill for partition, a court of chancery will not determine conflicting titles; nor, in an action of ejectment, is a partition by decree conclusive upon the rights of the parties. Whillock v. Hale, 10 Hump. 64.

In general, where the defendant is in possession, claiming adversely to the plaintiff, partition will not be granted in equity; but, where the question arises upon an equitable title set up by either party, the rule does not apply. Hosford v. Merwin, 5 Barb. 51; Burhans v. Burhans, 2 Barb. Ch. 398.

But it has been held, that a bill in Chancery lies for partition, notwithstanding an adverse possession, unless it has been continued long enough to bar a recovery under the statute of limitations. Howey v. Goings, 13 Ill. 95; Overton v. Woolfolk, 6 Dana, 374.

The defence, to a bill for partition, that the premises are held adversely to the complainant, may be made specially by plea or answer; but that is not necessary, where the fact is distinctly stated in the bill. Burhans v. Burhans, 2 Barb. Ch. 398.

writ or by petition.(a) The shares of the petitioners shall be set off, and the residue of the land remain undivided.(b) A remainder-man or reversioner cannot have partition;(1) nor any tenant for years, of whose term less than twenty years is unexpired, as against a tenant of the freehold. But all tenants for years may have partition between themselves; which, however, shall not bind the landlords or reversioners, when the terms end.(c) The petition sets forth the titles of all persons interested, and who will be bound by the partition, whether having a freehold or term, a present or future, a vested or contingent estate. A reversioner, &c., after a life estate or term, is a party in-

(1) See *Hodgkinson*, 12 Pick. 374; *Wainwright v. Dorr*, 13, 333; *Liscomb v. Root*, 8, 376. A mortgagee may, though the mortgagor or his co-tenant remain in possession; their possession being his. *Rich v. Loud*, 18 Pick. 322. By St. 1853, 993, past and future partitions are made valid, notwithstanding the existence of leases of the estate. So, although one tenant is trustee, attorney or guardian of another. A joint tenant, &c., though disseized, may maintain a petition for partition, if he has a present right of entry. *Marshall v. Crehore*, 13 Met. 462. See *Bonner v. Prop'rs, &c.*, 7 Mass. 475; *Barnard v. Pope*, 14, 434; *Fisher v. Dewerson*, 3 Met. 544.

The bill, in such a case, should be dismissed as prematurely filed, without prejudice to the right to institute a new suit, after a recovery in ejectment or otherwise. *Ib.*

Upon a bill for partition, the rents and profits accruing while the land was held adversely are not recoverable, being more properly recoverable as mesne profits, in an ejectment for the complainant's undivided share. *Ib.*

One holding a life estate in one-fifth of certain land, terminable by marriage, may have partition. *Hobson v. Sherwood*, 4 Beav. 184.

The right of a tenant in common, to partition of a legal estate, is as absolute in a court of equity as in a court of law. The courts have concurrent jurisdiction, as to an actual partition, and must adjudicate on the same principles. *Dounell v. Mateer*, 7 Ired. Eq. 94; *Haggin v. Haggin*, 2 B. Mon. 318.

In case of a petition at law, for an actual partition, if the defendant wishes to avail himself of an equitable defence, as, for instance, a claim under a contract for purchase, he must obtain an injunction to stay proceedings at law, until the cause can be heard in equity. *Ib.*

If the application be to a court of equity, it is not sufficient for the defendant to rely upon his equitable grounds of defence in his answer. He must file a cross-bill, for which the court will allow him a reasonable time. But his failure to do so will not prevent him from filing a separate bill for relief, as the partition affects the legal title only, and the share assigned in severalty could still be reached. *Ib.*

A complainant in a bill in equity claimed half of an estate by inheritance from his father, and the other half by inheritance from his brother, and alleged that the will of his brother was void for fraud, &c., but, in case the will should be adjudged valid, then he still claimed one-half of the estate, and insisted that he was entitled to a partition; and the prayer of the bill was, that the will might be declared void, or that a partition might be had. Held, the bill did not make a case for partition, and therefore was not *multifarious*. *Brady v. McCosker*, 1 Comst. 214.

On a bill for partition, the defendants' supposed title to a part of the land having failed, they cannot be released from a proportionate part of the purchase-money, due to the administrator of the party whose heirs are plaintiffs, upon a mere reference to the matter in their answer, without filing a cross-bill. *Glick v. Gregg*, 19 Ohio, 57.

(a) As to the degree of certainty required in the description of the land, see *Miller v. Miller*, 16 Pick. 215. Petition for partition of three parcels of land. The petitioner was proved to be seized in common of only two of them, and the respondent to be sole seized of the third. Held, the petitioner could not amend by striking out the third parcel, but the respondent should have his costs, and partition was ordered of the other two. *Loud v. Peniman*, 19 Pick. 539. But where a petitioner alleged a seizin in fee, and, upon the facts agreed, it appeared that his interest was only for life; the petition was amended so as to conform to the opinion of the court, and judgment for partition awarded accordingly. *Fay v. Fay*, 1 Cush. 93.

(b) This may be done in equity, on application of the respondents. *Hobson v. Sherwood*, 4 Beav. 184.

(c) Where the same person owns in fee one undivided part, and holds a mortgage of the remainder, of a lot of land; the mortgagor is not entitled to partition. *Bradley v. Fuller*, 23 Pick. 1. So mortgagees before foreclosure cannot have partition. *Ewer v. Hobbs*, 5 Met. 1.

terested, and entitled to notice.(a) Unknown parties who are interested shall be notified by public advertisement.(b) Where one not named in the petition appears and defends, the petitioner may deny his title. If the petitioner shows himself entitled to partition, an interlocutory judgment is rendered accordingly, and commissioners are appointed to make partition. If there are several petitioners, their shares may be set off together or separately at their election. If a division cannot be made without damage to the owners, a disproportionate share may be assigned to any one who will accept it, on his paying or securing a sum requisite to equalize the value; or the exclusive possession may be assigned to the parties alternately for certain specified times, according to their respective interests.(c) In the latter case, the occupant for the time being shall be liable to the other owners for any injury to the land, like a lessee without express covenants. For any injury by a stranger, the occupant may recover damages like a lessee; and he and the other tenants may recover jointly for any further damage for which lessors might sue. The final judgment, confirming and establishing the partition, shall be conclusive as to all rights, both of property and possession, of all parties and privies to the judgment,(1) including all who might have appeared and answered, excepting, however, any joint owner absent from the State, who is allowed three years to obtain a new partition. One claiming the land in severalty is not bound by a judgment of partition, not having appeared as a respondent. If one, who has not appeared and answered, claim the share assigned to or left for any of the supposed part owners, he shall be bound by the judgment, so far as it respects the partition and assignment of the shares, as if he had been a party; but may still bring a suit for the share which he claims, as a specific portion of the land, against the party to whom it was assigned or left. Where two or more persons appear as respondents, claiming the same share of the land, their relative title may be left undecided, except so far as to determine which of them may defend, and may be settled in a subsequent suit between them. A judgment in the partition suit, that either of the opposing respondents is not entitled to a share, shall be binding upon him, so far as it respects the partition and assignment of shares; but he may still maintain a subsequent suit against the other claimant. If any person, who has not appeared and answered, claims a share of the land, he shall be bound by the judgment, so far as the partition is concerned; but he may still sue each of the other tenants for his share, each being liable for a proportion thereof.(d) Where a

(1) See sec. 36.

(a) So an attaching creditor of one tenant. And a partition made without notice to him, is, as to him, void, and he may levy his execution as upon an estate in common. *Mason v. Luke*, 19 Pick. 39. Where a railroad passes over the land, the corporation need not be made parties. *Weston v. Foster*, 7 Met. 297.

(b) One may appear, and object the want of legal notice to others, and partition will not be ordered against him. *Ashley v. Brightman*, 21 Pick. 258.

(c) See *Codman v. Tinkham*, 15 Pick. 364.

(d) It is said, a petition for partition, though founded on statute, is in the nature of a *real action*. The question is one of legal title, not mere equitable interests. But a judgment therein is no bar to a writ of right. *Blanchard v. Brooks*, 12 Pick. 56. See *Mallett v. Bancroft*, 1 Story, 474; *Colton v. Smith*, 11 Pick. 311.

Judgment binds the right of *possession*, not *property*. *Pierce v. Oliver*, 13 Mass. 211.

party dies before partition, and a share is still assigned or left him, his heir or devisee may claim the original share, (undivided,) though made a party to the petition. Eviction of any tenant, from the share assigned or left him, by paramount title, shall entitle him to a new partition of the residue. Any person, having a lien upon the share of a tenant, shall be bound by the partition, but retain his lien upon the portion allotted to his debtor.^(a)

4. In New Hampshire,⁽¹⁾ "any person interested with others" in real estate, "where there is no dispute about the title," may obtain partition by application to the judge of probate. If a division would be injurious, the whole may be assigned to one of the petitioners, he paying or giving bond for the amount of the shares of other parties. Partition may also be made by the Superior Court. Notice is ordered, and issues of fact are sent to the Court of Common Pleas. Partition is made through a *committee*. No partition shall be avoided by a conveyance after entry of the petition, nor unless recorded; nor by any lien on the property. Such lien attaches to the portion set off to the debtor. If set off to one not having a legal title, this portion belongs to the legal owner. A reversioner after a life estate cannot have partition.

5. In Rhode Island,⁽²⁾ where persons own together in fee, or where one has a particular estate, in connection with others holding a fee or a freehold, a writ of partition lies. The court ascertain the rights of the parties, and partition is made conformably. The proceeding shall not affect any reversion or remainder.

(1) N. H. L. 344; Rev. St. 413-6. Brown v. Brown, 8 N. H. 93. See French v. Eaton, 15 N. H. 337.

(2) R. I. L. 206.

A judgment is a bar to another petition for the same object, if the parties and the title put in issue or necessarily decided are the same. But, where a former partition was only of a part of the land held in common, and all the tenants were not parties; the judgment is no bar to a petition for partition of the whole land, to which all the tenants are made parties. Colton v. Smith, 11 Pick. 311.

Where a disseisor of one tenant has obtained partition, the tenant may either recover possession of his undivided share, treating the partition as void; or may affirm it, and recover the part assigned to his disseisor. Brown v. Wood, 17 Mass. 68.

(a) By Statute 1854, 12, joint tenants, &c., of a mill privilege, water right, or other incorporeal hereditament may be compelled to make partition, either by bill in equity or the statutory process. In the latter case, the commissioners shall state in their return the best mode of partition, and the court may thereupon pass such orders and decrees in equity as may be necessary to effect justice between the parties.

It had been previously held, that, where tenants in common hold a mill, dam and stream as one entire tenement, one cannot have partition of the dam and water alone. Miller v. Miller, 13 Pick. 237. See Bailey v. Rust, 3 Shepl. 440; Whittemore v. Shaw, 8 N. H. 393.

By Statute 1850, 433, partition may take place, where remainders or interests are limited to persons not in being at the time of application, upon notice to the parents or parent. The court will appoint a *next friend* to act in the case in behalf of such persons.

By Statute 1850, 458, where the pleadings show that the respondent denies the plaintiff's title to any part of the land, and claims it in fee, and he is proved to have held it under a title which he believed to be good; he shall have compensation for improvements made by him or those under whom he claims, if the plaintiff prevails, as in case of real actions, by ch. 101 of the Revised Statutes; and also be liable, as provided in that chapter, for the plaintiff's share of the rent, profits and damages. If, after these are deducted, anything remains due to him for improvements, it shall be paid before judgment of partition; and the plaintiff shall not have any rents, &c., accruing after the verdict and before payment.

Before the passing of this statute, a respondent had no remedy for improvements. Marshall v. Crehore, 13 Met. 462.

6. In Connecticut,(1) the writ of partition is expressly provided. Provision is also made, that the guardians of minors, with the aid of persons appointed by the Probate Court, may make partition.(a)

7. In Vermont,(2) partition is made, upon petition, by commissioners. If the land cannot be conveniently divided, an assignment of the whole may be ordered to one of the parties, he paying such sum and in such manner as the court shall direct; and in case of non-payment, execution may issue. If no party will accept the whole, the land shall be sold. The sale shall bind the owners and all claiming under them. The partition shall be valid, though one owner, without the knowledge of the others, had previously conveyed his interest, or though he sell it pending the petition, and though the grantee of one of the tenants, whose conveyance was not recorded, was not made a party. And a partition in such case shall enure to the benefit of the legal owner. Three years are allowed, to any party without the State and not notified, to avoid the partition for good cause. The death of a party does not abate the process. If the petitioner has no title, or a less one than he claims, he is liable to costs, but partition may still be made.(b)

8. In Maine,(3) a writ of partition is authorized, and also an application for this purpose to the common law courts, who shall order partition by a committee. Any party aggrieved, if absent from the State, and not notified, may, within three years, have a new partition upon complaint. The whole may be assigned to one, if necessary.(c)

(1) Conn. St. 293, 351.

(2) 1 Verm. L. 197-203; St. 1851, 13; Harrington v. Barton, 11 Verm. 31; Verm.

Rev. St. 231-4. See Hawley v. Soper, 18 Verm. 320.

(3) 1 Smith's St. 145-50. See Ware v. Hunnewell, 7 Shepl. 291.

(a) Partition is held to be matter of *right*, notwithstanding any difficulty and inconvenience attending it in a particular case. *Scovil v. Kennedy*, 14 Conn. 349. It may be obtained by a bill in Chancery. *Ib.* St. 1839, 30. So, though different parcels of land are held by different titles. St. 1839, 30. See St. 1840, 27-8.

(b) The proceeding is an adversary one, and can only be sustained between those who could be suitors in respect to each other, in the common law courts. A husband and wife, tenants in common, cannot constitute adverse parties. *Howe v. Blanden*, 21 Verm. 315.

A saw-mill, mill-yard, mill pond, and the utensils of the mill, are not subject to partition. *Brown v. Turner*, 1 Aik. 350. Actual *possession* is not necessary, if the petitioner is not *disseized*. *Hawley v. Soper*, 18 Verm. 320.

(c) The owner of an equity of redemption in possession, and one interested in the estate and having a right of entry, though out of possession, may have a writ of partition. *Call v. Barker*, 3 Fairf. 320; *Upham v. Bradley*, 5, 422. By the Revised Statutes, any lien upon a share attaches to the portion set off to the debtor. Partition does not bind one claiming the whole property, who has not made answer. In case of eviction, it shall be made anew. *Rev. Sts.* 547-3; *Argyle v. Dwinel*, 29 Maine, 29. But see *Foxcroft v. Barnes*, 29 Maine, 128. Partition must be predicated upon the average value, as well as quantity, of the land. *Field v. Hanscomb*, 3 Shepl. 365. And the return of the commissioners must show this fact. *Dyer v. Lowell*, 30 Maine, 217.

The return of commissioners, that they have sufficiently notified parties interested, within the State, is not conclusive evidence of such notice in regard to the time and place of partition. The court should ascertain whether such notice has been given, and the commissioners should state what they have done; whether any and what persons were known to them to be concerned and resident in the State; and what notice was given to each of them. *Hathaway v. Persons, &c.*, 32 Maine, 136.

A review of the judgment and proceedings can be granted only upon the application of a party to the former process, or one representing his interest. There is no provision in the statutes, authorizing a person interested in the estate to be first admitted a party, after partition has been ordered, and the proceedings finally closed. *Elwell v. Sylvester*, 14 Maine, 536.

9. In New York, (1) any joint tenant, &c., may petition the court for partition, or if necessary, a sale of the land. (a) The petition shall describe the premises, set forth the rights of all persons, having either present or future, vested or contingent interests therein, and be verified by affidavit. Every person interested may be made a party. (b) If any

(1) 2 Rev. St. 617; 4 Kent, 365. See Cole 513; Van Orman v. Phelps, 9 Barb. 500; v. Hall, 2 Hill, 625; Handy v. Leavitt, 3 Underhill v. Jackson, 1 Barb. Ch. 73; Horton Edw. 229; Braker v. Devereaux, 8 Paige, v. Buskirk, 1 Barb. 421.

Commissioners have no authority to assign to one tenant the right of hauling lumber across the land assigned to another, and of driving lumber on the stream through such land, and using the dam there; nor to prescribe the mode of keeping the dam in repair. Dyer v. Lowell, 30 Maine, 217.

Certiorari lies in behalf of a co-tenant, although not a party to the record. *Ib.*

Where a person owns an undivided portion of lands, which portion is severed, and set out in severalty by legal proceedings, his title adheres to and follows the estate, and becomes limited by it. *Argyle v. Dwinel*, 29 Maine, 29.

The undivided interest of a town in land which has been reserved for public uses, may be legally located, after the same has been sold. *Ib.*

The subsequent incorporation of the town will operate as a sanction, on the part of the State, of such location. *Ib.*

There may be partition of a mill and mill-privilege. *Hanson v. Willard*, 3 Fairf. 142. See *Sts.* 1848, 49.

It is held, that the whole object of a petition for partition is, a partition among those who have titles in common. Disseizors, unless their possession has been long enough to give them a title, are not proper parties, and their equitable rights are not affected by the proceedings; and an entry of appearance by them does not affect their claim to betterments, in a writ of entry by one of the parties to the partition, the tenants proving their possession and improvement more than six years before filing the petition. *Tilton v. Palmer*, 31 Maine, 486.

Partition will not be granted of a part of the petitioner's land. *Duncan v. Sylvester*, 4 Shepl. 388. Two or more tenants may join in a petition, and have an assignment in common. *Upham v. Bradley*, 5, 423.

(a) The petitioner must have an estate entitling him to immediate possession. *Brownell v. Brownell*, 19 Wend. 367. So in New Jersey. *Stevens v. Enders*, 1 Green, 271. And this is the ancient English doctrine. 4 Kent, 364, n. An equitable estate is sufficient. *Hitchcock v. Skinner*, 1 Hoffm. 21. One disseized cannot have partition. *Clapp v. Bromagham*, 9 Cow. 530.

Where the owner of a life estate in the share of one of several tenants in common, assigned his property for the benefit of creditors, held, the assignees were entitled to partition, but not to have the premises sold, it not being for the benefit of the other owners. *Van Arsdale v. Drake*, 2 Barb. 599.

A suit in equity for partition cannot be maintained by an infant, either alone or jointly with tenants in common of full age. *Postley v. Kain*, 4 Sandf. Ch. 508.

A tenant by the curtesy initiate may file a bill for partition. *Riker v. Darke*, 4 Edw. Ch. 668.

A suit in partition cannot be maintained, unless the plaintiff or petitioner is in possession. *O'Dougherty v. Aldrich*, 5 Denio, 385.

Where land is devised, subject to the performance of a condition subsequent, and the devise enters, and suffers a breach of the condition, a party entitled to an undivided part of the land, in consequence of the breach, as tenant in common with the devisee, cannot maintain partition against the devisee, but must first establish his title by ejectment. *Ib.*

A purchased, from the commissioners of forfeitures in New York, an undivided half of the rent and reversion of a certain lot of land, which was under-leased to B. B, at the time of the purchase or soon after, was in possession of the whole lot, claiming under the lease, and also claiming to own the other half of the rent and reversion. A brings a bill for partition against B. Held, he could not claim partition during the continuance of the lease; that when B, in possession as lessee, acquired the rent and reversion of half the land, the tenancy as to that half was merged and the rent extinguished; and that, if the lease had for any cause become forfeited, A must first recover his half of the land by entry or action, before he could sustain this bill. *Lansing v. Pine*, 4 Paige, 639.

(b) A decree, in a suit for partition, brought by the committee of a drunkard, and to which he is not a party, will not transfer the legal title to his undivided share, set off to the defendants in severalty; therefore he should be made party. *Gorham v. Gorham*, 3 Barb. Ch. 24.

Where a bill in equity was filed by such committee for partition, and also for an account of rents and profits, without joining him as a party complainant; held, the omission was a ground for a special demurrer, but so far as the bill sought an account, it was matter of equity, and therefore, so considered not a ground of general demurrer.

party or his interest is unknown, uncertain or contingent, or if the title to the fee depends upon an executory devise, or the remainder is contingent—these facts shall be stated. Creditors having a lien need not be made parties; nor shall such lien be affected, except that it shall attach only to such part of the land as is set off to the debtor, and be subject to his share of the costs of partition. After notice of the petition, any party interested may appear as a respondent, and the proceedings shall be according to the usual course of a suit at law. A final judgment or decree binds all parties named in the proceedings, and having at the time any interest in the premises, as owners in fee or for years, or as entitled to the reversion, remainder or inheritance after the termination of any particular estate; or as having a contingent

Under the act of 1813, infants interested in estates of which partition is sought, should be notified of the suit, whereby the court acquires jurisdiction, of which it is not ousted, by neglecting to appoint a guardian *ad litem* of the infants. If an infant appears in such a suit by attorney, and not by guardian, the proceedings are irregular and voidable, but not void. *Fowler v. Griffin*, 3 Sandf. 385.

The heirs of the ancestor, from whom the lands descended, and those who have succeeded to their rights, are proper parties to a bill for partition; and, where some of the heirs have parted with their interest, their grantees, and not themselves, are proper parties. In case of defect of parties to a bill under the code in New York, if the objection is taken in the answer, the complainant should amend before trial, if the objection be true; if he lies by till the hearing, the court can allow him to amend in its discretion on payment of costs. *Vanderwerker v. Vanderwerker*, 7 Barb. 221.

Partition cannot be made of lands without the consent of all the tenants in common, while a third person has an irrevocable power of attorney to sell the land for the benefit of all. *Selden v. Vermilya*, 2 Sandf. 568.

Where lands are conveyed to a trustee, with power to sell for the benefit of all the owners, and which he is bound to do on the request of one of the owners, partition cannot be decreed without the consent of all the parties in interest. *Ib.*

In 1843, A, owing a large sum of money to B and C, secured by his bonds, to become due at different times thereafter, conveyed land to trustees, in trust to manage the same, and sell it as they might deem best, and to apply the income and proceeds to the payment of the bonds as they should become due. In case of default, the trustees, on the request of either creditor, were to sell so much of the land as would pay the amount due him; the land shares to be sold first, and afterwards the land, and the surplus to be paid over to A. In 1846, A, in consideration of a release by B and C of his personal liability on the bonds, released his residuary interest to the trustees, and procured certain outstanding interests to be conveyed to them. The agreement, then executed by all the parties, provided, that all the property should be offered for sale by the trustees, unless a division without sale should be agreed upon without unnecessary delay. Should any of the parties not consent to a division, then a sale was to be made under the trust deed of 1843, on the requisition of the other parties, for the payment of their bonds, which were due. A division was not agreed upon. Held, even if, by the transaction in 1846, the creditors became tenants in common of all the lands conveyed in 1843, and the trust estate ceased, the power to sell, nevertheless, continued in the trustees; that in such case the power conveyed to them by the instruments of 1846, being by the owners of the land, was not a power in trust, but a simple power of attorney, to convey the land for the benefit of the owners and that such power was not revocable by one of such owners without the consent of all, and the right to demand a sale was in each. *Ib.*

Held, also, that after the transactions of 1846, the lands were held under a valid express trust to sell for the benefit of the creditors, and that the power extended to the liquidation of all such bonds, and for their rateable benefit, without preference. *Ib.*

In such case partition will not be decreed of the lands at the instance of one of the creditors. *Ib.*

In case of trust, where all the trustees are parties, if by the death of the surviving trustee the trust has devolved on the court; the master who sells will be appointed a trustee, for the purpose of passing a legal title. *Cushman v. Henry*, 4 Paige, 345. Allowance shall be made, in partition, for *improvements*. *Hitchcock v. Skinner*, 1 Hoffm. 21.

Where there is a vested estate with contingent remainders over, in trust, to persons not *in esse*, and all from whom such after comers can spring are before the court; partition may be decreed. The limitations over are not affected by partition or sale. They are protected and attach to the individual shares, which by the decree are preserved in trust according to

interest therein, or an interest in any undivided share of the premises, as tenants for years, for life, by the curtesy, or in dower.^(a) Also all persons interested but unknown, to whom public notice has been given as provided. But the judgment does not affect persons having claims as tenants in dower, by the curtesy, or for life, in the whole of the premises. In case of partition by equity jurisdiction, if partition will prejudice some of the parties, compensation shall be decreed from the others. Whenever there is a denial of co-tenancy, an issue shall be formed and tried by jury, and the respective rights of the parties ascertained. The defendants may plead, that the petitioner or petitioners were not in possession of the land. One defendant may deny the title of another, and an issue shall be made to try it. New parties may be admitted, who have become subsequently interested, or known to be so. The court, having ascertained the respective rights of the parties by default, plea or verdict, shall declare them, and decree partition accordingly, with a reservation, however, of the rights of those tenants whose interests have not been ascertained. Partition is made by commissioners.^(b) The respective shares shall be designated by permanent monuments. If the land cannot be properly divided, it may be sold by order of court, on such credit as they may direct, the price to be secured by bond and mortgage of the land.^(c) Provision is made for ascertaining incumbrances upon the land, and when they exist, if the premises are sold, they shall be first satisfied from the proceeds; and in case of any dispute in relation to them, the court shall proceed to try their validity. The court, in their discretion, may order that any life interest in the land be sold, or otherwise. If sold, they shall direct a sum in gross to be paid to the party, if he formally assent; if not, an investment shall be made for his benefit in certain designated amounts, depending upon the nature of the interest. No commissioner or guardian shall be a purchaser. The court shall decree conveyance by the commissioners; which shall bar all parties named, and all unknown, if the required notice has been given.^(d)

the will. *Cheeseman v. Thorne*, 1 Edw. 629. See 2 N. Y. Rev. Sts. 322; *Manners v. Charlesworth*, 1 My. & K. 330; *Jackson v. Edwards*, 7 Paige, 386.

(a) It has been held, that *the wife* of a tenant in common is not a necessary party. If partition be made, her right of dower attaches to the share allotted to the husband, without any express order to that effect, and although she is not a party. So a sale was held not to bar her dower, the statute merely providing, that, in case of *an existing estate* in dower or by the curtesy, certain compensation shall be made in case of sale; and an inchoate right of dower being a mere possibility. *Matthews v. Matthews*, 1 Edw. 567.

But it has been since held, that a sale bars the right of dower; especially if the wife be made a party, though she is an infant. *Wilkinson v. Parish*, 3 Paige, 653; *Jackson v. Edwards*, 7, 386.

(b) The report of commissioners is regarded in the same light as the verdict of a jury on a trial at law; and, where they are selected by the parties in interest, their report will receive greater respect; and in all cases it will not be disturbed, but upon grounds similar to those which at law would allow of a new trial. *Livingston v. Clarkson*, 4 Edw. Ch. 596.

(c) Or the use of the property may be assigned to each tenant for alternate periods; or a receiver appointed, and the profits fairly divided. *Smith v. Smith*, 1 Hoffm. 506.

(d) By Statute 1847, 556, the shares of several co-tenants may be set off in common. Where there are conflicting claims as to some shares, a temporary division may be made until such claims are adjusted. Where there is a right of dower in a share, the widow may be a party.

By Statute 1852, 411, the Supreme Court may authorize proceedings in behalf of an infant tenant in common, &c., for partition, or may sell where a division cannot be well made. The court must be satisfied that it is for the interest of the infant.

10. In Pennsylvania,⁽¹⁾ provisions are made with regard to a writ of partition. When the inquest appointed to make partition are of opinion that it cannot be done without injury, they shall return an appraisement, and the court may adjudge the whole to such tenant or tenants as will take it at the valuation, and the sheriff shall execute a conveyance accordingly. But the land shall be subject to a lien for payment of the price to the other tenants. If neither of the parties will accept the whole land, it shall be sold by the sheriff, and the proceeds brought into court and distributed. Where judgment is rendered by default upon a writ of partition, any party interested may obtain a reversal for good cause within one year therefrom. Where equal partition in value cannot be made of any share or part, the sheriff and inquest may equalize, by awarding a certain sum from one to another, for which there shall be a lien on the land. Where there are several defendants to a writ of partition, the court shall award a mutual partition among them, as well as to the plaintiff, unless all of them declare a wish to the contrary. One having only a life estate, whether legal or equitable, is entitled to partition.^(a)

11. In Mississippi, Alabama and New Jersey,^(b) any co-parcener, joint tenant, or tenant in common, may make application for partition. The court shall ascertain the number of joint owners, and appoint commissioners, with directions to divide the land into a corresponding number of shares. Where the bounds of any tract or tracts to be divided are controverted, if the controverted part is valuable, the commissioners shall separate it from the residue, and so make partition as to attach to each share a portion both of the controverted and the uncontroverted part of the land. The parts or shares and the lots laid off shall be numbered, and partition afterwards made by balloting or drawing of tickets in the manner of a lottery; at which, on the application of any party, a judge or justice shall be present. The whole proceedings are recorded, and are effectual to make partition of the land. The rights of any one having a paramount title to the land are not affected. In New Jersey, the act does not apply to lands of general proprietors of the eastern or western divisions of the State. In Alabama,

(1) Purd. Dig. 682-5; St. 1842, 234, 236; 1841, 353. See Sts. 1851, 613; *Clepper v. Livergood*, 5 Watts, 113; *Frohock v. Gustine*, 8 Ib. 121; *Roning*, Ib. 415; *Downer v. Downer*, 9 Watts, 60; *Meheffy v. Dobbs*, Ib.

363; *Kannan v. Rimington*, 10 Eng. L. & Equ. 477; *Biddle v. Starr*, 9 Barr, 461; *Davis v. Norris*, 8 Barr, 122; *Dana v. Jackson*, 6, 234; *Corn v. Huffey*, Ib. 348.

(a) A deed of partition does not affect the title of the parties, but only fixes the boundaries. *Groundie v. Northampton, &c.*, 7 Barr, 233.

A bill of review, to correct a clear mistake in fact, on which a decree in partition was made, will lie more than three years after the decree, purchasers not having become interested in the estate. *George's Appeal*, 2 Jones, 260.

Where there were several tenants in common, and one died, leaving a will which was contested by his heirs; an act of assembly, authorizing partition, and directing all persons and corporations claiming under him, whether as heirs or devisees, to be made parties, and their purparts to be set out and conveyed to trustees, for such of them as may be entitled, or the proceeds, if sold, paid to such trustee giving security, was held to be constitutional; and the adverse claimants under the deceased co-tenant were held to have been properly joined. *Biddle v. Starr*, 9 Barr, 461.

(b) Chancellor Kent says, that in this State, according to the bill reported by Mr. Scott, the reviser, in 1835, partition was to be in just judgment and assignment, and not by lot. 4 Kent, 364, n. In Alabama, the Chancellor will not order a sale for the purpose of partition, but decree the execution of mutual deeds. *Deloney v. Walker*, 9 Por. 497.

minor devisees or heirs, holding jointly, may have partition on application to the Orphan's Court. In Mississippi, a partition may be re-examined in Chancery.(1) In New Jersey, joint tenants, &c., may be compelled to make partition, like co-parceners, by writ of partition. Such process shall bind only parties, their heirs, &c., where either or both are owners of a less estate than the fee. If *the tenant to the action* or defendant does not appear to defend, the court will proceed to make partition, which shall conclude all persons whatsoever, whatever right, &c., they have or claim, "although all persons concerned are not named in any of the proceedings, nor the tenant's title truly set forth;" with a saving, however, of one year, or one year from the removal of any disability, for the purpose of setting aside the partition. Where an undivided share of the land is leased, the lessee shall be tenant of the portion allotted to the landlord, and the latter shall warrant and make good the title, according to his original obligation. If the demandant is himself a lessee of the tenant, the relation shall still continue after partition. If a partition would be injurious, the commissioners may make sale of the land, which shall be valid against the owners and all claiming under them, but no other persons. The proceeds shall be paid to the parties, or if one is out of the State, invested. Where one or more of joint tenants, &c., are minors, the Orphan's Court may order partition.(2)

12. In Maryland,(3)(a) the Chancellor may order partition of the estates of infants, idiots, &c. Joint tenants, &c., holding *by devise*, may have partition by application to court. Commissioners are appointed, and division made as on a writ of partition.

13. In Delaware,(4) partition may be obtained by application to the Chancellor, who, after notice to parties interested, shall decree partition, after ascertaining the respective shares of the parties. Commissioners are appointed, who make return of their doings, accompanied with a survey of the land. If all the owners join in petition, no notice is requisite. If a division would be attended with injury and loss to the parties, the commissioners shall make a valuation of the property, and

(1) Miss. Rev. C. 232; Aik. Dig. 332-6; ch. 114, sec. 5; 5 Ib. 1814, ch. 109, secs. 5-6.
1 N. J. L. 89.

(2) 1 N. J. L. 299, 597; N. J. St. 1835-6, See Hardy v. Summers, 10 Gill & J. 316; Hewitt, 3 Bland, 185; Chaney v. Tipton, 11 Gill & J. 253.
395; 1840-1, 82. See Van Riper v. Bendan, 2 Green, 132; also Miss. L. 522.

(3) 2 Md. L. 1794, ch. 60, sec. 8; 1797, 72. See Ib. 1843, 527.
(4) Del. St. 1829, 168; 1833, 242; 1837,

(a) An objection to a return upon a commission, that the commissioners did not distribute the estate by lot, but at their own discretion assigned the several shares to the parties interested, cannot be sustained either by the practice of the court, the act of the assembly, or the rule of the English Court of Chancery. Cecil v. Dorsey, 1 Maryland, Ch. 223.

The legislature did not mean to confine the commissioners to a particular mode of making the partition; they may, if they please, award to each of the parties his share of the thing to be divided, or they may, at the proper stage of the proceedings, draw lots; and their return, otherwise unexceptionable, will not be set aside, because they adopted either of these modes. Ib.

It is a fatal objection to a return, that the value of the estate, in money, has not been stated by the commissioners. Ib.

The act requiring thirty days' notice of the execution of the commission, is not complied with by stating in the return that reasonable notice was given; but the commissioners must say, in their return, either that they gave at least thirty days' notice, or due notice, according to law. Ib.

As to the effect of partition upon *title*, see Coale v. Barney, 1 Gill & J. 324.

the court will order a sale by a trustee appointed for that purpose. Such sale shall pass the estate, subject, however, to paramount claims. The proceeds, with the same exception, are paid over to, or invested for the benefit of, the respective parties. Instead of a sale, one or more of the tenants may take the property at the valuation, either paying the price immediately, or entering into a recognizance with surety for it in Chancery, in such manner as the Chancellor shall direct. But no such assignment to one or more shall be made, where there are conflicting claims to it.(a)

14. In Tennessee,(1) public notice is given by advertisement before presenting a petition for partition. No other notice is requisite, and the partition shall be forever binding on all and every person or persons who shall or may have claim or title to the land as tenants in common, &c. Contrary to the general practice of giving jurisdiction to the Courts of Probate in case of descent, partition may be made of real estate held by the heirs of an intestate, by application to the common law courts. The commissioners appointed to make partition, may charge the more valuable dividend or dividends with such sum or sums as they shall judge necessary to be paid to the dividend or dividends of inferior value, in order to make an equitable division. The return of the commissioners is accompanied by a survey when necessary, and recorded, and the return and appropriation shall be binding among and between the claimants, their heirs, &c.(2)

15. In Illinois,(3) partition may be had by application to court through commissioners. It is provided that their report "shall be conclusive to all parties concerned." But another chapter of the Revised Statutes provides that reversioners, &c., shall not be affected. If necessary, the land shall be sold, and the sale will bind the owners and all claiming under them.

16. In Indiana,(4) concurrent jurisdiction for partition is given to the courts of law and of equity. It is made through commissioners. If necessary, the land is sold. They to whom partition is made release of record their title to the residue of the land.

17. In Missouri,(5) partition may be made on petition, and a sale in case of necessity. No commissioner or guardian shall purchase. Many of the provisions are similar to those in New York. Adverse claims may be presented, and in such case the proceeds of sale retained by the sheriff, and a legal process instituted for the purpose of settling the title. A part of the land may be divided, and the rest sold. So it may be divided into lots, with streets, &c. If the commissioners report that a division is impracticable, their authority ceases, and further proceedings will be conducted by the sheriff.

(1) 1 Scott, 641.

(2) 1 Scott, 385-6.

(3) Illin. Rev. L. 238-9, 473.

(4) Ind. Rev. L. 387-90. See St. 1844-5, 39; see *Amory v. Carpenter*, 8 Blackf. 280; *Carter v. Kerr*, Ib. 373. Commissioners to

make partition have no authority to lay out the land into town lots, streets and alleys, without consent of the owners. *Kitchen v. Sheets*, 1 Smith, 27.

(5) Misso. St. 422; 1838, 89-90; 1840-1, 108.

(a) By the Revised Statutes, (p. 286,) the Superior Court has jurisdiction of writs of partition. It may set off to two or more of the tenants in common. The jurisdiction of the Chancellor is also affirmed.

18. In Kentucky,(1)(a) where all or a part of joint owners have an inheritance, the writ of partition lies. Reversioners, &c., shall not be affected. Provision is made for partition, by application to certain *standing commissioners*, appointed generally for this purpose.(b) Particular provision is made for the case, where some of the parties are non-residents. It would seem, in this case, that no partition will be made, unless there is a *contract* to that effect. But, in the case of residents, no contract seems necessary. If no division can be had, either party may enter his proportion of the land with the commissioners, and save a forfeiture by paying the tax thereon.

19. In Ohio, partition may be effected by petition to the courts of law. There may be a sale, if necessary. In Arkansas, a process for partition is provided, to which all persons interested shall be parties, and which is executed by commissioners. If partition is impracticable, upon a return of this fact, a sale is ordered. Where there are distinct parcels, or a division is desirable, they are sold separately. The conveyance is made by the commissioners. Owners of less than a fee have the same remedies as an owner in fee-simple.(2)

20. In Virginia,(3) where a part of joint owners are unknown, partition may be had in Chancery, reserving to the unknown proprietors the amount of their shares. Where defendants are either absent or unknown, they may for cause rescind the partition within three years. Partitions shall not affect persons not named, unless they claim as joint tenants, &c., with those who are named. Where a partition is inconvenient, the value of a share in money may be assigned or the property sold.(c)

21. In North Carolina,(4) partition is obtained upon petition. The commissioners may charge the more valuable dividend or dividends with such sum as may be necessary to make an equitable division; which, however, shall not be paid by any minor tenant till he comes of age. But his guardian shall pay it upon receiving assets. A court of equity may order a sale, where partition would be injurious. So, also, on the application of joint tenants, &c., stating that their land is required for public uses. The proceeds belonging to any party under disability shall be invested for his benefit. Where land jointly owned is subject to dower, and the tenants and the party claiming dower apply together for a sale, the court of equity may order such sale, and that a third part

(1) 2 Ky. Rev. L. 876, 1070. See *Bates v. Thornberry*, 5 Dana. 9; *Talbot v. Todd*, Ib. 204; *Seay v. White*, 5, 555; *Borah v. Archers*, 7, 176.

(2) Ohio St. 1831, 254. See *Swan*, 618; *Goudy v. Shank*, 8 Ohio, 415; Ark. Rev. St. 592-8.

(3) Va. St. 1830, 99; Code, 525.

(4) 1 N. C. Rev. St. 450-3. See *Skinner*, 2 Dev. & B. 63; *Scull v. Jernigan*, Ib. 144; *Amis v. Amis*, 7 Ired. 219; *Irwin v. King*, 6, 219.

(a) It is held, in this State, that if one tenant has made improvements on a portion of the land, this part should be assigned to him—the value of the improvements being allowed him. *Sneed v. Atherton*, 6 Dana, 281. See *Powell v. Powell*, 9 Ib. 13. In making partition of land, its value, as affected by locality, is to be taken into consideration, as well as the quantity and quality. *Hunter v. Brown*, 7 B. Mon. 283.

(b) In this respect, the law of Kentucky seems to be peculiar to that State. In all the other States, the application is made to some court or a judge thereof.

(c) A tenant by the curtesy purchased the share in the land of one of the reversioners, the others being minors. On a bill in equity, filed for that purpose by the tenant by the curtesy, partition of the land was granted. *Otley v. McAlpine's Heirs*, 2 Gratt. 340.

of the proceeds be secured for the benefit of the latter, or ascertain the value of the life estate and decree payment of it to her absolutely.(a)

22. In South Carolina,(1) joint tenants, &c., may apply for a *writ of partition*, which shall issue to commissioners.

23. In Georgia, the statute, after reciting that it would be inconvenient to pursue the method of dividing lands by writ of partition, as practiced in Great Britain, authorizes parties to apply to the court for a writ of partition, to be devised and framed according to the nature of the case. The writ issues to *partitioners*, who shall proceed to make a division. One year is allowed, or, in case of disability, one year from its removal, for a party interested to set aside the partition for good cause.(2)(b)

(1) 2 Brev. 102. See Foster, Rice, 17; | (2) Prince, 541-2.
Goodhue v. Barnwell, Ib. 198.

(a) A judgment establishes the title, and concludes the parties. *Mills v. Witherington*, 2 Dev. & B. 434. Where a charge is imposed upon the share of one tenant for equality of partition, an equal division being impracticable, the land is primarily liable, and if a note is given, it is only collateral security. *Jones v. Sherrard*, 2 Dev. & B. 179. So, with a note of the husband, the land belonging to the wife. Ib.

The money assessed upon any lot, to produce equality of value, is a charge upon the land itself, into whosoever hands it goes; and there is no statutory limitation to the recovery of the money. *Sutton v. Edwards*, 5 Ired. Eq. 425.

Upon a suit for partition, a sale was ordered and made, and the money ordered to be distributed among the tenants. One of them afterwards petitioned to be reimbursed, out of a portion of said money which had not been distributed, certain advances which he had made for taxes. Held, the petition could not be allowed, as it would be contrary to the previous order for distribution. *Lewis*, 7 Ired. Eq. 4.

A decree of partition should describe the estate to be divided, and the share which each tenant should have. *Ledbetter v. Gash*, 8 Ired. 462.

(b) In Arkansas, an order of court, appointing commissioners to divide land without petition or notice to the parties interested, is void. *Harris v. Preston*, 5 Eng. 201.

Confirmation of the report of commissioners, does not, of itself, without decree of title, or deed from the commissioners, vest a legal title. Ib.

As to partition in Iowa, see *Telford v. Barney*, 1 Iowa, 575.

An erroneous computation or inaccuracy of commissioners may be corrected by the final judgment in proceedings for partition. *Wright v. Marsh*, 2 Greene, 94.

A judgment cannot be attacked collaterally, on the ground that the petition did not show the interest of unknown owners in the land. Ib.

A petition for partition may be verified by affidavit of an attorney. Ib.

CHAPTER LVI.

WORDS NECESSARY TO CREATE ESTATES, WORDS NECESSARY IN A DEED TO CREATE A FEE-SIMPLE OR A FEE TAIL.

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| 1. Introductory remarks. | 12. Rule in equity. |
| 2. <i>Heirs</i> necessary in a deed. | 13. <i>Heirs</i> necessary to estate tail. |
| 5. Origin of the rule. | 15. <i>Of the body</i> —not necessary. |
| 6. Exceptions—conveyance to a corporation. | 16. <i>Heirs males</i> . |
| 8. Omission of the word <i>his</i> —the word <i>heir</i> . | 18. Issue past and future. |
| 9. One clause may affect another. | 19–30. Heirs of one deceased. |
| 10. Words of <i>reference</i> . | 20. <i>Premises</i> and <i>habendum</i> . |
| 11. Releases. | 23. Remainder on failure of heirs. |
| | 24. Limitations to husband and wife, &c. |
| | 31. Rule in the United States. |

1. HAVING treated of the several estates which may be owned in land, the natural association of subjects leads us now to a consideration of the particular, technical language, by which such estates may be created and transferred. It will be seen hereafter, that the two most important modes of acquiring a title to real property, are by *deed* and by *devise*. These are the only two modes in which the construction and effect of language come into question, as determining the quantity or quality of interest in land which in any particular case is created or transferred. We shall therefore proceed to consider, first, what words in a deed, and second, what words in a devise, are requisite to pass the several estates in land recognized by the law.

2. With regard to the words in a deed necessary to create a *fee-simple*, it is the general rule, that no other expression than that of *heirs* is sufficient for this purpose. Thus, if land be conveyed to a man *forever*, or to him *and his assigns forever*, or *his executors, administrators and assigns*, or in *fee-simple*, or *to hold so long as the grantor and his heirs shall hold other lands which he owns in fee*, or to “his only proper use and behoof;” the grantee will take only a life estate. So, a conveyance to one and *his generation, to endure so long as the waters of the Delaware shall run*, creates only a life estate.(1)

3. Grant of land to A, to continue for a yard to build vessels in by A *and his heirs* so long as they shall see fit, but, if they cease to use it for this purpose, the land not to be sold, but remain forever to B and his heirs. Held, the word *heirs* was only *descriptio personæ*, and that A took a life estate, and B the remainder in fee.(2)

4. Gift to a son to hold to him and his assigns forever, with general warranty, and charged with the payment of £100 to the brother of the donee. The deed passes a life estate.(3)

5. This rule is of feudal origin. Feuds were anciently granted, chiefly with reference to the personal qualifications of the grantee, and

(1) Jones v. Doe, 1 Scam. 276; Bract. 17 terson v. McCousland, 3 Bland, 72; Hogan b; 2 Cruise, 231; 2 Chit. Black. 83; 2 Prest. v. Welcher, 14 Mis. 177; Weidman v. Maish, on Est. 4–5; Jackson v. Myers, 3 John. 388; 16 Penn. 524; Holliday v. Overton, 10 Eng. Clearwater v. Rose, 1 Blac. 137; Gray v. L. & Equ. 175.
Packer, 4 Watts & S. 17. As to the expres- (2) Rutty v. Tyler, 3 Day, 470.
sion “so long as a tree grows,” &c., see Pat- (3) Wright v. Dowley, 2 Bl. 1185.

therefore terminated with his life, unless the intent of the donor manifestly appeared to the contrary. But the rule is subject to several exceptions.

6. By a conveyance to a *sole corporation*, as for instance a minister *and his successors*, or to a corporation aggregate, without the word *successors*, a fee-simple will pass.^(a) But, in a grant to a sole corporation, the word *heirs* will give only a life estate. Lord Coke says, as the heir doth inherit to the ancestor, so the successor doth succeed to the predecessor.⁽¹⁾ But the word *successors*, connected with a limitation to a natural person, does not enlarge his estate, though accompanied by other incidents not belonging to an estate for life. Thus a conveyance to one *and his successors* in trust for payment of debts, giving him "at his own discretion full power to sell," does not pass the fee, but only an authority to convey in fee.⁽²⁾

7. In case of a conveyance in trust, without words of inheritance, a fee passes, if necessary to effect the purposes of the trust.⁽³⁾ Thus, a deed to trustees and their successors, in trust to sell and convey in fee-simple absolute, vests a fee-simple in the trustees.⁽⁴⁾

7 *a*. But where there was a conveyance to trustees, in trust for A, to the use of the first son of the grantor on the body of A lawfully begotten, and to the heirs male of said son lawfully begotten, and the grantor had four children, a son, who died unmarried and intestate, and three daughters; held, the son did not take a fee, for want of a limitation to the trustees and their heirs.⁽⁵⁾

8. It is said that a gift to a man *and heirs*, omitting the word *his*, will pass a fee-simple. Upon this opinion, however, Lord Coke remarks, "but it is safe to follow Littleton." A gift to two persons *and heirs* passes only a life estate, for the uncertainty. It was formerly held, that a grant to a man *and his heir* created only a life estate. But it has been since suggested, that the word is *nomen collectivum*, and sufficient to pass a fee.⁽⁶⁾

9. One clause in a deed may control another so as to pass a fee. Conveyance "to the use of all and every the child or children" of a marriage; if more than one, as tenants in common; and if but one, then to such child, his or her heirs and assigns forever. Held, a fee passed to all the children; the last clause operating as a limitation of all the preceding words. But where the first clause of a deed conveyed land in *fee-simple*, and on condition, both indicating an intent to pass the fee; and a subsequent clause conveyed a slave to the same

(1) Co. Lit. 8 b; Grammar, &c. v. Burt, 11 Verm. 632.

(2) Alger v. Fay, 12 Pick. 322.

(3) Welch v. Allen, 21 Wend. 147.

(4) Neilson v. Lagow, 12 How. (U. S.) 98.

(5) Pottow v. Fricker, 5 Eng. L. & Eq. 443.

(6) Co. Lit. 8 b; Colthirst v. Bejushin, Plowd. 28; 3 Inst. 8 b, n. 4.

(a) "A life estate to an ideal being, having a perpetual and uninterrupted existence, must be co-extensive with a fee or perpetuity, and words of limitation could not extend it." Per Shaw, Ch. J. Overseers, &c. v. Sears, 22 Pick. 126. Grant to the justices of a county and their successors. Held, the title vested in them and their successors, and the justices for the time being could maintain a suit. Justices, &c. v. Thomason, 11 B. Mon. 235.

person, *his heirs and assigns forever*; held, the grantee took only a life estate in the land. The latter clause did not enlarge the former.(1)(a)

10. It seems, words of *direct and immediate reference* to some other estate will pass a fee, without the word *heirs*. As where a grantee in fee reconveys the lands "as fully as they were granted to him;" or where one conveys two acres to A and B, to hold the one to A and his heirs, the other to B *in form aforesaid*. In this case, B takes a fee.(2)

11. It will be seen hereafter, that, in certain kinds of *release*, a fee may pass without the word *heirs*.(3) (See *Release*.)

12. It is said that courts of equity will supply the omission of the word *heirs*, when the intention so requires. Thus in case of an administrator's deed.(4)

13. With regard to the words necessary to create an *estate tail*; in a deed, the word *heirs* is necessary to create this estate. Thus to "one and his issue," or "seed," or "children," is insufficient.(5)

14. On the other hand, where the words "heirs of the body" are used, they are not to be controlled by any subsequent expressions. Conveyance to one and the heirs of his body, and in a subsequent clause a power to sell to any of his brothers. Held, the latter clause was repugnant and void.(6)

15. But no technical words are necessary to restrain the right of inheritance to heirs of the body. Thus, the words "of his body," or the word "begotten," may be omitted, if equivalent expressions are used. As, "his heirs whom he may beget from his first wife," or "the heirs of his flesh."(7)

16. A conveyance to one "and his heirs males," creates a fee-simple, although a remainder be limited afterwards. It is said, whoever hath an estate of inheritance, hath either a fee-simple or a fee tail; but where lands be given to a man *and his heirs males*, he hath no estate tail, and therefore he hath a fee-simple. But by act of Parliament, an estate may be effectually limited to a man and his heirs male, so as to make a fee-simple descendible to males only.(8)

17. If there are words of exclusive reference to *heirs of the body*, as where, after a limitation of uses for life and in tail, the conveyance is "to the use of A, and of the heirs male of the said A *lawfully begotten*; and for default of such issue, &c.;" an estate tail passes. But it has been said, that this case was decided upon the ground of being a

(1) Doe v. Martin, 4 T. R. 39; Wiggs v. Saunders, 4 Dev. & B. 480.

(2) Co. Lit. 9 b, n. 6; 2 Prest. 1, 2; Doe v. Lawton, 4 Bing. N. 461; Lytle v. Lytle, 10 Watts, 259.

(3) Co. Lit. 10 a.

(4) Walk. 274; Piatt v. St. Clair, 7 Ohio, 165.

(5) Co. Lit. 20 a, b; 1 Roll. Abr. 587.

(6) Pearse v. Owens, 2 Hayw. 234.

(7) Co. Lit. 20 b, 27 b; Abraham v. Twigg, Cro. Eliz. 478.

(8) Co. Lit. 27 a, and n. 5.

(a) A deed is also sometimes connected, for the purpose of construction, with some accompanying instrument. Thus, a deed to a married woman, to have and to hold to her and to her heirs, and the assigns of her heirs, subject to an agreement of the same date, between the grantor, the grantee, and her husband, that if the wife should die and leave no issue who should live to the age of twenty-one years, the deed should be void, and the estate go to the heirs of the grantor; creates an estate in fee-simple in the wife, dependent on the condition of leaving children, who should live to attain full age. *Westenberger v. Reist*, 1 Harris, 594.

feoffment to uses, and upon its own peculiar phraseology, and is of little authority where other words are used.(1)

18. Whether the words "thereafter to be begotten," will embrace issue previously born, seems to be a doubtful point. Lord Coke says, "begotten" will embrace future, and "to be begotten," past issue.(2)

19. An entailment may be made by a limitation to the heirs of the body of one deceased; as, for instance, to a son, and the heirs of the body of his father, who is deceased.(3)

20. A conveyance in the premises of the deed to A and his heirs, *habendum* to him and the heirs of his body; or to A and his heirs, *habendum* to him and his heirs, if he have heirs of his body, and, if he die without heirs, that it shall revert to the donor; creates an estate tail. Lord Coke says, a conveyance in the premises to A and the heirs of his body, *habendum* to him and his heirs forever, gives A an estate tail, with a remainder in fee.(4)

21. It has been held in Connecticut, that the former limitation passes a fee-simple.(5)

22. Conveyance, in 1793, to a daughter "and to her heirs born of her body," "to have and to hold the same to her and her heirs forever." The grantor covenanted with her "and her heirs as aforesaid," that he would warrant and defend the same to her "and her heirs as aforesaid." Held, she took a present estate tail, which, upon her death, passed to her eldest son.(6)

23. A conveyance to A and his heirs, and, if he die without heirs of his body, remainder over, creates an estate tail in A. It is the same as if the limitation were to A and his heirs, viz., *to the heirs of his body*.

24. A conveyance to a man and woman and the heirs of their two bodies, whether they be married at the time or not, and even though each is married to some third party, creates in them an estate tail.(7)

25. Conveyance to the use of a wife for life, remainder to the use of the husband for life, remainder to the use of the joint heirs of their bodies. Husband and wife take an estate in special fee tail.(8)

26. A conveyance to two husbands and their wives, and the heirs of their bodies, creates a joint estate for life and several inheritances—the one husband and wife taking one moiety, and the other husband and wife the other.(9)

27. But a conveyance to a man and two women, or a woman and two men, and the heirs of their bodies, gives them a joint life estate, and each of them a separate inheritance; because they cannot have one issue of their bodies, and the law will not notice a possibility upon a possibility, viz., that the man shall marry both women, or the woman both men, successively.(10)

28. A conveyance to a man and his wife, and the heirs of the body of the man, gives him an estate in tail general, and her a life estate.

(1) Beresford's case, 7 Rep. 41; Goodright v. Goodridge, Willes, 374.

(2) Canon's case, 3 Leon. 5; Co. Lit. 20 b, and n. 3.

(3) Lit. sec. 30.

(4) 1 Inst. 21 a.

(5) Chaffee v. Dodge, 2 Root. 205.

(6) Corbin v. Healy, 20 Pick. 514.

(7) Winbush v. Tailbois, Plow. 53; Paramount v. Yardley, Ib. 541; Beck's case, Lit. R. 344; Leigh v. Brace, 5 Mod. 266. (See Idle v. Cook, 1 P. Wms 70; Co. Lit. 25 b.

(8) Davis v. Hayden, 9 Mass. 514.

(9) Co. Lit. 25 b.

(10) Ib.

If it is to a man and his heirs begotten on the body of his wife, he takes an estate in tail special, and she nothing. If to husband and wife and the heirs which he shall beget on her body; they take a joint estate in tail. If to husband and wife, and the heirs of the body of the wife by the husband to be begotten, she takes an estate tail. To whichever body the word *heirs* inclines by the limitation, it creates a descendible estate in such person. But if it be not more particularly limited to the body of one than the other, but inclines to each alike, then it creates a descendible estate in each of them.(1)

29. Conveyance, executed prior to the Revised Statutes, (in Massachusetts,) to husband and wife, for their lives and the life of the survivor, and to the heirs of their bodies. Held, they took an estate tail.(2)

30. An estate tail, as has been stated, (sec. 19,) may be limited to the heirs of the body of A, A being dead; and it will vest in such person as answers to this description at the time; and, upon his death without issue, will go to the same person who would have taken it, if it had been originally conveyed to A. Thus, if A have left a son and daughter, the son takes in the first instance, and upon his dying without issue, the daughter takes as heir of the body of her father, "*per formam doni*." This limitation has been described as "of a compound or intermediate description between a descent and purchase." It is not strictly a descent, because A, the party regarded as the ancestor, never, in fact, owned the estate. Nor is it strictly a purchase, because, upon the death of the first owner, it does not pass to his heirs, but to the heirs of another. "In point of acquisition, it has the quality of a purchase, but, in regard to its course of devolution, it has the quality of a descent."(3)

31. The discussion as to the words in a deed necessary to create a fee-simple, has, in some of the United States, been rendered quite unimportant by means of statutory provisions upon the subject. In Tennessee, Iowa, Mississippi, Illinois(a) and Kentucky, a deed of land passes the fee-simple, unless express words or the construction or operation of law require a contrary construction.(4) So in Missouri,(5) unless there are express words, or a necessary implication; in Alabama,(6) express words, to the contrary. The same rule is adopted in Arkansas, New York and Virginia.(7)

(1) Lit. sec. 26, 29; 1 Inst. 26 a, n. 3; 219 a, n. 3; Fearn v. Bonham, Yel. 131, and n. 1.

(2) Steel v. Cook, 1 Met. 281.

(3) Mandeville's case, Co. Lit. 26 b, 220 a; Southcot v. Stowel, 2 Mod. 267; Fearn v. 110-12.

(4) Missi. Rev. C. 458; Laws of Illin. 1837, 14; 1 Ky. Rev. L. 443; Tenn. Sts. 1851-2, 40; Iowa Code, ch. 78, sec. 1200.

(5) Misso. St. 119.

(6) Clay's Dig. 156.

(7) 4 Kent, 7; Ark. Rev. St. 188. See Olmstead v. Olmstead, 4 Comst. 58.

(a) Words of inheritance have in this State been held necessary. Jones v. Bramblet, 1 Scam. 276.

CHAPTER LVII.

WORDS IN A DEVISE NECESSARY TO CREATE A FEE SIMPLE OR AN ESTATE TAIL.

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| <ul style="list-style-type: none"> 1. General principle. 2. What words sufficient. 4. Power to sell. 14. Devise for children, &c. 18. Reference to other provisions. 22. Introductory words. 29. "Estate," &c., meaning of terms. 43. Devise charged with debts, &c. | <ul style="list-style-type: none"> 56. Devise over, on devisee's dying under age. 61. Devise to trustees. 66. Devise of wild lands. 67. Estate tail, by what words created. 70. Debts charged upon. 71. Remainder after a devise in fee, &c. 96. Enlargement of life estate. 110. Rule in United States. |
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1. THE rule above stated, (ch. 56,) which requires the use of the word *heirs* to create a fee-simple by deed, is not applicable to devises; in which, as they were first introduced to the English law at a period when the feudal rigor had been much relaxed, a more liberal construction has always been allowed than in deeds.(1) Hence in a will, any expressions, which show an intent to give an absolute estate, will pass the fee. The implication need not be a *necessary* one, strictly and mathematically speaking, but so far necessary as it clearly arises from the reasonable construction of the will.(2) Words which only describe the *object* devised, give only a life estate; but words which comprehend the *quantum* of the estate, pass the fee.(3)(a)

2. Thus, a devise to a man *forever* or *in fee-simple*, or to one and *his successors*, or "his blood," or "for his own use, and to give away at his death to whom he pleases," will pass a fee.(4)

3. The words "freely to be enjoyed" have been held to pass a fee. But this construction has been doubted, unless there are other expressions or provisions which render it necessary.(5)(b)

4. A devise to give and sell passes a fee; otherwise, if the devise is expressly for life.(6)

5. A testator devises a slave to his daughter for life, and, at her death, to give it to any of her children, or emancipate it. The

(1) 2 Black. Com. 84; Goodright v. Allin, 2 Black. R. 1041; Morrison v. Semple, 6 Binn. 97. See Vanderwerker v. Vanderwerker, 7 Barb. 221; Franklin v. Harter, 7 Blackf. 488.

(2) Per De Grey, Ch. J., 2 Bl. Rep. 1041; Olmsted v. Harvey, 1 Barb. 102.

(3) Per Tilghman, Ch. J., 6 Binn. 97; Fox v. Phelps, 17 Wend. 393; Hammond v. Hammond, 8 Gill & J. 437. See Moody v. Elliott, 1 Md. Ch. 290.

(4) Bro. Abr. Devise, 33; Co. Lit. 9 b;

Corbet's case, 1 Rep. 85 b; Doe v. Roper, 11 E. 518; Codman v. Coffin, 2 Cush. 365.

(5) Loveacres v. Blight, Cowp. 352; Oates v. Brydon, 3 Burr. 1895; Goodright v. Barron, 11 E. 220.

(6) Co. Lit. 9 b; Moore, 57; Timewell v. Perkins, 2 Atk. 102; Moore v. Webb, 2 B. Monr. 283. See Codman v. Coffin, 2 Cush. 365; Carroll v. Carroll, 12 B. Mon. 637; Rawlinson v. Wass, 10 Eng. L. & Equ. 113; Collins v. Carlisle, 7 B. Mon. 13; Edmondson v. Dyson, 2 Kelly, 307.

(a) In case of a direct devise, a fee may pass without words of perpetuity, though the will also make an allowance for repairs of the property during the devisee's life. Otherwise, where the devise is merely by implication. Fuller v. Yates, 8 Paige, 325.

(b) A testator, before the New York Revised Statutes, devised a lot of land to his wife during her widowhood, and on her death to be "equally divided" between his two sons; without words of inheritance. Held, the sons took a life estate. Edwards v. Bishop, 4 Comst. 61.

daughter died without exercising her power. Held, she took a life estate.(1)

6. But where a testator devised the whole of his property to his wife for life; at her death, one-third to his daughter, and the other two-thirds to be at the sole and entire disposal of his wife, trusting that if she should not marry again, she should make the daughter her heir; and the wife died unmarried; held, she took an absolute estate in the two-thirds.(2)

7. When a devise is made to one *for life*, with a power of appointment *by will*, or to *leave to whom he pleases*—the word *leave* importing a devise;—he acquires merely a *power*, and can execute it only in the mode pointed out. But if land is devised to one generally, with power to dispose of it by will or deed; he takes a fee; although there is a devise over of what may remain after his death. Devise: “My wife shall have all what I have, &c., to do and act as she thinks good and proper; all shall be let in her power, that is, into the hands of my wife.” Held, the wife took a fee-simple.(3)

8. A testator gives to his wife a life estate in his lands, and subject to this his whole property, to be equally divided between whoever she should make her heir, and his brother. The wife takes a fee in one moiety.(4)

9. A devise to one for life, with power to sell, if necessary for his comfortable support, creates a life estate, with a contingent power; and a party claiming under a sale by the devisee, must prove that the contingency has happened.(5)

10. The power to sell real estate devised will not create a fee-simple, unless it is given exclusively for the devisee’s own benefit. It is not enough that, after the execution of certain trusts, the residue is devised to him.(6)

11. Devise to the testator’s wife, of “the use and benefit of all my estate, real and personal, and should the income prove insufficient for her comfortable support, she to dispose of so much thereof as shall be necessary for that purpose; and at her decease, I order the remainder to be equally divided to and among my children.” Held, the wife took a life estate, with a naked power to sell, if the income should not support her.(7)

12. A devise in fee will not be restrained by any expression of the testator’s desire, that the estate shall be disposed of by will by the devisee in a certain way. Thus, in case of a devise to A and her heirs forever, “in fullest confidence” that she will devise the property to the testator’s family; A takes the fee.(8)

13. One seized of a house and lands, having leased them for ninety-

(1) *Pate v. Barrett*, 2 Dana, 426.

(2) *Iloy v. Mester*, 6 Sim. 568. See *Jackson v. Robbins*, 16 John. 537; *Guthrie v. Guthrie*, 1 Call, 7.

(3) *Tomlinson v. Dighton*, 1 P. Wms. 171; *Croft v. Slee*, 4 Ves. 64; *Bradly v. Westcott*, 13, 453; *Anderson v. Dawson*, 15, 536; *Barford v. Street*, 16, 139; *Nannock v. Horton*, 7, 398; *Irwin v. Farrer*, 19, 87; *Goodtitle v. Otway*, 2 Wils. 6; *Doughty v. Browne*, 4 Yeates, 179; *Willis v. Bucher*, 2 Binn. 464;

Doe v. Howland, 8 Cow. 277; *Helmer v. Shoemaker*, 22 Wend. 137, *Dice v. Sheffer*, 3 W. & Serg. 419; *Garrett v. Garrett*, 1 Strobb. Equ. 96; *Pulliam v. Byrd*, 2 Strobb. Equ. 134; *Rubey v. Barnett*, 12 Miss. 3.

(4) *Shermer v. Same*, 1 Wash. Vir. 266.

(5) *Stevens v. Winship*, 1 Pick. 318.

(6) *Grout v. Townsend*, 2 Hill, 554.

(7) *Larned v. Bridge*, 17 Pick 339.

(8) *Wright v. Atkins*, Tur. & Russ. 143.

nine years, devises them to A for ninety-nine years; "the said A to have all my inheritance if the law will allow." Held, A took a fee.(1)(a)

14. In favor of children and grandchildren, a devise to trustees, for their benefit during minority, may pass a fee-simple by implication. Thus, a testator devised the residue of his estate to trustees, their heirs,

(1) *Widlake v. Harding*, Hob. 2.

(a) A testator gave all his estate to his wife, "in the fullest manner, subject to the following provisions." He then gave certain legacies, and desired that all his property should continue at interest, in the same situation as at the time of his death, for the benefit of his wife, and that his wife should make a will, and divide the property between his and her relations, in such manner as she should think they deserved. He then declared that, if his wife should be rendered unable to make such will, this property should be sold, and the money divided in the manner therein mentioned. He declared that the last clause was "not to do away with, or prevent his wife from exercising the entire right over his property, should she be enabled to carry it into effect in the way he had left it to her, or in any other most agreeable to herself." The widow, by her will, gave some legacies to her relations, but did not dispose of the residue of her estate. Held, the property had vested absolutely in the widow, and went to her next of kin. *Huskinson v. Bridge*, 3 Eng. Law and Eq. 180.

Devise to A and her heirs forever, and if she should die without heirs and intestate, then to B and C. Held, the word "intestate" implied a power in A of disposition by will, and therefore the devise over was void. *Armstrong v. Kent*, 1 N. J. 509.

Devise of an estate to "a daughter and the heirs of her body; if no children, to her entire disposal." Held, the devise created a fee conditional, which, on the daughter's having no children, was enlarged into a fee-simple. [Dargan, C. J., dissenting.] *Smith v. Hilliard*, 3 Strobb. Eq. 211.

A testator gave all his personal property to his wife absolutely; but a codicil, in the form of a letter, addressed to his wife, contained these words: "I hope my will is so worded that everything that is not in strict settlement you will find at your command. It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children, when you can no longer enjoy it yourself. But I should be unhappy if I thought it possible that any one not of your family should be the better for what I feel confident you will so well direct the disposal of." Held, the testator's widow took the property absolutely. *Williams v. Williams*, 5 Eng. Law and Eq. Rep. 47.

A testator devised his real estate to his wife, to be at her entire disposal; but, if any part thereof should remain undisposed of at the time of her decease, the same should go to his children, to be equally divided among them. Held, the wife took an absolute, indefeasible estate in fee in the land, and the limitation over to the children was not valid, either as a contingent remainder or executory devise. *McLean v. McDonald*, 2 Barb. 534.

A devise in a will, before the act of 1833, in Pennsylvania, of a plantation "to my wife for life, and at her decease to descend on my three daughters, or the survivor of them, share and share alike, the personality to descend to my three daughters in the same manner and on the same principle as my real estate," was held to pass the fee to such of the daughters as survived the testator, there being also a devise, without words of limitation, of a part of the land to be sold, the proceeds to be distributed. *Johnson v. Morton*, 10 Barr. 245.

Devise to the daughter of the testator, to her sole and separate use; she to have "the entire control during her life" over the property; then over. By a codicil he directed, that the devise to his daughter should vest in certain trustees, "she at her election to be entitled to the possession, use, management and control of the property during her life, to sell and exchange the same," and to dispose of it by will at her discretion, satisfying the will in other respects. Held, the codicil did not enlarge the estate given by the will; that the daughter took a life estate, with power to defeat the remainder by disposing of the property. *Rail v. Dotson*, 14 Sm. & M. 176.

Bequest: "My will and desire is, that after all my just debts are paid, all my property, real and personal, shall remain in the hands of my wife during her natural life, and that she shall have the disposal of one-half of it at her death." Held, 1. The wife took an estate for life in the whole property, with a general power of appointment as to a moiety, unrestricted in its execution as to time or mode; and she having died without exercising this power; 2. That the whole property was distributable as intestate, one moiety to her next of kin, the other to the testator's. *Pulliam v. Byrd*, 2 Strobb. Eq. 134.

Where, in a marriage settlement, the intended wife's estate was settled on her for her life, with remainder to her children, and power given her, with the consent of the trustee, to sell and dispose of the property, and her interest therein, as she saw fit; held, the power to sell being restricted and qualified, the estate given was but a life estate. *Deadrick v. Armour*, 10 Hump. 588.

executors, &c., to apply the *produce* and interest thereof for the support and benefit of such of his grandchildren, by his daughter, as should be living at his death, until they became of age or married; and directed that their father should be trustee, if all the trustees should die. Held, the grandchildren took a fee-simple; on the grounds, that it could not be supposed that provision was made for them during minority, and to cease at the very time when they would most need it; that, the devise being made to the trustees in fee, the whole was meant to be given away from the heir; that, if the father should become trustee, and his wife take as heir, he would be trustee for himself; and that the word *produce* might import the proceeds of a sale of the property.(1)

15. This case has been doubted, but afterwards approved in a later case.(2)

16. A testator devised the residue of his estate to trustees, in trust for his son till he became twenty-one, and then the trust to cease. Held, the son took the whole beneficial interest in fee; as if the devise had been to trustees in trust for him till he was twenty-one, then to him and his heirs.(3)(a)

17. Devise to A, a daughter, of two-thirds of the homestead, while single, and during her mother's life; at the mother's death, to be sold by the executors, if they should think best, and the avails to go to A; if not sold, the use to go to her, for her benefit. Held, A took the fee.(4)

18. A fee-simple may pass by devise, by words of mere reference to another devise. Thus, if one devise Blackacre to A and his heirs, and Whiteacre to B, to hold in the same manner as A holds Blackacre—B takes a fee. So, also, by words of reference to a purchase, which is in fee. Thus, where one devises "*my late purchase* from A, as also four acres of woodland, &c.," and the purchase from A was in fee, a fee passes in the whole land. So, if one devise "to my eldest son and his heirs Blackacre for his part; Item, I devise to my second son Whiteacre for his part:" the latter takes a fee-simple.(5)

19. Devise "to A all that my house and premises at P. I also give to A all that my land in P and R, to him, his heirs and assigns forever." A takes a fee in the house and premises.(6)

20. Devise to the testator's daughter A, of the southerly portion of his farm, and to his daughter B, her heirs and assigns, of "that part of my farm called C H, bounded, &c., with a privilege of digging ten

(1) *Newland v. Shepard*, 2 P. Wms. 194. See *Doe v. Lean*, 1 Ad. & Ell. (N.S.) 229; *Codman v. Coffin*, 2 Cush. 365.

(2) *Fonnereau v. Fonnereau*, 3 Atk. 316.

(3) *Reat v. Powell*, Amb. 387; *Doe v. Roper*, 11 E. 518; *Doe v. Clayton*, 8 Ves. 141.

(4) *Ingersol v. Knowlton*, 15 Conn. 468.

(5) *Perk. 561*; *Neide v. Neide*, 4 Rawle, 75; 1 Roll. Rep. 369; *Gough v. Howards*, 3 Bulst. 127; *Smith v. Berry*, 8 Ohio, 365. See *Brooks v. Whitney*, 11 Met. 413; *Areson v. Areson*, 3 Denio, 458.

(6) *Fenny v. Ewestace*, 4 M. & S. 58.

(a) *A fortiori*, a devise to trustees in fee, in trust for a person till he becomes of age, with direction that, upon his reaching the age of 21, they suffer him to enter upon and enjoy the estate—passes a beneficial fee-simple to the *cestui*. *Challenger v. Shepard*, 8 T. R. 597. See *Smithwick v. Jordan*, 15 Mass 113.

But the mere fact, of a devise to sons after a life estate, does not prove an intention to give the fee. *Olmsted v. Harvey*, 1 Barb. 102. See *Williams v. Caston*, 1 Strobb. 130.

barrels of clams yearly at the southerly end of my farm." Held, B took a fee in the privilege as well as the land.(1)

21. A, seized of lands in W, devised them to his son A for his life, and then to remain to C, the son of B, except B *purchased* another house, with so much land as in W for C, and then B should sell the lands in W as his own. B did not purchase other lands. Held, the word *purchase* imported a purchase in fee, and therefore C took a fee in the lands in W.(2)

22. The introductory words of a will, indicating an intent to dispose of a testator's whole interest, may be so coupled with other clauses, in themselves ambiguous, as to pass an estate in fee-simple. Devise—"All the estate I have I intend to settle in this manner—viz.: my estate at A I give to my dear brother, and after his decease, my desire is, that it should be disposed of to B." Held, the will passed a fee-simple, such being the plain intent of the testator, as expressed by the introductory clause.(3)

23. Devise: "as touching my worldly estate wherewith it has pleased God to bless me, I give, devise and dispose of the same in the following manner." The testator then gives to his mother all his estate at N, with all his goods and chattels, as they then stood, for her life; and to his nephew, T D, after her death, if he would but change his name; if he did not, then he gave him 20*l.* per year, to be paid him for his life out of N close and the farm held at R, which he gave her upon his nephew's refusing to change his name, to her and her heirs forever. Held, T D took a fee.(4)

24. But no operative and effective clause in a will is to be controlled by ambiguous words in the introduction, unless demanded by a reasonable interpretation; nor shall a subsequent clause, relating to a particular subject, be controlled by an introductory clause not relating to that subject. Thus, if the introductory clause is, "as to all my worldly estate," still the will does not pass an estate that is clearly omitted.(5)

25. "As touching such worldly interest, &c., I give all my lands and tenements, buildings, &c., with the appurtenances, &c., by her freely to be possessed and enjoyed." Held, only a life estate was devised.(6)

25*a.* Before the Rev. Sts. in New York, a devise with no words of inheritance passed only a life estate; and such devise is not enlarged by the general introductory clause of the will, to which it is not directly connected, nor by a general charge upon the whole estate of the testator by implication, not upon the person of the devisee.(7)

26. Devise, "as to what worldly goods," &c., then all the land to the wife for life, and after her death to the testator's two sons. Held, the sons took a fee.(8)

27. The intention to give a fee-simple may also be inferred from other parts of the will containing devises to other persons. A testator devi-

(1) Lakeman *v.* Butler, 17 Pick. 436.

(2) Green *v.* Armistead, Hob. 65.

(3) Tuffnell *v.* Page, 2 Atk. 37. See Barkeydt *v.* Barkeydt, 20 Wend. 576; Knight *v.* Selby, 3 Mann. & G. 92; Miller *v.* Lynn, 7 Barr, 443; Franklin *v.* Harter, 7 Blackf. 488.

(4) Ibbetson *v.* Beckwith, Forr. 157.

(5) Orford *v.* Churchill, 3 Ves. & Bea. 67; 13 Ves. 344; Doe *v.* Clayton, 8 E. 144; Wright *v.* Russel, Cowp. 661; 4 Dane, 531; 1 Dal. 226.

(6) Wheaton *v.* Andress, 23 Wend. 452.

(7) Vanderwerker *v.* Vanderwerker, 7 Barb. 221.

(8) Wyatt *v.* Sadler, Munf. 537.

ses lands to his wife, and after her death to A, one of his sons. He then bequeaths to B, another son, a legacy, "as his proportion of the estate." A takes a fee-simple.(1)

28. A testator, having a son and two daughters, each of them having children, and also a minor son unmarried, devises the dwelling-house, &c., valued at \$8,500, to the children of his son A, after A's death, and makes similar devises to his daughters and their children. To the minor son he devises "the reversion" of certain lands at the death of his wife, valuing the land at \$8,000, but ordering that it be estimated at \$6,000, on account of the probable delay in coming into possession of it. The remainder of his estate, consisting chiefly of stocks, &c., and a wood lot valued at \$1,000, to be equally divided among the children, first charging them with the amount received by them or their children in real estate according to valuation in the will, so that when one has received an excess in real estate, a deduction shall be made from his share of the personal property. "The wood lot, or any other estate which I have not disposed of, may be sold at the discretion of my executors." The valuation in the will was the value of the fee-simple. The children of A take a fee, subject to his life estate.(2)

28 a. A testator devised to his wife for life, and, at her decease, to his children, their heirs and assigns, as tenants in common; and, in case of the death of either of said children, his or her share to descend to the children of said child, or, if said child should die without issue, then to the surviving children of the testator. The wife died in the testator's lifetime. Held, upon the death of the testator, his children took an indefeasible estate in fee-simple.(3)

29. In a devise, the word, "estate," signifies the interest which a man has in lands, rather than the subject of that interest; even though there are other words, pointing to local situation, rather than the amount of interest. Therefore, "all my estate," or "all my real estate," passes a fee-simple. So, "all my land and estate in A," because the word "land," would give an interest for life, and, therefore, the word "estate" would be superfluous unless it passed a fee. So, "my estate at A," omitting the word "all." So, "testamentary estate," if aided by the introductory clause.(4)(a)

30. So the devise of "all the estate called A, containing 2,585 acres of land," passes a fee.(5)

(1) *Butler v. Little*, 3 Greenl. 230.

(2) *Baker v. Bridge*, 12 Pick. 27.

(3) *Caldwell v. Skilton*, 1 Harris, 152.

(4) *Johnson v. Kerman*, 1 Rolle Abr. 834; *Lane v. Hawkins*, 2 Show. 388; *Barry v. Edgeworth*, 2 P. Wms. 523; *Hungerford v. Anderson*, 4 Day, 368; *Holdfast v. Marten*, 1 T. R. 411; *Chichester v. Oxendon*, 4 Taun. 176; *Chorlton v. Taylor*, 3 Ves. & B. 160; *Holms v. Williams*, 1 Root, 332; *Godfrey v.*

Humphrey, 18 Pick. 537; *Fox v. Phelps*, 17 Wend 393; *Hammond v. Hammond*, 8 Gill & J. 437; *Maine Rev. St.* 378; *Foster v. Craigie*, 2 Dev. & B. 211; *Doe v. Roberts*, 11 Ad. & El. 1000; *Smith v. Berry*, 8 Ohio, 365; *Doe v. Lawton*, 4 Bing. N. 461; 6 Scott, 303; *Leavitt v. Wooster*, 14 N. H. 550; *Quennell v. Turner*, 4 Eng. L. & Equ. 84; *Bell v. Scammon*, 15 N. H. 381.

(5) *Lambert v. Paine*, 3 Cranch, 97.

(a) In a deed, otherwise; more especially where the terms of description and the limited authority of the grantor favor such construction. Thus, under a license to sell all the real estate of an intestate, his administratrix sold and conveyed "the residue of the deceased's dwelling-house, that was not set off to his widow as dower in said estate; reference being always had to the returns and bounds of the widow's thirds, for a particular description of the bounds of the premises." Held, the reversion of the estate assigned to the widow as dower did not pass. *Kempton v. Swift*, 2 Met. 79

31. A testator gave to his wife for life, "all that estate I bought of Mr. M," then to his son A, part of that estate called S, to him and his heirs; and the other part thereof to his son B and his heirs; and "to my son C, all that estate I bought of Mr. M after the death of my wife." Held, C took a fee-simple in the last named estate. Lord Hardwicke founded his opinion on the grounds, that the will was inartificially drawn by one "*inops consilii*," but showed a clear intent to distribute the testator's whole estate; that the want of the word "my" before "estate" made no difference; and though the word "estate" was used in the devise to the wife, yet by making it expressly for life to her, and general to C, the testator showed that he used it in different senses in the two clauses.(1)

31 a. "I give and bequeath to my wife, Clarissa, all my *estate*, both real and personal, for her own use and benefit, reserving only sufficient to pay my just debts." Held, a fee passed.(2)

31 b. Devise, "I give Horsecroft, my *estate* that I now live in, to my son J P, a lunatic." Held, the word "estate" passed a fee.(3)

31 c. A devise, "as to all my worldly estate," of a house to A, "and the remainder of my estate, real and personal, among my children, including A," would pass a fee, prior to the Pennsylvania statute of 1833.(4)

31 d. So, where a testator gave a tract of land and a slave to his wife for life, and *the balance of his estate*, real and personal, to his daughter for life, with remainder to her children; held, it was to be presumed that he intended to dispose of his whole estate, and, at the death of his wife, the land and slave went to his daughter, with remainder to her children.(5)

32. On the same principle, the words "my property," "all my real property," "all my right, title and interest," or, "part, share and interest," "all the rest and residue," "the residue," "whatever else I have not disposed of," "the whole reversion," or "remainder of my lands," have been held sufficient to pass the fee-simple.(6)(a) Devise, "as to all my temporal estate, &c., I give and devise the same as follows:" then legacies to A, with direction to sell real and personal estate for payment of debts and legacies; concluding with "as to all the rest of my goods and chattels, real and personal, movable and immovable, as houses, gardens, tenements, &c., to A." Held, A took a fee-simple.(7.)

33. But it is said that this construction will not be given, unless the manifest intent of the testator, as gathered from the will and the circum-

(1) *Bailis v. Gale*, 2 Ves. 48.

(2) *Tracy v. Kilborn*, 3 Cush. 557.

(3) *Pottow v. Fricker*, 5 Eng. Law and Eq. 443.

(4) *Peppard v. Deal*, 9 Barr. 140.

(5) *Deadrick v. Armour*, 10 Humph. 588.

(6) *Hopewell v. Ackland*, 1 Salk. 239; *Norton v. Ladd*, Lutw. 761; *Bailis v. Gale*, 2 Ves. 48; *Nicholls v. Butcher*, 18 Ves. 193; *Cole v. Rawlinson*, 3 Bro. Parl. Ca. 7; *Andrew v. Southouse*, 5 T. R. 292; *Murry v. Wyse*, 2 Ver. 690; *Morrison v. Semple*, 6 Binn. 94;

Fraser v. Hamilton, 2 Desaus. Cha. 573; *Grayson v. Atkinson*, 1 Wils. 333; 3 Cranch, 130; *Holms v. Williams*, 1 Root, 332; 4 Day, 368; 17 John. 281; *Brown v. Wood*, 17 Mass. 68; *Fox v. Phelps*, 17 Wend. 398; *Roe v. Bacon*, 4 M. & S. 366; *Cuthbert v. Lempriere*, 3 M. & S. 158; *Dewey v. Morgan*, 18 Pick. 295; *Doe v. Lean*, 1 Ad. & El. (N. S.) 229; *Donovan v. Donovan*, 4 Harring. 177; *Harvey v. Olmsted*, 1 Comst. 483; *Lippen v. Eldred*, 2 Barb. 130.

(7) *Shaw v. Bull*, 12 Mod. 596.

(a) As to the words "lands, tenements," &c., see *Moore v. Denn*, 7 Bro. P. C. 607; 2 B. & P. 247; *Doe v. Allen*, 8 T. R. 503.

stances of the case, so require. If the words of the will may be satisfied by an application to personal estate, the heir shall not be disinherited by implication.(1)(a)

34. But where the wife of the testator was made devisee for life of a particular estate in one clause, and a subsequent one devised to her, "all the rest, residue and remainder of my goods, &c., together with my real estate not herein before devised, &c.;" held, the circumstance that the particular and residuary devises were made to the same person, raised no presumption against an intent to give her a fee in the same lands which she took for life, inasmuch as the testator might change his intent even while making the will. And this construction was confirmed by the consideration, that where certain other estates were devised for life, the remainders in fee were expressly given over.(2)

35. A testator devised the income of shares in the corn market of London to his nephew for life; and all the rest of his estates, with all moneys in the stocks, &c., to A and others. Held, the last clause passed the reversion in fee of the corn market shares.(3)

36. Devise of lands to A and B, "whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be." A and B take a fee-simple.(4)

35. A testator bequeathed to his heir one shilling, and devised to A all his lands, and, in the next clause, all his goods, chattels, personal and testamentary estate. A takes a fee-simple.(5)

38. A testator, who died leaving a wife and children, devised to his wife "all my real estate, one clock, and the interest of \$500 during her lifetime." The rest of his chattels he bequeathed among his children, but made no further disposition of the real estate. Held, the wife took an estate in fee. So, where a testator devises one lot to A his heir at law, and to B, all the residue of his lands, "to be kept in the name and family of the B's as long as can be;" B takes a fee-simple.

39. Devise—the interest of all my land, property, whether houses, bank stock or cash, after discharging debts, to my wife; afterwards to my sister C's family, to go in heirship forever. C's eldest son takes a fee.

40. A testator devises his "temporal estate," after payment of debts, as follows; to his eldest son A all his lands at O and F; to his son B all his lands at C; and to his wife and daughter, "all the rest of his estate, real and personal." Held, the fee of O and F did not pass by the will, but descended to A.(6)

41. Devise: *all my estate* to be thus divided, the wife of the testator to

(1) Shaw v. Bull, 12 Mod. 596. See Areson v. Areson, 3 Denio, 458.

(2) Ridout v. Payne, 1 Ves. 10; 3 Atk. 486.

(3) Fletcher v. Smiton, 2 T. R. 656.

(4) Thomas v. Phelps, 4 Rus 348.

(5) Bradford v. Belfield, 2 Sim. 264.

(6) Areson v. Areson, 5 Hill, 410; Doe v. Wood, 1 B. & A. 518; Doe v. Smith, 5 M. & S. 126; Kennon v. McRoberts, 1 Wash. Vir. 96.

(a) A testator, who died without children, devised the residue of his estate, both real and personal, to be divided between his wife and two half-sisters, "as the law directs." Held, the wife took but a life estate in one-half the realty. Burton v. Burton, 4 Harring. 38.

So a devise of a *plantation* to A, subject to the life estate of his mother in one-third, without anything else to indicate an intention to give a fee, passes but a life estate. Calhoun v. Cook, 9 Barr, 226.

have a house to live in, and garden, and one-third of all the estate, remainder over. The wife takes a life estate in the house and garden, and a fee in the rest of the property.(1)

42. Devise, to my daughter A, of all my residue and remainder of real and personal estate, goods, &c., lands, &c. If she die before she comes of age to receive said legacy, the personal and real estates to return to B, to whom I bequeath it on the above proviso. Held, A took a conditional fee, and that the limitation to B was an executory devise. B having died, and then A, the heirs of B took the estate. If a power of disposition had been given to A, he would have taken an absolute fee.(2)(a)

43. A devisee, charged with the payment of a *sum in gross*, will take a fee-simple in the lands devised to him, though there are no words of inheritance. But if the charge is made *upon the land*, to be paid from its proceeds only; or if a less estate is expressly limited, this construction does not take place.(b) Even a personal charge is said to be not conclusive. Its effect is, to *supply defects of expression*.(3)

44. A testator devises to his son A, all his real and personal estate, subject to bequests; one of them "to his granddaughter B \$1,000, to be paid her by A when she becomes 18, in land in such place as he can buy it." A takes a fee.(4)

45. The comparative value of the land devised, and of the amount to be paid, does not affect the principle above stated. Because, however much the former may exceed the latter, if the devisee takes only a life interest, it may terminate before he has realized even the small sum to be paid; and the law always intends a devise to be beneficial to the devisee. Nor does it affect the principle, that the payment is to

(1) *Holme v. Harrison*, 2 Whart. 283.

(2) *Ackless v. Seekright*, 1 Bre. 46; (1 Call, 7.)

(3) 6 John. 192; *Jackson v. Bull*, 10, 148; *Tanner v. Livingston*, 12 Wend. 83; *Moor v. Price*, 3 Keb. 49; *Grumble v. Jones*, 11 Mod. 208; *Burkart v. Bucher*, 2 Binn. 455; *Co. Lit.* 9 b.; *Doe v. Fyldes*, *Cowp.* 841; *Welllock v. Hammond*, *Cro. Eliz.* 204; *Boraston's case*, 3 Rep. 20 b.; *Collier's case*, 6, 16; *Ackland v. Ackland*, 2 Vern. 687; *Stevens v. Winship*, 1 Pick. 318; *Lithgow v. Cavenagh*,

9 Mass. 165; *Fox v. Phelps*, 17 Wend. 393; *Sholfield v. Zehmer*, 6 Watts, 101; *Spraker v. Van Alstyne*, 18 Wend. 200; *Barkeydt v. Barkeydt*, 20 Wend. 576; *Bradford v. Perkins*, 23 Pick. 183; *Wait v. Belding*, 24 Pick. 129; *M'Lellan v. Turner*, 3, 436; *Olmsted v. Harvey*, 1 Barb. 102; *Olmstead v. Olmstead*, 4 Comst. 56; *Bell v. Scammon*, 15 N. H. 381; *Harden v. Hays*, 9 Barr. 151; *Franklin v. Harter*, 7 Blackf. 488.

(4) *Coonrod v. Coonrod*, 6 Ohio, 114.

(a) Devise to A of "the whole of my property in P," &c. To B, of "all my other lands in H and M, subject to the yearly payment of £150 to C, and should A have lawful issue, the said property to be equally divided between her lawful issue." Held, the words, "the said property," did not embrace the land devised to B, and that B took a fee-simple. *Pep-percorn v. Peacock*, 3 Scott N. R. 651.

(b) "It is my will and order, that my beloved wife A, shall be master of my estate, both real and personal, so long as she shall remain my widow, subject to the payment of" legacies. Held, the wife took a life estate, subject to be defeated by her marriage. *Beardslee v. Bear Islee*, 5 Barb. 324; *Leavitt v. Wooster*, 14 N. H. 550; *Quennell v. Turner*, 4 Eng. L. & Equ. 84; *Bell v. Scammon*, 15 N. H. 381.

In one case it is said, that if the charge is on the person or land, the estate is a fee; if on the rents and profits, otherwise. *Kennon v. M'Roberts*, 1 Wash. Vir. 96, (*infra*, sec. 52.) The payment must be either a *personal charge* or a *condition annexed to the estate*. *Van Alstyne v. Spraker*, 13 Wend. 578. A mere direction or injunction to the devisee does not amount to a condition; but the words, "he paying," will create a condition or limitation, (it seems,) according to the intent. *Fox v. Phelps*, 17 Wend. 393.

A devise of all the estate, after payment of debts and legacies, the devisee being also executor, passes a fee, though there is no personal charge. *Kellogg v. Blair*, 6 Met. 322.

be made *in futuro*. But if the payment is to depend on a contingency, the rule is said not to apply. As where the testator leaves both real and personal estate and charges his estate generally, so that the lands are not liable till the personal estate is exhausted. But if the land is first devised, the devisee "paying," &c., and the personal estate is bequeathed to the same person in a succeeding clause; the charge being made on account of the land alone, the devisee takes a fee. So, where a testator devised a house to his wife, and the remainder of his property as follows; to his wife one part, and to each of his six children one part, adding, "my mother-in-law, A B, to live in the house with my wife and children, or, if she prefers it, to receive in lieu thereof \$200;" held, the widow, by acceptance of the devise, became contingently liable for the charge, and that her estate was thereby enlarged to a fee-simple.(1)

46. So, where a testator devised to his wife "all the rest I have in the world, both houses, lands, goods and chattels, stock in trade, and all other things belonging to me;" ordering her to sell the personal property, and, if this will not pay the debts, the real estate; held, the wife took a fee, for the whole property was devised in one clause, and the order to sell the personalty first was merely directory, and what the law would imply; and moreover she was empowered to sell the lands, which she could not do without having the fee.(2)(a)

47. It has been held, that where a devisee is indebted to the testator, and charged with the payment of debts, on that ground such charge does not give him a fee. So a charge upon the land does not create a fee-simple, if there is another fund, in immediate connection with which the charge is imposed.(3)

48. A devise of land, charged with payment of debts and legacies, passes a fee-simple. A testator gives to A £20, *to be paid out of his lands* within one year. He then gives other legacies, and devises all his lands to B. B takes a fee.(4)

49. A testator devises "all the residue, &c., my legacies and funeral expenses being thereout paid." Held, although the residuary words were insufficient to pass the fee, the other clause gave an estate in fee-simple.(5)

50. Where a devisee is charged with a *perpetual payment*, he takes a fee-simple. Thus, where he is to pay £3 annually to B and his heirs; or £6 yearly to the merchant tailors of London. So where one devised four coats to four boys of the parish of D forever, and all his lands, &c., and personal estate to his wife and her assigns; held, she took a fee.(6) And even where the payment is to be only for the life of the third per-

(1) Jackson v. Harris, 8 John. 141; Doe v. Holmes, 8 T. R. 1; Coan v. Parmentier, 10 Barr, 72. See Vanderwerker v. Vanderwerker, 7 Barb. 221.

(2) Goodtitle v. Maddern, 4 E. 496.

(3) Tanner v. Livingston, 12 Wend. 83; Burlingham v. Belding, 21 Wend. 463.

(4) Ackland v. Ackland, 2 Ver. 687; Taylor v. Kocher, 3 W. & Serg. 419.

(5) Doe v. Richards, 3 T. R. 356.

(6) Shailard v. Baker, Cro. Eliz. 744; Webb v. Hearing, Cro. Jac. 415; Smith v. Tyndal, 2 Salk. 685.

(a) The above-mentioned rule of construction may sometimes vest a fee-simple even in another devisee than the one charged with the debt. Where a testator devised the upper half of certain land to his son, and the lower to his grandson, without words of inheritance, and charged the son with payment of legacies; held, a fee-simple vested in the grandson, as well as the son. Barkeydt v. Barkeydt, 20 Wend. 576.

son, or is without any certain limitation, the devisee takes a fee-simple. As where one devised lands to A, conditionally that he should allow to his son, meat, drink, &c., during his natural life. So, where one devised two houses to his son, on condition that he should pay his sisters £5 a year, with a clause of entry on non payment. So where there was a specific devise of real estate, and a general residuary devise of personal property, to A, he paying debts, legacies, &c., and A was made executor, and among the legacies was an annuity to B for her life, to be paid by the executors—held, the devise of real and personal property being made by one clause, both were charged, and the annuity, being of uncertain duration, must have a fee to support it.(1)

51. The same construction has been given, even where the payment is charged rather upon the land than the person of the devisee. Thus, where the testator gave two tenements to A, “she paying *thereout* 40s. a year to her sister B,” held, A took a fee-simple.(2) So where, after the introduction “as touching all such temporal estate,” &c., the testator devised a house to his grandson, paying yearly and every year *out of the said dwelling-houses* 15s. to his granddaughter, the grandson took a fee.(3)

52. But if an annual sum is to be paid *from the rents and profits*, the fee does not pass. So, if a devise is upon a condition to be performed during the life of the testator, this is not sufficient to supply the want of words of inheritance.

53. Devise to A, on condition that he shall serve the testatrix as a coachman, so long as she shall require, and shall at all times conduct to her satisfaction. A takes only an estate for life.(4)

54. So it has been held, that where the property is given over to others upon the devisee’s death, the latter takes only a life estate.(a)

55. A testator devises his whole property to his wife, on condition of her paying to his mother a certain annuity for her life; and after the wife’s death, the property to be divided equally among his surviving children. The children all died, leaving the widow, who married again and died. Held, she took only a life estate.(5)

56. A devise to one generally, with a limitation over if he die under age and without issue, may pass a contingent fee-simple to the first devisee.

57. Thus where, after the introduction “as to my worldly estate,” the testatrix gave to her son A a certain house, and if he died in minority, to her three daughters—held, the construction must be, that if A lived till 21, he should have the right to dispose of the property himself; if not, the testatrix disposed of it. Therefore, A took a fee-simple.(6)

58. A testator devised to the two children of his brother, when they

(1) *Lee v. Stephens*, 2 Show. 49; *Reed v. Hatton*, 2 Mod. 25; *Goodright v. Allin*, 2 Black. R. 1041. drew *v. Southouse*, 5 T. R. 292.) *Harvey v. Olmsted*, 1 Comst. 483.

(2) *Baddeley v. Leppingwell*, 2 Burr. 1533.

(3) *Goodright v. Stocker*, 5 T. R. 13; (An-

(4) *Farrar v. Ayres*, 5 Pick. 404.

(5) *Joslin v. Hammond*, 3 Mylne & K. 110.

(6) *Frogmorton v. Holyday*, 3 Burr. 1618.

(a) On the other hand, where a will provided that the executors should pay the debts, and devised one farm to A, and others to B, C and D, making A and B joint executors and *residuary legatees*; held, A took a life estate. *Doe v. Roberts*, 7 Mees. & W. 382.

reached 21 years; but if either died a minor, the survivor to be heir to the other. Held, the devisees took a fee.(1)

59. A woman devised to her grandchildren as tenants in common. If either died under age, without leaving issue, the survivor to have his share. Held, they took a fee.(2)

60. A testator devises to his daughter A all his residue and remainder of personal and real estate, goods, &c., lands, &c.; and if she die "before she comes of age to receive said legacy, the personal and real estate to return to B, to whom I bequeath it on the above proviso." Held, that A took a conditional fee, which expired upon her dying under age (3)

61. Where a devise is made to trustees, if the purposes of the trust cannot be satisfied without having a fee, they will take this estate, though no words of inheritance are used. And it is enough that there are purposes which *by possibility* could not be answered otherwise.(a)

62. Thus, a devise of land to an executor, to be sold for payment of debts and legacies, with power to convey in fee, passes to him a fee-simple in trust.(4)

63. A testator devises all his real and personal estate to trustees, their executors, administrators and assigns, in trust to pay annuities and large legacies, first from the personal estate, and if that were insufficient, "by and out of the rents, issue and profits arising by the real estate." Several of the legacies were payable within a year from the testator's death. Held, it was the evident intent that the trustees should have power to sell the real estate for payment of the legacies and annuities, and therefore they took the fee.(5)

64. A testator bequeaths several small annuities, some for life, others in fee, to be paid by his trustee A every year. He also gives to his trustee and executor £5 to build a tomb for him, he and his heirs always to keep it in order; and appoints A his sole executor and trustee. Held, the real estate was subject to trusts, some of which were in fee, and therefore the trustee should take an estate co-extensive with the charges.(6)

65. But where a devise is made to trustees for a limited purpose, remainder to the persons to whom the beneficial interest is given, the legal estate of the trustees ceases upon the fulfilment of such purpose, and vests in the remainder-men.(7)

66. In all the instances above named, where an estate in fee has been created without words of inheritance, this construction has resulted from the terms of the will itself. The same construction may arise from the nature of the property devised. Thus, a devise of *wild lands*

(1) Doe v. Cundall, 9 E. 400.

(2) Toovey v. Bassett, 10 E. 460.

(3) Ackless v. Seekright, 1 Bre. 46; Guthrie v. Guthrie, 1 Call, 7.

(4) Inman v. Jackson, 4 Greenl. 237. See Payne v. Sayle, 2 Dev. & B. 455; Doe v. Davies, 1 Ad. & El. (N. S.) 430; Ackland v.

Lutley, 9 Ad. & El. 879; Doe v. Ewart, 7 Ad. & Ell. 636.

(5) Gibson v. Montfort, 1 Ves. 485.

(6) Oates v. Cook, 3 Burr. 1684.

(7) Heardon v. Williamson, Keen, 33; Ackland v. Pring, 2 Mann. & G. 937.

(a) Devise to A and B and their heirs to the use of C for life, after his death to the use of D and E as tenants in common, with introductory words of a general character. Held, D and E took a fee-simple. Knight v. Selby, 3 Mann. & G. 92.

passes a fee without words of inheritance; and the nature of the property may be proved by extrinsic parol evidence.(1)(a)

67. An estate tail may pass by devise, without any technical words.(b)

68. Thus a devise to one "and his seed," or to a man and his wife, "*et hæredi de corpore, et uni hæredi tantum*," or to a man "and his heirs male," or to a son "and his oldest male heir, forever;" will pass an estate tail.

69. So, a devise to one "and his lawful heirs;" or to one "and his heirs lawfully begotten," although this expression would literally apply as well to collateral as lineal heirs.(2)

70. An express estate tail will not be enlarged into a fee-simple, by being charged with the raising of money; more especially where it is to be raised from the annual profit of the land, and where there are remainders over, and notwithstanding the clause "from and after the

(1) Sargent *v.* Towne, 10 Mass. 303; Russell *v.* Elden, 3 Shepl. 193.

(2) Clerk *v.* Day, Cro. Eliz. 314; 3 Cruise, 201; Baker *v.* Wall, 1 Ld. Ray, 185; Cuffee *v.* Milk, 10 Met. 366; Church *v.* Wyat, Moore, 637; Nanfan *v.* Legh, 7 Taun. 85; Winder *v.* Diffenderffer, 2 Bland, 178; Doe *v.* Bannister, 7 Mees & W. 292; Douglas *v.* Congreve, 5 Bing N. 318; Doe *v.* Charlton, 1 Maun. & G. 429; Simpson *v.* Ashworth, 6 Beav. 412; Riggs *v.* Sally, 3 Shepl. 408; Lott *v.* Wyckoff, 1 Barb. 565; Wiley *v.* Smith, 3 Kelly, 551.

(a) I have thus undertaken to present a summary statement of the several cases, in which a devise may pass an estate in fee-simple without words of inheritance, and of the decisions in England and America upon the subject. From these decisions certain general principles have been extracted, as above laid down. But perhaps there is no instance in the law, where decisions are so unsatisfactory as the foundation of principles, or where a careful inquirer so fully realizes the impossibility of anything more than approximation to settled and well-defined rules. The very principle itself of construing devises by implication—an implication founded often upon clauses, or even single words or expressions, wholly disconnected in form with the one under consideration; or, in other words, of construing by the intent and not the language; involves the consequence, that each case, as it occurs, turns upon its own circumstances, and is drawn out from the application of an established rule by the very slightest point of difference from previous and analogous decisions. It is very observable, also, that the several distinct principles, supposed to be deducible by an accurate analysis from the decisions on this subject, do in fact, when those decisions are carefully examined, run into each other. For example, in Coonrod *v.* Coonrod, (p. 630,) although the case was decided upon the ground of a charge on the devise, yet the devise was of "all my real and personal estate," which of itself has been held sufficient to carry the fee-simple. The same remark applies to Goodtitle *v.* Maddern, (p. 631,) and Goodright *v.* Stocker, (p. 632.) So, in Frogmorton *v.* Holyday, (p. 632,) cited to the point, that where there is a devise over, in case the first devisee dies a minor, &c., such devisee will take a fee by implication—there was a similar introductory clause. Also in Ackless *v.* Seekright, (p. 633.) So, in Gibson *v.* Monfort, (p. 633,) referred to as establishing the principle that by a devise to trustees the fee will pass, where the purposes of the trust so require; the devise is, of "all my real and personal estate;" and, moreover, legacies and annuities are charged upon the lands devised. And in regard to the last-named point, it might, perhaps, be the most philosophical view of the subject, to treat all charges upon the land as trusts, and thus reduce two principles to one. Newland *v.* Shepard, (p. 625,) is cited, as showing that the law peculiarly favors children and grandchildren in enlarging their estates by implication. It is observable, that in a large proportion of the cases decided upon this subject, that class of persons are the objects of the testator's bounty, although they do not expressly stand upon this ground.

(b) See Weld *v.* Williams, 13 Met. 486; Grout *v.* Townsend, 2 Denio, 336. A devise to A, and, if he should die without an heir, to the two sons of the testator, was held under the law of North Carolina, to create an estate tail in A, which, in that State, amounted to an estate in fee-simple, and the limitation over was held to be too remote. Weatherly *v.* Armfield, 8 Ired. 25.

Devise: "I lend to A" certain lands "during his natural life, and after his death, I give the above-mentioned land to his heirs, lawfully begotten, to them and their heirs forever; and in case he should die without lawful issue of his body, then I lend the land to B." Held, A took an estate tail, which, by the law of 1784, in North Carolina, became an estate in fee, and therefore, the limitation over to B was void, and he and his heirs took nothing. Folk *v.* Whitley, 8 Ired. 133.

raising thereof by A. or her heirs, she and her heirs shall enjoy, &c., forever.”(1)

71. The same rule applies,(a) where the devise is first in fee, and restricted by a subsequent clause to an estate tail.

72. Devise to A and his heirs, on condition of his granting an annual rent to B and his heirs from the land: and if A die without heirs of his body, remainder to B and the heirs of his body. Held, notwithstanding the first express devise in fee, and the charge on the land, the clause “if A die without heirs of his body,” restrained the devise to an estate tail.(2)

73. Nor does it make any difference, that the remainder is limited to the right heirs of the tenant in tail.

74. A testator devises distinct parcels of land to his several sons, to them or their heirs forever, on condition that each pay another son £30. Item, if any of said children die without issue, I give their estate “unto his or their right heirs forever.” The sons take an estate tail.(3)

75. So where the devise is to A and the heirs of his body, *and their heirs forever*, and the land charged with an annuity; but if he die without leaving issue, to B; A takes an estate tail.(4)(b)

76. A devise to A and his heirs, and “if he die without issue,” a remainder over in fee, gives A an estate tail, on the ground that the intent is paramount in a will, without regard to the relative position of the words.(5)(c)

77. And the same construction is given, where these respective dispositions are made by two distinct clauses of the will.

78. A testator devises all his lands to his wife for life, and after her death, all his lands in A to one son, and his heirs forever, and all in B to another and his heirs forever. Item, I will that the survivor of them shall be heir to the other, if either of them die without issue. Held, the sons take an estate tail (6)

79. Devise to A, his heirs and assigns forever; ordering, however, that A shall not sell or dispose of the land from his lawful male issue; and if A should die without such issue, the land to revert and belong to the testator’s surviving sons and their male issue. A takes an estate tail male general.(7)

80. A testator devises to the use of A his eldest son and his heirs forever—and failing issue of A, to his son B and his heirs; and in the same way to C and his heirs; and failing his issue male, to the use of his issue female and their heirs forever. The sons take successively estates in tail male; and upon the death of A, leaving only female issue, B takes.(8)

(1) Doe v. Fyldes, Cowp. 833; (Denn v. Slater, 5 T. R. 335; Grout v. Townsend, 2 Hill. 554.)

(2) Dutton v. Engram, Cro. Jac. 427; Heffner v. Knapper, 6 Watts, 18; Moody v. Walker, 3 Ark. 198.

(3) Brice v. Smith, Willes, 1.

(4) Denn v. Shenton, Cowp. 410.

(5) Browne v. Jerves, Cro. Jac. 290; Eichberger v. Barnitz, 9 Watts, 450.

(6) Chadock v. Cowley, Cro. Jac. 695.

(7) Dart v. Dart, 7 Conn. 250.

(8) Fitzgerald v. Leslie, 3 Bro. Parl. Cas. 154; (Doe v. Wichelo, 8 T. R. 211.)

(a) Devise to a son “and the heirs lawfully begotten, &c., and their heirs and assigns.” Held, an estate tail. Buxton v. Uxbridge, 10 Met. 87; (*infra*, sec. 75.)

(b) (*Supra*, sec. 71, n.) Devise among sons equally, they paying certain legacies, and if any of them die without issue, their share to be divided among the surviving brothers. Held, an estate tail in the sons, with a vested remainder to the survivors, and the heirs of those who died before the son, who died without issue. Lapsley v. Lapsley, 9 Barr, 130.

(c) See Dutton v. Engram, Brice v. Smith, *supra*.

81. The same construction has been given, even where the tenant is empowered to dispose of the land.

82. Devise to the testator's four children and to each of them and their heirs forever, share and share alike. And if they agree to sell the estate, the proceeds to be equally divided; but if to keep it whole together, the rents, profits, &c., to be equally divided between them *and the respective heirs of their bodies*. Held, the children take an estate tail.⁽¹⁾

83. In case of a devise to one and his heirs, and if he die without heirs, remainder over to another; if the latter is a stranger, the remainder is void, being limited upon a fee-simple.

84. But if the second devisee is, or may be, a collateral heir of the first, as a brother or sister, both devises shall stand, and the first devisee takes an estate tail. This is upon the ground, that a devise to one and his heirs, and if he leave no heirs, remainder to his heirs, would involve an evident absurdity.^(a)

85. One whom the law would not suffer to inherit, although a relation, stands on the same footing as a stranger. As, in England, a brother of the half-blood.⁽²⁾

86. Devise to A, the testator's son, and if either of the testator's daughters survive A *and his heirs*, they to have the land for life. A takes an estate tail, his sisters being his collateral heirs.⁽³⁾

87. So a devise to a grandson for life, and after his death to his right and lawful heirs and assigns forever, and for want of such lawful heirs to another grandson, his heirs, &c.—passes an estate tail to the former.⁽⁴⁾

88. The same construction is adopted, where the remainder is limited to the heirs of the testator, if they must also be the heirs of the first devisee.

89. Thus if one having two sons, A and B, devise lands to B (the younger) and his heirs, and for default of the heirs of B, to his own heirs; although the remainder is void, because A, as the testator's heir at law, takes the reversion *by descent*; yet, upon the ground of manifest intention, and inasmuch as the heir of the testator must also be the heir of B; B takes an estate tail.⁽⁵⁾

90. A devise to one *and his issue*, or lawful issue, or *children*, if he have no children at the time, gives him an estate tail. If to one "and his *male* children," an estate tail male. Hence, where these terms are used in connection with limitations over, a similar construction is adopted to that above referred to, where "heirs" are expressly named.⁽⁶⁾

91. Devise to a son for life, and after his death to the men children of his body; and if he die without any man child, remainder over. The son takes an estate in tail male.⁽⁷⁾

(1) *Roe v. Avis*, 4 T. R. 605; (*Doe v. Rivers*, 7 Ib. 276.)

(2) *Tilburgh v. Barbut*, 1 Ves. 89.

(3) *Webb v. Hearing*, Cro. Jac. 415; *Tyte v. Willis*, Forr. l.

(4) *Morgan v. Griffiths*, Cowp. 234.

(5) *Nottingham v. Jennings*, 1 P. W. 23.

(6) *Wild's case*, 6 Rep. 16; *Frank v. Stovin*, 3 E. 548; *Kingsland v. Rapelye*, 3 Edw. 1; *Peppercorn v. Peacock*, 3 Mann. & G. 356; *Wheatland v. Dodge*, 10 Met. 502.

(7) *And*. 43.

(a) See *Perry v. Briggs*, 12 Met. 17; *Deboe v. Lowen*, 8 B. Mon. 16.

92. Devise of all the residue of real and personal estate to A and his sons in tail male, and for want thereof to B and his sons in tail male, and on failure of such issue, to the testator's own right heirs. Neither A nor B had issue at the making of the will or the testator's death. A died without issue. B takes an estate tail male.(1)

93. Devise: "I give to my daughter M and her children, one-half of my house and land, &c. Item, I give to my daughter J and her children the other half. But if either of my aforesaid daughters should die and leave no children, my will is, that my surviving daughters and their children should enjoy their deceased sister's part." M was unmarried at the making of the will, but it did not appear whether she ever had any child. Held, J took an estate tail.(2)

94. Devise: to my son A, when he shall be 21, the fee-simple and inheritance of S, to him and his child or children forever; but if he die under 21, to my wife forever. A had no children at the testator's death or the making of the will. Held, A took an estate tail.(3)(a)

95. A testator devises to his daughter all his effects and estate, real and personal, "as a place of inheritance to her and her children or her issue forever." And if she die leaving no child, or if her children die without issue, the estate to be sold. The daughter takes an estate tail.(4)(b)

96. A devise without words of limitation may be enlarged by subsequent words or by implication, so as to create an estate tail instead of an estate for life. Thus a house was devised to three brothers among them; provided always that the house were not sold, but should go to the next males of the name and blood. Held, the devisees took an estate tail.(5)

97. A testator devises a house to his wife for life, and after her death his son A to have it; and if A married and had by his wife any male issue, his son to have it; and if he had no male issue, his son B to have the house; and if any of his sons or their heirs male, issue of their bodies, went about to aliene or mortgage the house, the next heir to enter. Held, B took an estate tail; that the words, "have no male issue," were equivalent to "die without male issue;" and that the clause, "his sons or their heirs male," and that prohibiting alienation, showed an intent to give an estate tail.(6)

98. Devise to the testator's three daughters to be equally divided;

(1) Wharton v Gresham, 2 Black. R. 1083.

(2) Nightingale v. Burrell, 15 Pick. 104.

(3) Davie v. Stevens, Doug. 321.

(4) Wood v. Baron, 1 E. 259.

(5) Blaxton v. Stone, 3 Mod. 123; Hope

v. Taylor, 1 Burr. 268; Evans v. Astley, 3 Burr. 1570; Heffner v. Knepper, 6 Watts, 18; Chapman's case, Dyer, 333.

(6) Sondag's case, 9 Rep. 127.

(a) Devise to a sister for life, remainder to her son A, "and his heir male, living to attain the age of twenty-one;" if no heir male, then to such issue female, £200, to be equally divided; if no such male or female living, said £200 to the sister's children; "and the inheritance of said estate, for want of such male issue, to redound to my heir male," &c. Held, A took an estate tail, the words "living to attain" not being *descriptio personae*, or a condition precedent, but a subsequent condition, defeating the estate tail, if no such heir male should live to be twenty-one. Doe v. Permement, 11 Ad. & El. 431.

(b) By Statute 1 Vict. ch. 26, the words "die without issue," "die without leaving issue," or other words importing either want or failure of issue, are construed to mean death without issue then living, not an indefinite failure of issue, unless a contrary intention appear from other words of the will. Acc. George v. Morgan, 16 Penn. 95.

and if any of them died before the other, then the one to be the other's heir, equally to be divided; and if they died without issue, devise over to strangers. The daughters take estates tail.(1)

99. A testator devises to his wife for life, then to his son, and if he die without issue, having no son, to a stranger. The son takes an estate tail.(2)

100. An express estate for life without waste may be enlarged by subsequent words or necessary implication into an estate tail. This takes place, where a remainder over is limited, which is not to take effect until failure of the issue of tenant for life, and, at the same time, there are no words by which such issue or the whole of them take as purchasers.

101. Devise to A for life, without waste, remainder to his several sons as far as the sixth; and, if A die without issue male, to B in fee. To effectuate the evident intent of admitting any sons beyond the sixth, held A took an estate tail.(3)

102. Devise to A for life, then to the first son or issue male of his body, and the heirs male of the body of such son; then to the second son or issue male of A forever. And after A's death *without issue male of his body*, or *after the death of such issue male*, to charitable uses. Held, notwithstanding the express limitation for life, and the charitable devise, inasmuch as no son of A beyond the second could ever claim as purchaser, the words "such issue male" must be construed to mean "issue male" generally, and A took an estate in tail male.(4)

103. Devise to trustees for the sisters of the testator, A and B, equally between them during their natural lives, without waste; and if either of them die leaving issue or issues of her or their bodies, then in trust for such issue or issues of the mother's share, or else the survivor or survivors of them and their respective issue or issues; and if both A and B die without issue as aforesaid, and their issue or issues to die without issue or issues, devise over. The question was, whether A and B took estates for life or in tail. The Court of Great Sessions determined that they took the latter. This decision was reversed by the Court of K. B., but affirmed by the House of Lords. It was contended, that the issue of A and B were designed to take as purchasers; and that this intent appeared from the limitation "to the survivor or survivors of them, and their respective issue or issues;" the word survivors not being applicable to the sisters, of whom there were but two, but only to their issue.(5)

104. A testator devises to W all his freehold estate at A for life; and after his decease to and among his issue; and in default of issue, devise over in fee. Held, to effectuate the *general intent*, although the particular intent might be otherwise, W took an estate tail.(6)

105. Devise to A, a daughter of the testator, and her children, of one-half of the estate, and to B, another daughter, and her children, of the other. If either of them die and leave no children, my surviving daughters and their children shall enjoy their deceased sister's part. A was unmarried at the making of the will. B was married,

(1) King v. Rumball, Cro. Jac. 448.

(2) Robinson v. Miller, 1 Rolle Abr. 837.

(3) Langley v. Baldwin, 1 P. Wms. 759.

(4) Att. Gen. v. Sutton, 1 P. Wms. 753;

Robinson v. Hicks, 3 Bro. Parl. Ca. 75.

(5) Sparrow v. Shaw, 3 Bro. Parl. 120;

Shaw v. Weigh, Fitzg. 7.

(6) Doe v. Applin, 4 T. R. 82.

but it did not appear whether she ever had a child. Held, B took an estate tail.

106. Devise to A for life; if he die without issue, leaving no children, the lands to be sold, and the proceeds divided among three other sons; if any die before A, their shares to be divided among their children. A takes an estate tail.(1)

107. The same construction has been adopted, even where the word "only," or the words "and no longer," are added to an express limitation for life.(2) So, in case of a devise to A, who was then unmarried, "for and during the term of his natural life, and no longer," provided, &c.; and, after his decease, to such son as he shall have, lawfully to be begotten, taking the name of R, and for default of such issue devise over in fee; the question arose, whether A, having fulfilled the condition prescribed, took an estate tail, or only a life estate, with remainder to his first son only. After two decisions in Chancery in favor of the latter construction, and judgments of the King's Bench and the Lords Commissioners in favor of the former, the case was carried to the House of Lords. On the one side, it was contended, that besides the positive words "and no longer," the words "for default of *such* issue," must mean for default of a son as above described, and not of issue generally. Therefore, that A took only a life estate; and, if so, the son must claim as purchaser, and, for want of any words of inheritance, could have only a life estate. On the other side it was argued "*inter alia*," that as A was unmarried at the time of making the devise, there was no probability of an intent to designate any particular son; and that the word "son" was *nomen collectivum*, and the phrase "for want of such issue," referred to it in that sense. Held, A took an estate tail.(3)

108. The same construction is adopted, where the direct limitation is to the heirs of the body, but in a mode different from that in which the law passes an estate by descent; so that the children must take as purchasers, unless an estate tail is created.

109. Devise to the testator's daughter A, and the heirs of her body forever, as *tenants in common*, and not as joint tenants; and if A die before 21, or without having issue, devise over. Held, although the testator intended that A should take only for life, and her children as purchasers, he also intended that the issue of these children should take, before the remainder ever took effect. Therefore A became tenant in tail.(4)

110. It was stated in the last chapter, (s. 31,) that the common law rule, which requires the word *heirs*, to pass a fee-simple by deed, has been altered by statute in several of the States. In these States, the same statutory provisions apply alike to deeds and to devises; and, in some other States, a similar change has been made in regard to devises alone. In Massachusetts,(a) New Hampshire, Vermont and Ohio,

(1) *Nightingale v. Burrell*, 15 Pick. 104; *son v. Robinson*, 2 Ves. 225; 3 Bro. Parl. Ca. 180.

(2) *Doe v. Cooper*, 1 E. 229.

(4) *Doe v. Smith*, 7 T. R. 531; *Doe v. Cooper*, 1 E. 229.

(3) *Robinson v. Hicks*, 1 Burr. 38; *Robin-*

(a) The intention need not be declared in express terms; if it can be clearly and satisfactorily inferred, (on a comparison of the different parts of the will,) either from particular provisions, which are inconsistent with an intent to give a fee, or from the general import, scheme and object of the will. *Fay v. Fay*, 1 Cush. 93.

a fee-simple passes by devise, unless a contrary intent clearly appear.(1) In New Jersey, if there are no words importing a life estate, and no remainder is limited(2). In Maryland (in case of wills made after April 1, 1826) and in Pennsylvania, unless the contrary appears, by a devise over, words of limitation, or otherwise.(3) The same rule is adopted in North Carolina and Tennessee.(4)(a)

CHAPTER LVIII.

THE RULE IN SHELLEY'S CASE.

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| <p>(1) History of the rule—<i>Shelley's case</i>.
 3-5. Effect of intervening estates between the ancestor and heirs.
 4. Life estate by implication.
 6. Joint or several life estate and inheritance—husband and wife, &c.
 8. Two estates created, by distinct instruments.
 13. Union of legal and equitable estates.
 15. Use of the words <i>issue, children, &c.</i>
 18. Marriage articles.
 31. Rule applies to devises, notwithstanding other provisions implying a contrary intent.</p> | <p>37. <i>Heir, next heir male</i>, words of subsequent limitation added to the word <i>heir, &c.</i>
 48. Trusts, executed and executory—distinction.
 56. Terms for years.
 62. Distinction as to subsequent words of limitation.
 68. Rule, where the heirs are to have only a life estate.
 70. <i>Issue</i>, effect of the word.
 81. Union of trust and legal estate.
 90. Case of <i>Perrin v. Blake</i>.
 95. American doctrine.</p> |
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1. It was early settled, that where a conveyance is made to a person for life, remainder to his heirs or the heirs of his body; instead of giving him a life estate and a contingent remainder to the heirs, it vests a fee-simple or an estate tail in the first grantee. This construction was adopted, for the purpose of saving to the lord, the profits or perquisites incident to inheritances: and also upon the general ground of preventing an abeyance of the fee, which would render it inalienable during the life of the first taker.(5) The principle was finally established in a case called *Shelley's case*,(6) which, from the importance of the rule and its frequent application in practice, has become more notorious and *proverbial*, perhaps, than any other case in the English

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| <p>(1) Ohio L. vol. 30, 1831-3, p. 41; Mass. Rev. St. 417; N. H. Rev. St. 311; Swan, 999; Verm. Rev. St. 254.
 (2) N. J. L. 60.
 (3) Md. L. 1825, 93; Park & John. 467.</p> | <p>(4) 4 Kent, 8.
 (5) Co. Lit. 22 b, 319 b; 2 Rolle's Abr. 414. See <i>Schoonmaker v. Sheely</i>, 3 Denio, 485.
 (6) 1 Rep. 93.</p> |
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A testator, in lieu of bar of dower, devised the "use and improvement" of one-third of his real estate to his wife, bequeathed her certain personal estate during her life, and the income of certain other personal estate during her widowhood; and also made devises in fee of certain real estate, by the use of the proper technical terms. Held, by the words "use and improvement," the wife took an estate for life in the real estate, and (admitting the devise to her to be within the Rev. Sts., c. 62, sec. 4, which the court did not decide) that the statute did not enlarge her estate to a fee, as it clearly appeared, by the will, that the testator intended to convey a less estate. *Fay v. Fay*, 1 Cush. 93.

(a) By St. 7 Wm. IV, and 1 Vict. ch. 26, a general devise, without words of limitation, passes the testator's whole interest in the property devised. 1 Steph. Comm. 224.

Reports. The facts of this case were as follows: E. Shelley, tenant in tail, suffered a recovery, and declared the uses of it to himself for life, without impeachment of waste, remainder to a trustee for twenty-four years, remainder to the heirs male of the body of E. Shelley, and the heirs male of the body of such heirs male, remainder over. Held, by the Chancellor, and all the judges except one, that E. Shelley took an estate tail. The decision rested upon the ground, that if R. Shelley, the first son of E. Shelley, took by purchase and not by inheritance, then no other son of E. Shelley could ever take the estate, which would disappoint the word *heirs* (of E. Shelley,) in the deed; and that the limitation to the heirs male of the heirs male of E. Shelley did not control the prior limitation, but was merely declaratory, because every heir male of the heir male of E. Shelley was an heir male of E. Shelley himself.

2. It is said, that the rule in *Shelley's case* was adopted to carry into effect the *general intent*, by annexing particular ideas of property to particular modes of expression; not as an essential, permanent and substantial rule, which the intent cannot control.(1) On the other hand, it is said to be, not a rule of construction for ascertaining the intention of the party, but a rigid rule, the chief operation of which is to defeat the intention of the grantor.(2)

3. It was formerly held, that if intervening estates are limited between the grantee and his heirs, all of which, as well as the grantee's own estate, may terminate in his life; the inheritance does not vest in the grantee, because he may have no heir to take the remainder. But Mr. Fearn has denied this exception to the rule.(3)(a)

4. The rule is applicable though the first grantee take an estate for life by implication and not by express words.(b) But if he take only an estate for years, his heirs take as purchasers, and not by inheritance.(c)

5. Where a limitation to heirs is immediate, the tenant for life or ancestor takes one entire estate of inheritance. Where it is mediate, that is, where some other estate interposes between the estate for life and the remainder, the tenant takes the inheritance, not to be executed in possession till the mesne estates terminate; unless the mesne estates are less than freehold, when the subsequent limitation vests immediately. If the mesne remainders are contingent, the life-estate does not merge in the remainder to the heirs; but the two interests unite *sub modo*, so as to open and let in the mesne estate when the contingency happens.(5)

6. Where the prior estate is limited to several persons jointly, and the remainder to their heirs, it seems they take a joint inheritance.

(1) Harg. Tracts, 493; 4 Cruise, 256. See *King v. Beck*, 15 Ohio, 550.

(2) *Berry v. Williamson*, 11 B Mon. 245.

(3) 2 Rolle's Abr. 418; *Fearn*, 33; *Curtis v. Price*, 12 Ves. 89.

(4) 4 Cruise, 256; *Tipping's case*, 1 P. Wms. 359.

(5) *Fearn*, 37-8, 42; *Colson v. Colson*, 2

Atk. 247; *Hodgson v. Ambrose*, Doug. 337; *Hayes v. Foarde*, 2 Bl. R. 698.

(a) Devise to A for life, then to B for life, then to the heirs of the body of A in tail. A takes an estate tail. *Douglas v. Congreve*, 4 Bing. N. 1. Devise to A for life, remainder to his oldest son; for want of *such* issue, to his daughter or daughters, share and share alike, forever; if A has no issue, to him, his heirs and assigns forever. A takes an estate in tail general. *Doe v. Charlton*, 1 Scott N. 290.

(b) But see 14 Pick. 25.

The rule applies to husband and wife. But if the limitation of the life-estate is *successive*, as to the husband for life, remainder to the wife for life, remainder to the heirs of their bodies; it seems they take a joint remainder in tail.(1)(a)

7. A limitation to A, remainder to the heirs of A and B, creates a contingent remainder, not a vested inheritance. So, also, a limitation to the wife for life, remainder to the heirs of the body of husband and wife; because, if the wife should die first, as the husband could have no heir during his life, the limitation to the heirs would be defeated. And in such case, neither husband nor wife takes an estate tail; the former having no prior limitation to him, and the latter, because, though taking the life estate, the heirs are not applied to her body. If the limitation is to the husband for life, remainder to the wife for life, remainder to the heirs of her body by him begotten, she takes an estate-tail.(2)

8. The rule in *Shelley's case* is inapplicable, where the prior estate and the remainder are created by distinct conveyances, or by a deed and subsequent will. Thus, if an estate for life is conveyed to A, remainder to the heirs of B, and B afterwards purchases A's interest; the inheritance does not thereby vest in B.(3)

9. Conveyance by A, on the marriage of B his son, to the use of B for life, remainder to his wife for life, remainder to their first and other sons in tail. A afterwards devised to the issue male of B by any other wife, in tail male, and on failure of such issue male of B, to his grandchildren by his daughter C in fee. Held, the devise to B's male issue by any other wife could not be tacked to his life estate.(4)

10. A conveys to B for life, and afterwards devises the reversion to the heirs male of the body of B. Held, the two interests could not unite.(5)

11. It is said, that where the second limitation is made by virtue of a power created by the first, the rule in *Shelley's case* applies, because one taking an estate in this way holds in construction of law by virtue of the original instrument which created the power.

12. Conveyance to A for life, remainder to the use of B, his wife, for life, &c., remainder to their sons severally in tail, remainder to the use of their daughters successively in tail, remainder to the use of B and the heirs of her body; and in default of such issue, to the use of such person as B should appoint. B subsequently made an appointment to the use of the heirs of A. Held, if the last limitation had been of a legal estate, it would have given A the fee; but that it did not create a legal, but only an equitable interest.(6)

13. The last case leads naturally to the remark, that the rule in

(1) Fearn, 40; Stevens v. Brittredege, T. Ray. 36.

(2) Fearn, 44; Gosage v. Taylor, 2 T. R. 435; Alpess v. Watkins, 8 T. R. 516.

(3) Cranmer's case, 2 Leon. 5, 7.

(4) Moore v. Parker, 1 Ld. Ray. 27.

(5) Doe v. Fonnereau, Doug. 487.

(6) Venables v. Morris, 7 T. R. 342; Ib. 438.

(a) Conveyance (before the Rev. St. ch. 59, sec. 9, took effect) to A, to the use of a husband and wife for their lives and the life of the survivor, then to the use of B for life, then to the use of the heirs of the wife forever. Held, the wife took a fee, in case of surviving the husband and B. Bullard v. Goffe, 20 Pick. 252. Devise to A, for the life of herself and her husband B; after their deaths, to the lawful issue of her body. Held, A took an estate tail. Griffith v. Evan, 5 Beav. 241. See Hinman v. Bonslaugh, 1 Harr. 344.

Shelley's case does not apply, unless the two estates are of the same nature, either legal or equitable. Thus, if the limitation for life is a legal interest, and that to the heirs a trust, or the converse; in either case the two estates cannot become united into one.(1)

14. Conveyance by A to B, C and D, selectmen of the town of H, to them and their successors in office for the time being, for the use of E, and after his death, if any of the premises should remain, to E's heirs forever; to hold for the use aforesaid at the discretion of the grantees. Held, B, C and D took a legal estate in trust for E and his heirs, and as the trust was in fee, the estate of the trustees was also in fee.(2)(a)

15. The rule in question does not apply, where the words *lawful issue*, *issue*, *sons* or *children*, are used instead of *heirs*; because it is founded upon the maxim "*nemo est hæres viventis*," and the policy of preventing an abeyance of the fee, which reasons do not exist in the case supposed.(3)(b)

(1) *Say v. Jones*, 3 Bro. Parl. 113; 4 Watts & S. 418; *Turner v. Patterson*, 5 Dana, 295; *Cursham v. Newland*, 4 Mees. & W. 101; *Cursham v. Newland*, 2 Beav. 145; 455; *Settle v. Settle*, 10 Humph. 474.

(2) *Newhall v. Wheeler*, 7 Mass. 189.

(3) 4 Cruise, 261. See *Ellet v. Paxson*, 2 Jones & S. 418; *Turner v. Patterson*, 5 Dana, 295; *Cursham v. Newland*, 4 Mees. & W. 101; *Cursham v. Newland*, 2 Beav. 145; *Minnig v. Batdorff*, 5 Barr, 503; *Ward v. Jones*, 5 Fred. Eqn. 400.

(a) In *White v. Woodberry*, (9 Pick. 138-9,) it is said, that in the case of *Newhall v. Wheeler*, the operation of the statute (changing the rule in *Shelley's case*) does not seem to have been considered by the court. The distinction is also taken between the two cases, that in the prior one the land was devised (conveyed) to the use of one for life, and after his death, if any of the premises should remain, to his heirs forever; while in the latter, the devise to the trustee was in strict trust, the income to be paid to another for his life, and then the estate to descend to his heirs, so that the latter took nothing but a right to the income and profits. The case of *White v. Woodberry*, was as follows:—Devise to A, his executors and administrators, upon trust to pay the income to B for his life, and after his decease, the same to descend to his legal heirs, &c. Held, the words *the same* applied to the estate itself, not to the trust, and that A took a trust estate during B's life, with a remainder to those who should be his heirs at his decease; that this would be the construction, independently of any statute affecting the rule in *Shelley's case*; but that the Statute of 1791, ch. 61, sec. 3, which changes this rule, applied to equitable as well as legal estates.

Where an estate was intended to be given to one, with contingent remainders to his issue, and was conveyed directly to trustees, in trust for the party who was to have the life estate, during his life, and also to preserve the contingent remainders, and upon that estate to limit the future remainders; the person first beneficially entitled takes an equitable estate for his life, and those in remainder take by purchase, and not by descent. *Vanderheyden v. Crandall*, 2 Denio, 9.

(b) Devise to A, and to his male children and their heirs, to be equally divided amongst them and their heirs forever. At the making of the will, A had no children. Held, he took a life estate, with a contingent remainder in fee to his children. *Sisson v. Seabury*, 1 Sumn. 235. But where a devise was made to the testator's son during his life, after his decease to his heirs and their heirs and assigns forever; held, the words were words of limitation, and gave the son a fee-simple. *Schoonmaker v. Sheeley*, 3 Hill, 165. Deed to a daughter and her husband, of a certain *dower* in lands, for the benefit of her and his children, to her and her children forever. Held, she took a life estate, with a remainder to her children, including those subsequently born. *Webb v. Holmes*, 3 B. Monr. 406. Devise to A for his natural life, after his death to all and every issue of his body, share and share alike, as tenants in common, and the heirs of such issue. Held, A took only a life estate. *Greenwood v. Rothwell*, 5 Mann & G. 628.

A devise was made to A "during her natural life, and at her death to her children and their heirs, in fee simple, to be for her and her family's use during her natural life, and her children and their heirs to enjoy it at her death." Held, that the husband of A took no interest by the devise. *Heck v. Clippenger*, 5 Barr, 385.

A testator, in the year 1812, devised his real estate to his illegitimate son, J B, for life, "and from and after the decease of the said J B, for and to the first and every other son of

16. The rule is inapplicable, where the word *heir* is used, and other words of limitation are added to it.

17. Limitation to A for life, remainder to his wife B for life, remainder to the heir male of her body by him begotten, and to the heirs or executors of such heir male. Held, this created a contingent remainder in fee to him who should be the heir male of B at her death.(1)

18. The rule in *Shelley's case* is inapplicable to *marriage articles*; which are regarded as made for the benefit of children, who take as purchasers for a consideration; and are in their nature *executory*, and therefore to be construed liberally, by the intention. They are even more liberally construed than a will.

19. Hence a limitation to the heirs of the body of the husband by the wife is construed as if made to the first and other sons in tail. And it seems, lapse of time will be no bar to a decree in equity for a conveyance conformable to the articles.(2)

20. It is said, that upon the construction of an estate tail in the husband, the consideration of love and affection, which he had to his intended wife and the heirs male of their bodies, would have run thus: that he did, in consideration thereof, settle an estate on himself, which

(1) *Bayley v. Morris*, 4 Ves. 788; (*Waker v. Snowe*, Palm. 359.) | *Wms.* 145; 1 Abr. Eq. 387; *Trevor v. Trevor*, 5 Bro. Parl. 122.

(2) *Fearne*, 123; *Bale v. Coleman*, 1 P.

the said J B, lawfully issuing, according to seniority of age and priority of birth, in tail male; and in default of such issue, to the daughter or daughters of the said J B, to hold to them, if more than one, and their heirs, as tenants in common, and not as joint tenants, and in default of issue of the said J B, to and for my own right heirs forever. Held, J B took an estate for life. *Baker v. Tucker*, 2 Eng. Law and Eq. 1.

A testator directed that the residue of his property should be divided between his brothers and sisters, and the children of a deceased sister, "to them and their children forever." Held, the latter clause gave the children no share in the division; that the children of the deceased sister were not equal participants with the other devisees, but that a class was intended, who took the share of their mother. *Lachland v. Downing*, 11 B. Mon. 32.

A testator made the following devise in 1775: "I give to my brother W's son N, during his natural life, (after the decease of my wife,) and to his eldest male heir, and after his decease, and to said male heirs and assigns forever, all and singular, my homestead, &c." At the time of making the devise, N had no issue; but he afterwards had several children, of whom the third son alone survived him. Held, N took a life estate only, and at his decease, his surviving son took an estate in tail male. *Canedy v. Haskins*, 13 Met. 389.

A testator devised the use and improvement of his real estate to his wife, for her life, and the remainder after her decease to his daughter A, and the children of his daughter B, and the children of his daughter C, to them and their heirs and assigns forever in fee "in manner following, namely: one-third part thereof to my said daughter A; one-third part thereof to the children of my said daughter B, and the survivor or survivors of them; and one-third part thereof to the children and survivor or survivors of them, of my said daughter C." Held, the children of C took vested remainders, as joint tenants, on the death of the testator. *Stinson v. Batterman*, 5 Cush. 153.

A testator devised land to his son, "during his natural life; but if he should marry and have children, then at his death to his children lawfully begotten, and their heirs forever." The son married and had six children lawfully begotten. Held, each of the children took a vested remainder in one-sixth part of the land. *Wight v. Shaw*, 5 Cush. 56.

A will had the following clause: "I lend to my daughter Lucy Camden, my negro woman Sidney and her child Sarah, and a negro boy named John, to her during her natural life, and to her heirs, lawfully begotten on her body. But should my said daughter or her husband, dispose or convey out of the way, conceal or attempt to alienate the negroes aforesaid, I do hereby declare her title to cease, and direct my executors to take them into possession; and in such case, after her decease, they and their increase to be divided among her children, if any living, otherwise to be divided among my children, A, B, C and D, and their heirs." Held, Lucy C. took a life estate, subject to the condition, with remainder in fee to her children living at her death, and the heirs of such as might be dead. *Pryor v. Duncan*, 6 Gratt. 27.

he might give away from his heirs male whenever he thought fit. Upon this principle, the Court of Chancery will decree a conveyance conformable to the intent and purpose of the articles; even where the party has already made one precisely conformable to its language.(1)

21. By articles, in consideration of a proposed marriage between A and B, A covenants to convey to trustees and their heirs, to the use of himself for life without impeachment, &c., remainder to B for life, remainder to the use of the heirs male of his body by B, and the heirs male of such heirs male, remainder to the use of his own right heirs; with a covenant, that unless and until such limitations were well raised, he would stand seized to the same uses. A afterwards levied a fine, and settled the land upon C, his second son. After A's death, D, his oldest son, brings a bill for a conveyance conformable to the articles. Held, the articles were merely executory, notwithstanding the covenant to stand seized, which was but provisional and temporary. Decreed, that a conveyance be made to D, in tail male, remainder to the other sons in tail male.(2)

22. The same construction is given to articles, by which the land is to be settled upon the heirs of the body of the wife.(3)

23. It is said, that the exception to the rule in *Shelley's case*, above stated, takes place only where the limitation is made to the heirs of the body of that parent from whom the estate moves, or to those of both parents; thereby enabling either the father alone during coverture, on the settling parent alone, surviving the other, to bar the issue. But where the limitation, coming from the husband, gives an estate tail to the wife alone, neither parent alone can ever bar the issue—the husband, because he takes no estate tail, and the wife, not during coverture, being then under disability, nor afterwards, by virtue of St. 11 Hen. VII, c. 20. Hence the rule in *Shelley's case* is held applicable to such a case; the law regarding the necessary concurrence of husband and wife in barring the entailment, as a reasonable security for the protection of the issue.(4)

24. It was agreed by marriage articles, to settle lands to the use of the husband for life, remainder to the wife for life, remainder to the heirs of her body by him, remainder to him in fee. Decreed, that the settlement be made to the father for life, remainder to the eldest son in tail.(5)

25. A and B, upon their marriage, agreed to purchase lands, and settle them to the use of A, the husband, for life, remainder to B for life, remainder to the use of the heirs of her body by him, remainder to the heirs of the survivor. The lands having been purchased, A and B join in mortgaging them by a recovery; and the mortgagee brings a bill to foreclose against C, the son of A and B, who claimed to have a settlement made conformable to the articles. Judgment for the plaintiff.(6)

26. By marriage articles, A covenanted to surrender customary lands to the use of himself for life, remainder to B the wife for life, and, after their deaths, to the use of the heirs of her body, if he survived her, and

(1) 1 Abr. Eq. 390; *Streatfield v. Streatfield*, 4 Cruise, 264; *Cusack v. Cusack*, 5 Bro. Parl. 116.

(2) *Trevor v. Trevor*, 1 Abr. Eq. 387; 5 Bro. Parl. 122.

(3) *Jones v. Laughton*, 1 Abr. Eq. 392.

(4) *Fearne*, 131.

(5) *Honor v. Honor*, 1 P. Wms. 123.

(6) *Whately v. Kemp*, 2 Ves. 358; *Green v. Ekins*, 2 Atk. 477.

of his body, if she survived him, remainder to his own heirs. A surrender was afterwards made by A to these uses, and then by A and B to the use of themselves for their joint lives, and the life of the survivor, then of their eldest son for life, then to his first son who should come of age, in fee-simple. Held, by the terms of limitation, the entailment could not be barred but by the joint action of A and B, the survivor having no power over it, and that the articles were well executed by the first surrender.(1)

27. Where, by the same articles, one limitation is made in terms which require a strict settlement in favor of the issue, and another in the language which applies ordinarily to an entailment, the latter will be held to authorize an estate tail in the husband.

28. Agreement by marriage articles, that money should be laid out by trustees in lands, and settled on A the husband, for life, remainder to B the wife for life, remainder to the first and other sons successively in tail male, chargeable with a payment for younger children, remainder to A in fee. By the same articles, C, the father of A, covenanted to settle other lands upon A, and the heirs male of his body, remainder to the heirs of C; and he afterwards made the settlement in these terms. Held, a good execution of C's part of the articles, which was plainly designed for the benefit of A himself, the issue being provided for as purchasers by the other lands.(2)

29. The Court of Chancery construes marriage articles in favor of daughters, as liberally as in favor of sons. Thus, if an agreement is made to settle lands upon the heirs female of the husband after prior limitations to the heirs male, and the only issue is a daughter, who dies after a recovery suffered by the husband, the court will order a conveyance to two grand daughters in tail, as tenants in common, with cross-remainders.(3)

30. An agreement to settle lands on *the issue* of the marriage is construed to embrace females as well as males, so that a settlement will be decreed to the first and every other son, and, for default thereof, to the daughters, &c.; and the reservation to the husband, of a power to appoint *the sort, manner and form* of the provision, will give him a control over the manner only, but not the interest itself.(4)

31. The rule applies in general to a devise as well as a deed, that wherever lands are given to one for life,(a) or for "his natural life," with an immediate remainder to his heirs, or the heirs of his body; such heirs take by limitation, not by purchase, and an estate in fee-simple or fee tail is created, instead of a life estate with a remainder over. It is said, such a limitation is not a direct gift to the issue, it only amounts to an enlargement of the estate in the first devisee, con-

(1) Highway v. Banner, 1 Bro. 584.

(2) Fearne, 135; Chambers v. Chambers, 2 Abr. Eq. 35; Howel v. Howel, 2 Ves. 358.

(3) West v. Errissey, 2 P. Wms. 349; 1

Bro. Parl. Cas. 225. (See Powell v. Price, 2 P. Wms. 536.)

(4) Hart v. Middlehurst, 3 Atk. 371; Dod v. Dod, Amb. 274.

(a) The principle of controlling an express estate for life by the implication arising from subsequent words of entailment in the will, has received the somewhat strained apology, that such construction "does not defeat the estate for life; for without fine or recovery, which is not to be presumed, an estate tail is only an estate for life." Per Ld. Ch. J. Wilmot, Dodson v. Grew, Wilm. 278.

verting a life estate into a fee-simple or fee tail, and rendering it thereby transmissible to his issue.(1)

32. The same construction is adopted, though there are other provisions in the will besides the express limitation for life, showing an intent to give a life estate only.(2)

33. Thus, a devise to trustees, directing that they allow A to take the profits for life, and afterwards stand seized to the use of the heirs of his body, and authorizing A and the trustees to make a jointure to his wife, gives A an estate tail.(3)

34. So a power of leasing, given to the devisee for life, does not prevent his taking an estate tail, because such power is more beneficial than that which belongs to a tenant in tail.(4)

35. So where lands were devised to A for life, without impeachment of waste, remainder to trustees and their heirs for the life of A, to support contingent remainders, remainder to the heirs of the body of A; held by Lord King, in reversal of Sir J. Jekyll's decision, that A took an estate tail.(5)

36. *A fortiori*, the interposition of an estate to trustees, to preserve contingent remainders, will not reduce the interest of a devisee to an estate for life, where the devise is made to him, and the heirs of his body.(6)

37. The rule above stated is equally applicable, where the remainder is limited by the word *heir* instead of *heirs*.

38. Devise to A for life, remainder to the next heir male; in default of such heir, remainder over. A takes an estate tail.(7.)

39. Devise to A, the testator's youngest son, forever; and, after his death, to the heir male of his body forever. In default of such heir male, to B, his eldest son, forever. A takes an estate tail.(8)

39 a. Devise: "I give and bequeath to my grandson D, my dwelling-house wherein I now live, he to take possession of the same at the age of twenty-one years; to hold the same to him during his life, and at and upon his decease, I give the same dwelling-house to the eldest male heir of his body lawfully begotten, and upon the decease of such male heir, to the male heir of said deceased and his heirs forever. And in case my said grandson shall not leave any male heirs, I then give said house to his next eldest brother during his life, and upon his decease to his eldest male heir, lawfully begotten, and to his heirs forever." Held, D. took an estate tail.(9)

40. Words of limitation, added to the word *heir*, may require a different construction; (*infra*, s. 47,) but a limitation to the next heir male, creates an estate tail.(10)

41. So the word *first*, prefixed to *heir male*, shall be understood first in order of succession from time to time, and an estate tail shall pass.

42. Devise to A, the first son of the testator, for life, remainder to the heirs male of his body, remainder to B, a second son, for life, and

(1) Legate v. Sewell, 1 P. Wms. 87; Hawley v. Northampton, 8 Mass 3; Rundale v. Beley, Cart. 170; 6 Cruise, 240; James, &c. Dall. 49; Sayer v. Masterman, Amb. 344.

(2) Carr v. Porter, 1 McCord's Cha. 81.

(3) Broughton v. Langley, 2 Ld. Ray, 873.

(4) Bale v. Coleman, 1 P. Wms. 142.

(5) Papillon v. Voice, 2 P. Wms. 471.

(6) Sayer v. Masterman, Amb. 344.

(7) Burley's case, 1 Vent. 230.

(8) Wilkins v. Whiting, 1 Rolle's Abr. 836; Bulsr. 219; Richards v. Bergavenny, 2 Vern. 324.

(9) Malcolm v. Malcolm, 3 Cush. 472.

(10) Miller v. Seagrave, 6 Cruise, 245.

after his death to *the first heir male* of his body. B takes an estate tail, this construction being favored by the prior devise.(1)

43. The same rule applies, although additional words of limitation are annexed to the words *heirs* or *heirs of the body*.

44. Devise to A for life, and after his death, devise of the same land to the heirs males of his body, and *his* heirs forever; but if *A should die without such heir male*, devise over. Held, the words *his* and *if he died*, &c., being of doubtful import, could not control the prior limitation to *heirs male*, and make it *descriptio personæ*; and that A took an estate tail.(2)

45. Devise to A for the term of his natural life, and after his death, to the heirs males of his body, and the heirs male of the body of every such heir male, severally and successively, as they should be in priority of birth; and for want of such issue to B, &c. Held, by three judges, and Lord Cowper in Chancery, against one judge, that A took an estate tail.(3)

46. Devise to A during her natural life. Then to the heirs of the body of A, and to his or her heirs forever, after A's decease. For want of such heirs of the body of A, then, after A's decease, to the testator's own next heirs, and their heirs forever. Held, A took an estate tail, with a remainder to the right heirs of the testator.(4)

47. In some special cases, however, the effect of the word *heirs* may be controlled by following words of limitation.(5)

48. In general, the rule in *Shelley's case* is applicable to trusts in Chancery, as well as legal estates in a court of law. This is the case, where by the will the trusts are fully limited and declared. It may be otherwise where the limitations are imperfect, and something is left to be done by the trustees in the first place, and consequently secondarily by the Court of Chancery.(6)(a)

49. A testator devised to four persons and their heirs, for payment of debts, and afterwards to the use of them and their heirs. Afterwards, by a codicil, he ordered that after payment of debts, A, one of the devisees, should have his share to himself for life, with a power to lease, remainder to the heirs male of his body, &c. Held, by Lord Harcourt, reversing the decision of Lord Cowper, that a will, being voluntary, was not like marriage articles, under which they issue claim as purchasers, and whose object would be defeated by a power in the husband to alienate, but the intent of the testator must be presumed to conform to the rules of law, according to which, in this case, an estate tail was clearly created; and that the debts being paid, the case was as if there had been no trust. Decreed, that A's share be conveyed to him and the heirs male of his body, &c.(7)

50. A contrary doctrine seems to have been afterwards laid down by Lord Hardwicke.

(1) *Dubber v. Trollope*, Amb. 453.

(2) *Goodright v. Pullyn*, 2 Ld. Ray, 1437; 2 Str. 729.

(3) *Legate v. Sewell*, 1 P. Wms. 87.

(4) *Morris v. Ward*, 8 T. R. 518.

(5) 6 Cruise, 247.

(6) *Austen v. Taylor*, Amb. 376; *Wright v. Pearson*, Amb. 358; *Fearne*, 187. See *Clagett v. Worthington*, 3 Gill, 83.

(7) *Bale v. Colman*, 1 P. Wms. 142.

(a) In case of executory trusts, "heirs of the body," though preceded by a life estate to the *cestui*, are construed as words of *purchase*, not of limitation. *Tallman v. Wood*, 26 Wend. 1; *Berry v. Williamson*, 11 B. Mon. 245; *Porter v. Doby*, 2 Rich. Equ. 49.

51. Devise to trustees in fee, in trust to pay debts, by the rents and profits, sale or mortgage; then to the trustees for a long term, upon certain trusts; then to the trustees in fee, in trust, as to one moiety, to the use of A for his natural life, without impeachment of waste; afterwards to the trustees in fee for the life of A, to preserve contingent remainders, but to permit A to receive the rents and profits during his natural life; after his death, to the use and behoof of the heirs of the body of A; and, for want of such issue, to B in the same manner. Held, by Lord Hardwicke, in regard to the estate of B, that a conveyance, if prayed for, would have been decreed first to trustees to preserve, &c., then to the *first and other sons* of B; that there were no contingent remainders to be preserved, unless the limitation to B's heirs made one; and that B therefore took a life estate.(1)

52. But in a subsequent case Lord Hardwicke remarked, that *Bagshaw v. Spencer* was decided upon the ground, that the intent there appeared to contradict and overrule the legal construction; and that unless such intent was shown either expressly or by necessary implication, equity would adopt the rules of law. Lord Keeper Henley also placed this decision upon the ground of a special intention, shown by the circumstances of a trust and the peculiar limitations of the will.(2)

53. Devise to A, in trust to pay the rents to B for her life, and after her death to pay the same to C for life, and afterwards to pay the same to the heirs of his body. Held, by Lord Hardwicke, that a conveyance in tail should be decreed to C.(3)

54. Devise to trustees in fee, in trust to raise money for grandchildren of the testator, subject thereto to the use of A and assigns for life, remainder to trustees to preserve, &c., remainder to the use of the heirs male of A begotten, *and their heirs*. If A should die, leaving no issue male living, then the land to be charged with sums of money. *For default of such issue male of A*, devise to the grandchildren, or such as should be living at the failure of such issue, their heirs and assigns. Provided, that if A did not comply with certain conditions, the estate, so limited to him for life, to cease as if he were dead; and the estate so limited to him for life, and his issue male, to go to such of his grandchildren as should be living, and their heirs. Held, according to the manifest intent, the heirs male of A could not take as purchasers, because they would then take a fee-simple, which would avoid the subsequent limitations; that the words *for default of such issue male* could not apply to the issue male of the children of A, thereby giving A a life estate, his children an estate tail, and the remainder to the grandchildren; but that the words *and their heirs* must be rejected as surplusage, making A to be tenant in tail.(4)

55. Devise to trustees in fee, in trust for A for life, remainder to trustees to preserve, &c., remainder to the heirs of the body of A, remainder to the heirs of the testator. The will proceeded to bequeath the personal estate to trustees, to be laid out in lands, which should be subject to the limitations and trusts already mentioned. Upon a bill to have it thus laid out, held, that in this case the trusts were all declared by the will, and the trustees had nothing to do, but buy the

(1) *Bagshaw v. Spencer*, 1 Col. Jurid. 378.

(2) *Garth v. Baldwin*, 2 Ves. 646; *Wright v. Pearson*, Amb. 358.

(3) *Garth v. Baldwin*, 2 Ves. 646.

(4) *Wright v. Pearson*, Amb. 358; *Fearae*, 187.

land; that there was no necessity for their making a conveyance; and that equity could not interfere to vary the legal construction, by which A took an estate tail.(1)

56. The rule in *Shelley's case* applies to a devise for years as well as for life, unless the will discovers an intention that the heir should take as purchaser. Thus, if a term be devised to one for life, remainder to the heirs of his body, A takes an estate tail.(2)(a)

57. The rule does not apply, where the words *children, sons, &c.*, are used instead of *heirs*. Thus, a devise to A for life, remainder to his sons or children, &c., gives A a life estate.(3)

58. Devise to the testator's son A for life, and, after his death, to his male children, successively, one after another, as they were in priority of age, and to their heirs; and in default of such male children, then to A's female children and their heirs, and if A died without issue, then to the testator's grandson in fee. Held, A took neither an immediate estate tail by the limitation to his children, nor an estate tail in remainder by implication, under the clause "if A died without issue," &c.(4)

59. Devise to A for life, and that then the premises shall descend and come to his male children, if he have any, for life, and to the male children descending from them. A takes a life estate.(5)

60. Devise to A, the son of the testator, for life, and after his death to all and every his children equally, and their heirs; and if A died without issue, then to the testator's daughters. A takes a life estate.(6)

61. Devise, to the testator's wife, of the use, &c., of one-third of the estate for her life, at her death to his children, their heirs, &c. The children take a vested remainder in fee.(7)

62. It has been seen, that the rule in question is sometimes held applicable, though other words are added to the word *heirs*, which modify its signification. It is said, there is an old opinion of Lord Holt's, to the effect, that the words *heirs of the body* are so positive to give an estate tail to the first taker, that they cannot be got rid of by subsequent words. But Lord Kenyon remarked, that this was certainly too *strait-laced* a construction. And the principle seems to be now well settled, that where there are other words showing that by *heirs* was meant *descriptio personæ*, the first devisee takes only a life estate, with a remainder to his heirs. The distinction is said to be this. Where the superadded words limit an estate to the heirs, of a different nature from that which the ancestor would take, if the word *heirs* was construed as a word of limitation; the heirs take as purchasers. Thus, a limitation to the use of A for life, and after his death to the use of his heirs, *and the heirs female of their bodies*, gives A a life estate, and his heirs, *as purchasers, an estate tail female*; for if the heirs of A took by descent, then A would have the fee-simple, and the last clause of the devise would be

(1) *Austen v. Taylor*, Amb. 376.

(2) *Dod v. Dickinson*, 8 Vin. Abr. 451, pl. 25; *Horne v. Lyeth*, 4 Har. & J. 431.

(3) 6 Cruise, 253; *King v. Melling*, 1 Vent. 231.

(4) *Ginger v. White*, Willes, 348.

(5) *Goodtitle v. Woodhull*, Willes, 592.

(6) *Goodright v. Dunham*, Doug. 264.

(7) *Nash v. Butler*, 16 Pick. 491.

(a) See *Adams v. Cruft*, 14 Pick. 16. In South Carolina, the rule was held applicable to a devise of negroes; and the limitation of an estate tail being too remote for personal property, the devisee for life took an absolute title. *Dott v. Cunningham*, 1 Bay, 453.

defeated, nor would there be any possible mode of giving it effect. But, on the other hand, where the superadded words do not oppose or contradict those preceding, but in their general sense include them; the heirs will take by descent. As where the first words describe heirs special, and the following words extend to such heirs; in which case it may be supposed that the latter were used in the same qualified sense as the former. It has already been seen, that where the first words give an estate tail general, which the succeeding words serve to limit, the latter words are not to be attended to, and the rule in *Shelley's case* applies.(1)

63. Devise to trustees, in trust for A and her assigns, for life, without impeachment of waste, remainder to the trustees to preserve, &c.; and from and after her death, in trust for her heirs male, severally, successively, and in remainder, one after another, as they and any of them should be in seniority of age, &c., the elder of *such sons*, and the heirs of his body, &c., being always preferred, and to take before the younger and the heirs male of his and their body and bodies; and in default of such issue, for all and every the daughter and daughters of A, as tenants in common, &c., and the several and respective heirs of their bodies; in default of such issue, remainder over. Held, the will showed a clear intention to give A only a life-estate; that the limitations following the devise to A were wholly needless, if A took an estate tail; that the words *heirs male* of the body of A were descriptive of the persons afterwards called *such sons*, and the construction was to be the same, as if it had been said, "meaning by heirs, &c., the eldest and other sons of A;" and this construction was confirmed by the subsequent provision for the daughters. That although, upon this construction, if A's eldest son had died before the testator, leaving a son, this son could not take, but the devise must lapse; such possible inconvenience could not control the will and enlarge A's estate; and that A took a life estate.(2)

64. But in another case, very similar to the last one, a different doctrine seems to have been held.

65. Devise to trustees and their heirs, in trust for the testator's first son for life, and to preserve, &c. After his death, to the several heirs male of such son lawfully issuing, the elder of such sons and the heirs male of his body, taking before the younger and his heirs male. For want of such issue, in trust for his second, &c., and all and every other son and sons, for their respective lives, with remainders as before; and for want of such issue, for his first daughter, and every other his daughter and daughters for their several lives, and upon trust to preserve, &c.; and from and after their several deaths, in trust for the several heirs male of their bodies, giving the same preference to the elder as above mentioned; with a power to the parties holding the land to settle jointures. Held, a son of the testator took an estate tail; a contrary intention not sufficiently appearing.(3)

66. In some cases, where the word *heir* is used, with superadded words of limitation, it is construed a term of purchase, and the first devisee takes only a life estate.

67. Devise to A for life, afterwards to his next heir male, and the

(1) *Fearne*, 286; 1 Rep. 95 b; *Lyles v. Digge*, 6 Har. & J. 364.

(2) *Goodtitle v. Herring*, 1 E. 264.

(3) *Poole v. Poole*, 3 Bos. & P. 620.

heirs male of the body of such next heir male. A takes a life estate.⁽¹⁾

68. The same construction is given, where the heir of the devisee for life is to have only a life estate. And though there is a subsequent limitation over "for want of *such heir male*," this shall be held to mean not heirs male generally, but the heir previously mentioned, who was to take for life.⁽²⁾

69. Devise to A, "to be hers during her natural life, and then to her only heir during its life." A takes a life estate, with a contingent remainder to the person who shall be her heir at her death.⁽³⁾

70. In a will, the word *issue* is a word of purchase or of limitation according to the intention; while in a deed it is always a word of purchase.^(a) The intention of the testator in using this expression, is often inferred from very slight circumstances peculiar to each case; and hence the decisions upon the subject seem not easily reconcilable.⁽⁴⁾

71. Devise to A for life, and, if he should have any issue male, to such issue and his heirs forever. For want of issue male, devise over. A takes a life estate, and his issue as purchasers in fee.⁽⁵⁾

72. But it has been held in New York, that a devise to A for life, on her death to her lawful issue and their heirs forever, equally to be divided, gives an estate tail by the English law, and, in New York, a fee-simple.⁽⁶⁾

73. Devise to A for life, remainder to his *lawful* issue. A takes an estate tail.⁽⁷⁾

74. Devise of the residue, &c., to be divided between A and B, and delivered to them at the age of twenty-one years; but "should they die, leaving no lawful issue," devise of all my *estate* to C. B takes the fee, and his issue can claim only by descent, not by purchase.

75. Even where the limitation is made to the heirs of the body of the issue of tenant for life, in such a way, that giving the first taker an estate tail would pass the land in the same line of descent as giving him a life estate; the issue have been held to take by purchase.

76. Devise to A for life *only*,^(b) without impeachment of waste, then to the issue male of his body, if any, remainder to the heirs male of the body of that issue. A takes a life estate, with remainder to the issue in tail.⁽⁸⁾

77. Where the general intent so requires, the word *issue* will give the first devisee an estate tail, though followed by other words of limitation.

78. Devise to A, for his natural life, and from and immediately after

(1) Archer's case, 1 Rep. 66 b; (3 B. & P. 625; Dubber v. Trollope, Amb. 459.)

(2) White v. Collins, Com. R. 289.

(3) Bennett v. Morris, 5 Rawle, 9.

(4) 4 T. R. 294; 1 Vent. 225; Papillon v. Voice, 2 P. Wms. 472; Carr v. Porter, 1 McCord's Cha. 81; Horne v. Lyeth, 4 Har. & J. 431; (3 J. J. Mar. 238.)

(5) Luddington v. Kime, 1 Ld. Raym. 203; Doe v. Collins, 4 T. R. 294; (Findlay v. Riddle, 3 Binn. 139.)

(6) Kingsland v. Rapelye, 4 Kent, 231.

(7) James's Claim, 1 Dall. 47.

(8) Carr v. Porter, 1 McCord's Cha. 81.

(9) Backhouse v. Wells, 10 Mod. 181.

(a) Ld. Ch. J. Wilmot remarked, that the word *issue* is used in the statute *de donis* without an idea of purchase annexed to it. Dodson v. Grew, Wilm. 277, 2 Wils. 322. In New Hampshire, the word *issue* is defined to mean all lawful lineal descendants. Rev. St. 45.

(b) The case is said to have turned upon the use of this word. 4 T. R. 296, n.

the termination of that estate, to the issue male of his body, and to *his and their heirs*, share and share alike, if more than one; and, *for want of such issue*, to B in fee. Provided, that if A *should alienate*, he should pay a certain sum to the party next entitled. Held, if the issue of A took by purchase, they would be tenants in common; that if all but one died before A, he would take the whole; that the words *for want of such issue*, meant *for default of such issue*, and supposed the inheritance vested in A, but liable to be defeated by his death without issue, and could not be confined to issue living at A's death; that the clause restraining alienation by A implied that he was to have the inheritance; that the added words of limitation "his and their heirs" should be rejected to effect the intention; and that A took an estate tail.(1)

79. Devise to A, a nephew of the testator, for his natural life, and, from his death, to the use of his issue male, and the heirs male of the body of such issue; and *for want of such issue male*, to B, another nephew, in fee-simple. Held: 1. The will intended a successive inheritance to all the issue male of A, *ad infinitum*, since B was to take only upon the failure of such issue. That the word *issue*, unqualified, was *plural*, and embraced all; and the word *body*, though singular, was not meant to point out one individual, viz., the first issue, and exclude the rest, but to limit the devise to one at a time in a course of succession, and exclude the issue from taking all together, as they might have done if the word *bodies* were used; that if the issue took by purchase, they would be joint tenants for life and tenants in common of the inheritance, and the surviving son of A would take the whole for life, the other sons being dead, and, upon his death, the estate must break into ten parts, with no cross-remainders, and upon failure of the issue of one son, that part would go to B, thus contradicting the evident intention for B to have nothing, while there remained any issue of A. 2. That the intention of the testator could not be affected by giving A a life estate, unless the word *issue* was construed to mean the first and other sons of A in succession. This construction might be given, if the will had expressly so ordered, but not otherwise, without doing violence to the meaning of language. *Issue* has an established *collective* sense, and though, after an estate tail is created, it passes successively to the first and other sons; yet this is *the operation of law*, and not the effect of the words in the will. Whereas, to construe the word as a limitation would effect the same object, without distorting the language. Moreover, the former construction would vest the remainder in each son of A when born, and he might by fine bar all his issue. That, although, supposing the first son of A to take by purchase, the others might take by limitation, upon the principle that where an estate once vests in *an heir of the body* of one as purchaser, it is *quasi* an estate tail from the ancestor, and passes to *his* descendants, as well as those of the purchaser; yet the intention might still in this case be defeated. If B, a second son of A, died, leaving daughters, in the life of A, and A left other sons; then, upon this construction, the daughters would take nothing, because B was never complete heir to A; while, by *limitation*, such daughters would take, as representing B, in regular succession. 3. That the intention in favor of all the issue of A ought to

(1) *King v. Burchall*, 4 T. R. 296, n.; (1 Eden, 424.)

prevail over the express limitation to him for life; and although the issue and remainder-men were thus put in his power, it was not to be presumed he would exercise it, and that, if A took only a life estate, this would create contingent remainders which he might defeat; so that the chance of the issue was better in the former case than in the latter. Held, A took an estate tail.(1)

80. Devise to A for life, and if he die leaving lawful issue, remainder to his heirs as tenants in common, and their respective heirs and assigns. A takes a life estate.(2)

81. It has been stated that the rule in *Shelley's case* is in general applicable to trusts, as well as legal estates; that in this, as in many other respects, *equity follows the law*. It was also intimated, and now remains to be more distinctly stated, as a qualification of the general principle; that where a trust is *executory*,(a) or where, for the completion and fulfilment thereof, the action of the trustees and the interposition of Chancery are requisite, the court will, to effect the intention of the parties, construe the word *heirs* or *issue* as a word of purchase, and decree a conveyance and limitation accordingly. The court take much greater liberties in the construction of executory than of executed trusts.(3) And a devise, in this respect, is construed like marriage articles. It will be seen, that where the Court of Chancery directs a limitation not creating an estate tail, it at the same time inserts other limitations, not provided for by the parties, but rendered desirable by the creation of a life estate with contingent remainders; as, for instance, an intervening estate to trustees to preserve, &c.

82. This construction has been adopted, even where *entailment* was expressly mentioned in the will.

83. Devise to trustees and their heirs, for payment of debts, &c., and afterwards to settle the remainder and what was left unsold, a moiety to A and the heirs of his body by a second wife, and in default of such issue, to B and the heirs of his body—the other moiety to B and the heirs of his body; remainders over: taking special care in such settlement that A and B should have no power to *dock the entails*, during their lives. Held, A and B were entitled to have the land conveyed to them only for life, without impeachment, &c.; because, if conveyed in tail, they could not be prevented from barring their children.(4)

84. Devise of a sum of money to trustees, to be laid out in lands, which were to be settled as follows: to A for life without impeachment, &c., and with power for a jointure; then to trustees to preserve, &c., remainder to the heirs of the body of A, remainder over. Held, the court had power over the money to be thus laid out, and that the lands should be limited to A for life, remainder to trustees, remainder to *his first and every other son* in tail male, remainder over.(5)

85. Devise of money and stock, the latter to be sold, and the money laid out in purchasing lands, which were to be conveyed to A for life, after his death to his issue, and for want of such issue to B. On a bill by A for a conveyance, decreed, that it be made to A for life, remain-

(1) *Roe v. Grew*, Wilm. 272; 2 Wils. 322. | and *v. Earl, &c.*, 2 Vern. 526.

(2) *Finlay v. Riddle*, 3 Binn. 139.

(4) *Leonard v. Earl, &c.*, 2 Vern. 526.

(3) *Roberts v. Dixwell*, 1 Atk. 607; *Leon-*

(5) *Papillon v. Voice*, 2 P. Wms. 471.

(a) As to the distinction between executory and executed trusts, see p. 301.

der to trustees to preserve, &c., remainder to his first and other sons in tail general, remainder to his daughters in tail as tenants in common, with cross-remainders, remainder in fee to B.(1)

86. Devise to trustees, in trust to convey to the use of A for life, without impeachment, &c., remainder to her husband B for life, remainder to her issue, remainders over. Decreed, that a settlement be made to A for life, remainder to B for life, remainder to trustees to preserve, &c., remainder to her first and other sons in tail.(2)

87. Devise of personal estate to trustees, to be laid out in land, which was to be settled and assured *as counsel should advise*, upon said trustees, in trust for A and the heirs male of his body, to take in succession and priority of birth; in default of such issue, then in trust for B in the same manner. The net proceeds of the property, before the purchase, to be paid to A and B respectively, and their respective sons and issue male, who should be respectively entitled to the rents of the lands when purchased. Held, the clause, requiring advice of counsel, showed an intent that there should be a strict settlement, no such aid being needed for an estate tail; and that the word *sons* in the subsequent clause, confirmed this construction. Decreed, that the land be settled on A for life, remainder to his first and other sons in tail male.(3)

88. Where the devise gives only a trust or equitable estate to the first taker, and a legal interest to his heirs; he takes only a life estate.(4) (See *supra*, sec. 14.)

89. Devise to trustees, to pay debts, &c., and the residue into the hands of A, a married woman, for her life; then to stand seized to the use of her heirs, severally and successively, as they should be in priority of birth, &c., and to the heirs of their respective bodies in tail general. The devise to A being of a trust, and that to her heirs of an executed use, A takes only a life estate.(5)

90. It remains to give an account of the most important and interesting decision, in which the rule in *Shelley's case* was ever brought into question. This case derives peculiar interest and value, not only from the elaborate discussion to which it led in regard to the true construction and application of the rule in question, and the general rules for construing devises; but also from the circumstance, that some of the ablest of English judges disagreed in opinion, and that the solitary judgment of Judge Yates, in the Court of King's Bench, was afterwards almost unanimously sustained, and the judgment below reversed, in the Exchequer Chamber.

91. Devise substantially as follows: should my wife hereafter be *enceinte* with child, if it be a female, I bequeath to her £2,000, to be paid when she comes of age, or is married; in addition thereto, she to be educated and supported till the portion is payable. If a male child, I give and bequeath my estate, both real and personal, equally to be divided between said infant and my son A, when said infant shall reach the age of twenty-one. It is my intent, that none of my children

(1) *Ashton v. Ashton*, 1 Coll. Jurid. 402.

(2) *Glenorchy v. Bosville*, For. 3; 1 Coll. Jurid. 405; (*Meure v. Meure*, 2 Atk. 265;) *Roberts v. Dixwell*, 1 Atk. 507.

(3) *White v. Carter*, Amb. 670.

(4) *Silvester v. Wilson*, 2 T. R. 444.

(5) *Say v. Jones*, 3 Bro. Parl. 113, 8 Vin. 262; *Shapland v. Smith*, 1 Bro. 75; *Roy v. Garnett*, 2 Wash. 9.

shall sell and dispose of my estate for longer term than his life; and to that intent, I give, &c. all the rest, &c., of my estate to A and the said infant, for their natural lives, remainder to B and his heirs, for the lives of A and said infant; remainder to the heirs of the bodies of A and the said infant, &c.; remainder to my daughters for their lives, equally to be divided; remainder to B and his heirs for the lives of my daughters; remainder to the heirs of the bodies of my daughters, equally to be divided. The testator died, having survived B, and leaving A, his only son and heir, and three daughters. The wife of the testator was not *enceinte* at his death. The question was, whether A took an estate for life, or in tail. Willes, J., was of opinion that he was but tenant for life; upon the grounds of an intention to that effect, appearing both from the introductory clause of the will, from the appointment of a trustee to preserve, &c., and otherwise; and that the rule in *Shelley's case* was pronounced upon a deed, *and in argument*, and being founded on obsolete feudal reasons, must not be extended an inch beyond its literal application. Aston, J., was of the same opinion; upon the grounds that the rule was feudal, and to be construed strictly, and not an invariable one; that as the word *heirs* was a term of art, and not indispensable in a devise to create an inheritance, so, also, when used, its common import might be controlled by the intent; that there was no distinction in this respect between trusts and legal estates; that a court of equity, as well as a court of law, would construe a devise to make an estate tail, *in the absence of an intention to the contrary*; and that the clause prohibiting the first devisees from alienation, being used at the beginning of the will, must be construed not as a *restraint* upon a tenant in tail, but as *explanatory* of an intent to give an estate for life. Lord Mansfield concurred. He remarked, that the legal intention, when clearly explained, must control the legal sense of a term of art, unwarily used by the testator; that the rule in *Shelley's case* was not a general proposition subject to no control, but was to be governed by the intention, if such intention were lawful, if not, the legal import of the words must govern; that the testator evidently had a strict settlement in his eye, and the heirs of A's body were to take as purchasers successively; that there was no sound distinction between the devise of a legal estate and a trust, and between a trust executed and executory; that all trusts were executory, and in every shape that a will appeared, the intention must govern. He agreed, that as there was a devise to A for life, and, in the same will, a devise to the heirs of his body, the case was within the letter of *Shelley's case*, "and he did not doubt but there were and always had been lawyers of a different bent of genius, and different course of education, who had chosen to adhere to the strict letter of the law; and they would say that *Shelley's case* was uncontrovertible authority, and they would make a difference between trusts and legal estates, to the harassing of a suitor." (a) Yates, J., dissented. He remarked, that although in a will free scope must be given to the intention, as appearing from the whole scheme and design of the instrument; yet it must be clear and consistent with

(a) This last remark was aimed at Judge Yates, who dissented from the other judges, and who, in consequence of the sarcasm, resigned his seat upon the bench.

every rule of law ;(a) if not thus consistent, even in cases of trust, there were many instances where the intention had been disregarded, and in such case, it was better to adhere to the law and let a thousand wills be overthrown ; that the principle of giving effect to the intention, in whatever words expressed, was applicable only to executory trusts, but in this case no future conveyance was to be made, but everything was fixed by the will itself ; that to require the intention to be consistent with the rules of law, was as necessary to the safety and certainty of property, as to prohibit a testator from doing what was illegal ; that the favor shown to a will was this—to supply barbarous words, and, if the devises were imperfect, allow a necessary implication, but if the limitations were perfect, no assistance was needed, and the words must have their legal effect ; that technical expressions were the measures of property in legal devises, and the determinate meaning affixed to them by the law must never be perverted by the judges ; that the rule in *Shelley's case* was a rule of construction of wills as well as deeds, well established, and unalterable but by Parliament, and in itself reasonable and just, though the original reason of it had ceased ; that the rule did not speak the word *heirs* abstractedly, or insinuate that there was any magic in this word ; it only speaks of the two limitations, to one for life, to his heirs the inheritance ; the freehold was merged in the inheritance, and the ancestor took the whole estate ; that the question was not what estate the ancestor took, but what estate the heirs took ; and they could not take as purchasers, unless particularly designed ; that although the testator intended A should have a life estate, he also intended that the heirs of his body should all succeed, which they could not do unless he was tenant in tail ; and that the restriction upon A's power to convey was repugnant to the estate tail devised to him, and therefore void.(1)

92. The Court of King's Bench, therefore, decided that A took a life estate. A writ of error was brought upon this judgment in the Exchequer Chamber, and it was reversed by the opinion of seven judges against one. Hence, it appears, that eight judges held that A took an estate tail, and four that he took an estate for life.

93. Upon the hearing in the Exchequer Chamber, Sir Wm. Blackstone was one of the judges in favor of reversing the judgment below ; and his argument, published from his own manuscript by Mr. Hargrave, presents perhaps the most luminous view of the rule in *Shelley's case*, its nature, applications and modifications, to be found in the books. The following is a concise abstract of it.(2)

94. Some rules of law are essential, permanent and substantial, and to be regarded as indelible landmarks of property. These are beyond the control of any intention on the part of a testator. Such is the rule, that the owner of the inheritance has power to alienate. There are other rules, of a more arbitrary, technical and artificial kind, founded on no great principle of legislation or national policy. These

(1) *Perrin v. Blake*, 1 Col. Jurid. 283. | (2) 1 Harg. Tra. 487.

(a) Thus, where one devised an estate to his children and the heirs of their bodies respectively forever, and none other ; held, the last words were void, as creating a perpetuity, and the children took an estate tail, though the testator wrongly supposed it would be inalienable. *Adams v. Cruik*, 14 Pick. 23-4.

are rules of interpretation and evidence; by which the law attaches a certain meaning to particular expressions, and supposes that a party who uses them intends to convey such meaning. Such are the rules by which certain words create respectively estates in fee, in tail, and for life.

Another class of rules, are in themselves mere maxims of positive law, but deduced by legal reasoning from some great fundamental principles; and of this kind is the rule in *Shelley's case*. Such being the nature of the rule, it is flexible, subject to exceptions, and liable to be controlled by the intention of a testator. But this intention must be consistent with the great and immediate principles of legal policy, and also so plainly expressed, or to be collected from the will by such cogent and demonstrative arguments, as to admit of no reasonable doubt. In the present case, there is no doubt the testator intended to give a life estate to A; nor can there be a doubt of such intention in any case where a life estate is expressly devised.^(a) But the question is, what estate he meant to give to the heirs of A, and in what way? If he had no intention upon this point, the general rule of law must prevail, and they must take by descent. They cannot take as purchasers, unless it is affirmatively shown that he so intended. And this must appear from one of four circumstances: 1. Where the ancestor takes no estate, or an interest less than freehold. 2. Where no estate of inheritance is given to the heir. 3. Where explanatory words are added to the term *heirs*, indicating a consciousness of having used it improperly, and a desire to qualify its meaning. 4. Where other limitations of inheritance are added to this word, with the purpose of constituting a new root of descent, independent of the first devisee. The two circumstances in this case, favoring the construction of a life estate, are these. 1. The interposition of an estate to trustees. But it does not appear that they were trustees to preserve, &c., and, even if they were, according to previous cases, it would make no difference. 2. The restriction upon A's power of disposition. But this is not to control the limitation of an estate to which it is repugnant, but merely indicates a mistaken opinion on the part of the testator, that under the circumstances A had no power to convey the estate, and an intention to affirm this legal construction. But the restriction does not indicate any intention, that, in order to effect his object, the heirs should take by purchase.^(b)

95. The rule in *Shelley's case* is undoubtedly in force in this country, as a settled principle of the English law; except where it has been changed by express statutes.^(c) In Connecticut, Michigan, New York,

(a) "That the testator intended to devise a life estate to J, could not be made more manifest than from the will itself, if confirmed by one from the dead, even if that were the testator himself." But a subsequent intention to provide for all J's male issue was held to be the more important intent, and therefore controlled the construction of the will. *Roy v. Garnett*, 2 Wash. 31.

(b) See further, as to *Shelley's case*, 6 Cruise, 283; *Fearne*, 192-6; *Hickman v. Quinn*, 6 Yerg. 96; *Polk v. Paris*, 9 Yerg. 209; *Payne v. Sale*, 3 Bat. 455; *Swain v. Roscoe*, 3 Ired 200; *McFeely v. Moore*, 5 Ham. 465; *Schoonmaker v. Sheely*, 3 Edw. 1.

(c) In England, it has been recently abrogated by act of Parliament. St. 3 & 4 Wm. IV, provides, that a devise to the heir shall pass the estate to him as devisee, not by descent; and that a limitation by deed to the grantor or his heirs shall create a new estate by purchase; and where one takes by purchase or will, under a limitation to the heirs or heirs of the body of the ancestor, the descent is to be traced, as if such ancestor had been the purchaser. 4 Kent, 228, n.

and Ohio, and probably other States, the rule is abolished by statute. In New Jersey it is provided, that where there is a devise to one for life, remainder to his heirs, issue, or the heirs of his body, the life estate is good, but, after his death, the estate passes to his children or heirs. (a) In Maine and Missouri, a devise, and in Maine a deed, to one for life, then to his children or heirs or right heirs in fee, passes a life estate to the former, and a remainder in fee to the latter. In Rhode Island, the same construction is given to a devise for life, remainder to the children or issue in fee-simple. In New Hampshire, an express particular estate created by devise, is not enlarged by a subsequent devise to heirs or issue. In Massachusetts, a conveyance or devise to one for life, and after his death to his heirs in fee, or by words to that effect, gives him a life estate, and a remainder in fee to his heirs. (1)(b)

(1) Bishop v. Selleck, 1 Day, 299; M'Gram v. Davenport, 6 Por. 319; Brant v. Gelston, 2 John. Cas. 384; Kingsland v. Rapelye, 4 Kent, 231; 5 Conn. 100; 1 Smith, 152; R. I. L. 216; Mass. Rev. St. 405; 1 N. Y. Rev. St. 725; Conn. St. 348; 1 N. J. L. 774; Misso. St. 620; Swan, 999; Mich. Rev. St. 253; N. H. Rev. St. 311; Me. Rev. St. 372. See Sheely v. Schoonmaker, 3 Denio, 485; Dunn v. Davis, 12 Ala. 135.

(a) The rule in Shelley's case is abolished as to devises. Den v. Demarest, 1 N. J. 525. See Demarest v. Haffer, 2 Ib. 599.

(b) Devise of the improvement of a farm, with a personal charge upon the devisee, and at her death, to be equally divided among all her legal heirs. The devisee takes only a life estate, and her children, living at the testator's death, a remainder in fee. Bowers v. Porter, 4 Pick 198.

The statute seems not to apply, where a life estate can arise, if at all, only by implication. Adams v. Cruft, 14 Pick. 25. (See Rogers v. Rogers, 3 Wend. 503.)

Devise to the testator's son, of the rent or improvement of certain real estate, the devisee "to receive the rent annually or quarterly, (if the same should be leased or let,) during his natural life, and the premises to descend to his heirs." By a codicil, the testator repealed and revoked that part of his will wherein any part of his estate, real or personal, was devised or bequeathed to his son, and in lieu thereof made the following bequest: "I do bequeath to my son only the income, interest or rent, of any portion of my real or personal estate, as the case may be, so that no more than the income, interest or rent of any portion of my real or personal estate, and not the principal of said personal, or fee of said real estate, may come to the said, &c., my son, which at his decease it is my will, that the said real and personal estate shall then : o to the legal heirs." It was held, that by the terms of the will alone, the estate therein mentioned would have been devised in fee to S, and his heirs, either as a fee simple in him, according to the rule in Shelley's case, or as an estate for life in S, with remainder in fee to his heirs, according to the rule as modified in Massachusetts by St. 1791, c. 60, sec. 3: but that by the codicil, the devise in the will to S, whether of a fee-simple, or of an estate for life, with remainder in fee to his heirs, was wholly revoked, and an estate thereby devised to him for life, with vested remainder in fee to the legal heirs of the testator. Brown v. Lawrence, 3 Cush. 390.

In Pennsylvania, the following recent cases have occurred: Devise—"I give unto my son M, all that messuage, to hold to him for and during his natural life, and after his decease to the heirs of his body, lawfully begotten, and to their heirs forever; and, in default of such issue, then to the heirs of my son S, and their heirs forever." Held, M took an estate tail under the rule in Shelley's case. George v. Morgan, 4 Harris, 95; Worrall v. Morgan. Ib.

A testator devised to his wife the use and income of a plantation, for her support and maintenance during her life, and to his youngest son A, the whole of the plantation, and also a piece of wood land after the decease of his wife. If A was a minor at the time of his wife's death, he desired his executors to lease the plantation until he became of age. If A died under the age of twenty-one years, and without lawful heirs, then the plantation was to be sold by the executors, providing it was after the decease of his wife, and the whole of the proceeds to be divided equally among the lawful heirs, his son B, and his daughters C and D; provided, always, that if A survived and "begets lawful heirs," then after his decease, the proceeds of said plantation were to be equally divided, share and share alike, to the heirs of A. A made a conveyance to bar the entail, and tendered a deed in fee-simple to the purchaser. The court considered the estate which A derived under the will, as an estate tail, but held, that, whatever the estate might be, A had such an estate as the purchaser was compellable to take. Maurer v. Marshall, 4 Harris, 377.

CHAPTER LIX.

JOINT TENANCY, ETC., HOW CREATED.

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| 2. Joint tenancy, &c., by deed. | 24. Joint tenancy, &c., by devise. |
| 8. Rule in United States. | 36. <i>Cross-remainders</i> by devise. |
| 11. Trust, how created by deed. | 53. Condition, &c., by devise. |
| 13. <i>Cross-remainders</i> by deed. | |

1. WITH respect to the words necessary to create an estate for life, for years, or at will, nothing requires to be said in addition to the observations heretofore made in connection with these several estates.

2. It has been seen, (ch. 54,) that in England, a conveyance to several persons, generally, creates a joint tenancy; while in the United States, on the contrary, such conveyance creates a tenancy in common. In England, upon the same principle, where one clause of the deed imports a tenancy in common, and another a joint tenancy, the latter clause will prevail. And this construction is adopted even in marriage articles, where the *intent* is peculiarly regarded.

3. Conveyance to trustees, upon trust that A and B might equally divide the rents and profits between them; and the whole to the survivor. Held, a joint tenancy.(1)

4. A marriage settlement in trust, after limitations to the husband

(1) *Clerk v. Clerk*, 2 Vern. 323; *Ward v. Everett*, 1 Ld. Ray. 422.

In Kentucky, it is held, that the words, "heirs of the body," in wills are usually to be construed as words of *purchase*, and not of *limitation*. *Prescott v. Prescott*, 10 B. Mon. 56.

Thus, even in a deed, where the intention clearly appeared to be, to give a present interest to the children; this rule was adopted. *Jarvis v. Quigley*, 10 B. Mon. 104.

In North Carolina, A devised to his son a tract of land, "for and during his natural life," and after his death, "to the heirs of his body to be equally divided between them, to them and their heirs forever," and, if he died without heirs of his body, living at the time of his death, then to his daughter. Held, the son took only a life estate. *Moore v. Parker*, 12 Ired. 123.

Where a devise made in North Carolina, since the act of 1784. (Rev. Sts. c. 122, sec. 10, and c. 93, sec. 1,) was to A for life, and, should he have lawful issue, then to be equally divided between his lawful issue, but should he not have lawful issue, then over; held, A took only a life estate. *Ward v. Jones*, 5 Ired. Eq. 400.

The rule in *Shelley's* case is in force in Georgia, but the courts favor the intention of the testator, and take hold of any words which tend to explain or qualify the technical terms, that would, by that rule, otherwise create an estate in fee or in tail. *Dudley v. Mallery*, *Mallery v. Dudley*, 4 Geo. 52.

A conveyance was made to A, during the life of her husband B, and, after her death, to the children of A, who should then be living, "and if it should happen, that the said A should depart this life leaving no child or children by her said husband, then in trust for the maintenance and support of the said B and his children." B died before his wife. Held, the fee never vested in B. *Ib*

Devise of slaves: "I lend to B certain property during her natural life, and after her decease to return to the heirs of her body, share and share about." Held, these words created an estate tail under the laws of South Carolina, and B took absolutely. *Watts v. Clardy*, 2 Florida, 369.

In New Jersey, A gave to B and her heirs, forever, all the residue of his real and personal estate, but, if B died, "without leaving lawful issue," then to C and D, as tenants in common. Held, the limitation over was upon an indefinite failure of issue, and failed as an executory devise; that B, therefore, under the statute *de donis* took an estate tail, and, in New Jersey, an estate for life, with remainder to her children. *Morehouse v. Cotneal*, 2 New Jer. 430.

and wife, directed the trustees to permit all and *every* the child and children of the body of the husband by the wife, to take the rents to them and their heirs, in such shares and proportions as the husband should appoint; and for want thereof to receive them to them and their heirs forever. Held, the children, who survived their parents, took as joint tenants; that the word *every* had no contrary import, being always used in creating a joint tenancy; and although, under the first clause, if the husband had made an appointment, it would have created a tenancy in common, yet, in default of such appointment, the parties took as joint tenants under the general words of the subsequent clause.(1)

5. A conveyance to A and B, to have and to hold to them, *scilicet* the one moiety to A and to his heirs, and the other to B and his heirs, makes a tenancy in common. A and B take several freeholds, and, as Lord Coke says, an occupation *pro indiviso*, by virtue of the *habendum*, which, being express, controls the implied interest given by the premises.(2)

6. A conveyance to two persons, *equally to be divided*, their heirs, &c., creates an inheritance in common. It was formerly held, that the words *equally divided* should be thus construed, but not the words *to be divided*. But the distinction no longer exists. This construction is more especially adopted, where the estate conveyed is a term for years, limited in trust for children; where an intention appears to make distinct provisions for them, and a pecuniary payment is charged upon the land, making them purchasers.(3)

7. It is said, there are no precise words necessary to create a tenancy in common. The words *equally to be divided* go to the *quality* and not to the *limitation* of the estate. They are words of *qualification* and *correction*.(4)(a)

8. It is held in Massachusetts, that a grant to two persons "jointly, equally to be divided," creates a tenancy in common under the statute of that State, if not at common law. So a conveyance to two persons *jointly and severally*. So a conveyance of a *moiety in quantity and quality* makes a tenancy in common between grantor and grantee.(5) So, in Kentucky, a deed of land to two persons, by one common boundary, but stating the particular interest conveyed to each, constitutes them tenants in common.(6)

9. In Pennsylvania, independently of statutory provisions, it seems, a deed to A and B, their heirs and assigns, *habendum* to them, their heirs, &c., and to the heirs, &c., of the survivor, creates a joint tenancy. But where the premises convey to them or any of them, their or any

(1) *Stratton v. Best*, 2 Bro. 233; (*Staples v. Maurice*, 4 Bro. Parl. Cas. 580) See *Holliday v. Overton*, 10 Eng. L. & Equ. 175.

(2) *Lit.* 298; *Fisher v. Wigg*, 1 P. Wms. 18.

(3) 2 Vent. 365; *Hawell v. Hunt*, Prec. in Chan. 164; *Rigden v. Vallier*, 2 Ves. 252; *Goodtitle v. Stokes*, 1 Wils. 341; *Den v. Gaskin*, Cowp. 660; *Evans v. Brittain*, 3 S. & R. 138; *Larsh v. Larsh*, Addi. 310; 2 Lit.

113; 2 J. J. Mar. 382; 3 Mon. 380; *Bowling v. Dobyn*, 5 Dana. 438.

(4) *Rigden v. Vallier*, 2 Ves. 252; *Fisher v. Wigg*, 1 P. Wms. 14; *Fisher v. Wiggs*, 12 Mod. 298; 1 Abr. Eq. 291; *Jackson v. Luquere*, 5 Cow. 228; (3 S. & R. 393.)

(5) *Burghardt v. Turner*, 12 Pick. 534; *Miller v. Miller*, 16 Mass. 59; *Adams v. Frothingham*, 3 Mass. 352.

(6) *Craig v. Taylor*, 6 B. Mon. 457.

(a) Although the weight of authority is in favor of the rule above stated, it is proper to notice, that in *Fisher v. Wigg*, 1 P. Wms. 14, Lord Holt dissented from the opinion of the court, maintaining that the words *equally to be divided* signify no more than the law would imply without them.

of their heirs or assigns, *habendum* to them, their heirs and assigns, &c., this is a tenancy in common.(1) So, by a conveyance to "A, in trust for herself and her children, to have and to hold for herself and her children, their heirs and assigns;" A and her children become tenants in common in fee in equal shares.(2)

10. In Kentucky, a deed to two persons and the survivor of them, his heirs, &c., passes a life estate to them, and a contingent remainder in fee to the survivor.(3)(a)

11. No particular form of words is required to create a *trust*, if the intention appear. Either a trustee or *cestui* will take a fee-simple, without using the word *heirs*, when the purposes of the trust so require.

12. A, a revolutionary soldier, delivers his discharge, which entitled him to bounty land, to B, with this certificate under hand and seal: "This is to certify, that B, the bearer, is entitled to all the lands that I am entitled to, &c., for my services certified in my discharge." The usual consideration of \$15 was paid by B. B transfers his right, and his assignees afterwards take out a patent for the land in A's name, the law so requiring. Afterwards C, knowing the transfer to B, purchases from A for \$250. Held, no consideration, or words of inheritance, were requisite to pass A's title; and he took the land as B's trustee, especially as an act sanctioned all transfers previously made by soldiers.(4)(b)

13. Where a particular estate is conveyed to several persons, in common, and, upon the termination of the interest of either of them, his share is to remain over to the rest, and the remainder-man or reversioner is not to take till the termination of all the estates; the parties take as tenants in common, with *cross-remainders* between them.(5)(c)

14. No technical words in a deed are necessary to create cross-remainders. Any words which express the intention of the parties will be sufficient. And it is sufficient to say that there shall be cross-remainders, without the artificial language commonly used for the purpose.

15. But cross-remainders cannot be implied, even in a deed to uses. Thus an inheritance will not pass in this mode, without the use of the word *heirs*.(6)

16. It is said that cross-remainders are created by deed as to accruing shares, by a limitation of the whole estate to the only surviving child and his issue, or a gift over of the entire remainder, after failure of all the

(1) *Shirlock v. Shirlock*, 5 Barr. 367.

(2) *Davidson v. Heydon*, 2 Yeates, 459; *Galbraith v. Galbraith*, 3 S. & R. 392.

(3) *Ewing v. Savary*, 3 Bibb, 237.

(4) *Fisher v. Fields*, 10 Johns. 505.

(5) 4 Cruise, 249.

(6) *Doe v. Wainwright*, 5 T. R. 427.

(a) Devise to A, the testator's wife, in common with B, his daughter, of the use of certain rooms, and to B in common with A of the same rooms, while B should remain unmarried. Held, after A's death, B, not being married, was entitled to the sole use of the rooms. *Jarvis v. Buttrick*, 1 Met. 480.

(b) Mere words of recommendation to a devisee, to give the devised estate to the testator's children, at such time and in such manner as the devisee shall think best, do not create a trust. *Gilbert v. Chapin*, 19 Conn. 342.

(c) The distinction is not very obvious, between a tenancy in common with cross-remainders and a joint tenancy; so far as the interest of the tenants themselves is concerned. The former, however, always implies a remainder subsequent to the tenancy in common, to take effect after the termination of the estates of all the tenants in common; while the latter may be in fee-simple.

issue, or an express creation of cross-remainders as to the original shares.(1)

17. Conveyance to the use of A and B, and the heirs male of their bodies; and, for default of such issue of either of them, to the use of the survivor of them, having issue male, and to the issue male of such issue male; and, for default of issue male of their bodies, remainder over. Held, A and B took several inheritances, and there was no cross-remainder in tail for want of the word *heirs*.(2)

18. Where one covenants to stand seized to the use of A and B, and the heirs of their bodies, of a part of his land, and, if they die without issue, then to remain, &c., and of another part to the use of C, D and E, and the heirs of their bodies; and, if they die without issue, then to remain, &c.; no cross-remainders arise by implication.(3)

19. Conveyance, upon the marriage of A, the son of the grantor, (after previous limitations,) to the use of such child or children of A, and in such shares, &c., as A should appoint; and, in default of appointment, to the use of all and every the children of A, and the heirs of their several and respective bodies, as tenants in common; but, if only one child, to the use of such child and the heirs of his or her body; and in default of all such issue, to the right heirs of the grantor forever. A had two children at the time, and afterwards had others, and died without making an appointment. Held, notwithstanding the power, A's children took vested estates tail; that there were no cross-remainders between them, but, on the death of each child without issue, his share fell into the reversion.(4)

20. Limitation by marriage settlement, to the use of all and every the daughter and daughters of the marriage, share and share alike, equally to be divided between them; and of the heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and, for default of such issue, to the use of the right heirs of the husband. Held, although the intent of the deed probably was, that the remainder over should not take effect, while any issue of the marriage remained; yet such construction could not be *implied*, and there could be no cross-remainders between the daughters and their issue.(5)

21. Conveyance to the use of the future children of A, as tenants in common, and the heirs of their several bodies issuing. And, if any such child or children should die without issue, his, her, or their parts to remain to the use of the *surviving* child or children of A, and the heirs of his, her, or their respective bodies, and so, *toties quoties*, as any of the said children should die without issue, till there should be only one child left; and if all the children should die without issue, or, if A should have no issue, then to B in fee. Held, the meaning of the word *surviving*, in its connection, was, that on the death of one child without issue, his share should go to the surviving line of heirs, either the surviving children, or, if dead, to their issues; and not wholly to one surviving child. And this construction was confirmed by the limi-

(1) *Edwards v. Alliston*, 4 Russ. 78.

(2) *Nevell v. Nevell*, 1 Rolle's Abr. 837, R. pl. 2; *Cook v. Gerrard*, 1 Saun. 185, n. 6.*

(3) *Doe v. Dorvell*, 5 T. R. 518.

(4) *Cole v. Livingston*, 1 Vent. 224.

(5) *Doe v. Worsley*, 1 E. 416.

* In this note, it is said, all the cases on the subject are collected with great ability; per Lord Kenyon, *Doe v. Worsley*, 1 E. 416.

tation of a remainder over in fee, on the death of *all* the children without issue: showing that the cross-remainders were to continue so long as the *lives of children* lasted. Hence, the deed created cross-remainders among A's children: and the share of one deceased vested in a surviving child, and the heir of another deceased.(1)

22. Conveyance by marriage settlement to trustees, remainder to children as tenants in common; for default of such issue, and if any of said children, there being more than one, should die under twenty-one, without issue, the share of such child to go to the survivors as tenants in common; if all such children should die without issue, to the use of the settler in fee. Held, no cross-remainders were created between the children, except in the case that one should die without issue, and under twenty-one.(2)

23. In marriage articles, which are construed less strictly than deeds, cross-remainders may sometimes arise by implication.(3)

24. In England, a devise to two or more persons, generally, or to them and their heirs, makes them joint tenants for life or in fee; even though the estates are to have different commencements. So, where the right of survivorship is given, the estate is a joint tenancy, even though there are other words indicating a tenancy in common; as, for instance, where the devise is to A, B and C in tail, every of them to be the other's heir by equal portions. So a devise to two, equally to be divided between them, and to the survivor of them, or words of equivalent import, make a joint tenancy. Where there are two different dispositions of the same property in a will, it is said, if the two estates have the unity or sameness of interest essential to a joint tenancy, the devisees shall be joint tenants—otherwise, they are tenants in common.(a)

25. Independently of statutory provisions, substantially the same principles have been adopted in this country. Thus, it is laid down in Pennsylvania, that in case of a devise to several persons, with no indication of an intent to *divide* the property, or to give it in *severalty*, the estate is a joint tenancy; while, if such intent appears from express words, or the nature of the case, it is a tenancy in common.(4)

25 a. So, in Massachusetts, a testatrix having devised all the rest and residue to her executors, or the survivor of them, their heirs or assigns, to be held by them, or the survivor of them, their heirs or assigns, for the following uses: the income to be paid semi-annually, to my daughter, and, in case of her marriage, the trust to remain the same, the inter-

(1) Doe v. Wainewright, 5 T. R. 427.

(2) Meyrick v. Whishaw, 2 B. & A. 810.

(3) Twisden v. Lock, Amb. 663; 2 Col. Jur. 347.

(4) 6 Cruise, 287; Martin v. Smith, 5 Binn.

16; Spry v. Bromfield, 7 Mees. & W. 545.

See Vanderplank v. King, 3 Hare, 1; Howell v. Howell, 1 Spencer, 411.

(a) Devise, that the residue, after the death of a tenant for life, should be equally divided among the testator's five sisters and their respective families. Held, a gift of one fifth to each of the sisters and her children, living at the testator's death, as joint tenants. Parkinson, 2 Eng. L. & Equ. 104.

In case of *husband and wife*, named as devisees, the wife will take alone, where different clauses taken together indicate an intention to that effect, and that the former is named, only as having an interest in the wife's estate.

A testator, owning one-half of a tract of land, devised the same to his "daughter, M, wife of F," &c.,—"in short, my will is, that F and M, my son-in-law and daughter, have my share of that land." Held, that M alone took a fee in the land. McClure v. Douthitt, 6 Barr, 414.

est still to be paid to her, on her own receipt." Held, the executors took a fee-simple in the real estate, as joint tenants, and an absolute property in the personal estate, also in joint tenancy, without any beneficial interest in either, for themselves, but in trust to pay the income of both to the daughter for her life, with an equitable reversion therein, to the legal heirs of the testatrix at the time of her death, to be conveyed and paid over to them on the decease of the daughter.(1)

26. If an intention appear by the will, that all the devisees shall take several and distinct shares, they will be tenants in common. Thus, a devise to A, B and C, and their heirs, respectively, forever, makes A, B and C tenants in common. So a devise to two sons *equally* and their heirs. So a devise to several persons, their heirs and assigns, all of them to have part and part alike, and the one to have as much as the other. So a devise to two grandsons, A and B, "jointly, their heirs and assigns forever."(2) So a devise to "three children, to be kept as joint stock until the youngest shall arrive at the age of 21 years, and then the whole property and its increase to be divided equally between them, to each one third part."(3) So a devise to "the survivors of my brothers and sisters," naming them, is a gift in common, to all who survive the testator, with an immediate right of possession; not a contingent devise to the two who should survive the third.(4) So, a devise to A and B *equally* to them, for this word implies a division. So the words *equally to be divided*, have sometimes been held to create a tenancy in common, even though there were other words indicating a right of survivorship. Thus, a devise to three daughters, equally to be divided; and if any of them die before the other, the survivors to be her heirs, equally to be divided, and if they all die without issue, remainder over; creates several estates tail, with cross-remainders. So a devise to the testator's two sons and their heirs, and the longer liver of them, equally to be divided between them and their heirs, after the death of his wife, makes the sons tenants in common; because the will intends that the posterity of the sons, as well as themselves, shall have *an equal part*, and the word *survivor* means only that the survivors shall share equally with the heirs of the one who dies first. So a devise to A, B and C, and as they shall severally die, to their several heirs, makes them tenants in common.(5)

27. In case of an executory trust, where the greatest latitude of construction is allowed to effect the intention, even the words *joint tenants* may make a tenancy in common.

28. Devise to trustees, as soon as the testator's three daughters should respectively reach the age of twenty-one, to convey to them and the heirs of their bodies, *as joint tenants*. Held, the meaning was, that there should be a survivorship only in case either of the daughters should die without issue; and therefore Chancery would decree conveyances to them at twenty-one respectively, in tail male, with cross-remainders in tail.(6)

29. So where an estate is devised "to be equally divided among, &c., and the survivor of them and their heirs forever," if the devisees

(1) Keating v. Smith, 5 Cush. 232.

(2) Davis v. Smith, 4 Harring. 68.

(3) Weir v. Humphries, 4 Ired. Eq. 264.

(4) Brimmer v. Sohler, 1 Cush. 118.

(5) 6 Cruise, 287-94. See Fleming v. Kerr, 10 Watts, 444; Brown v. Ramsey, 7 Gill, 347; Moody v. Elliott, 1 Md. Ch. 290.

(6) Marryat v. Townley, 6 Cruise, 295.

are children of the testator, and a tenancy in common will best effect the testator's undoubted intention as to the disposing of the property among them and their issue, the words *equally to be divided* shall control the word *survivor*, and the will shall create a tenancy in common.(1)

30. Devise to the testator's five children, and the *survivors and survivor* of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint tenants. Held, the word *survivor* referred to the death of the testator himself, and that the children took as tenants in common.(2)

31. Devise: according to quantity and quality, each taking possession of his part at the age of twenty-one, but if one or more die before this age, their part to be equally divided among the survivors. This is a tenancy in common.(3)

32. But where a will contains words importing a joint tenancy, and others importing a tenancy in common, both shall have effect if possible.

33. Thus a devise to A and B, and the *survivor* of them and their heirs, equally to be divided, share and share alike, gives A and B a joint tenancy for their lives and the inheritance in common.(4)(a)

34. Devise to A and B, severally and in distinct parts, each to have his part on these conditions and limitations. If A should die, leaving no heirs of his body, living B or any heirs of his body, the lands devised to A to be and remain to B or such his said heirs; and the same provision in favor of A, &c., in case of B's death. If A and B both die, leaving no heirs of either of their bodies, remainder over. Held, A and B took an estate tail, with cross-remainders in tail.(5)

35. A devise may be so expressed, as to create a tenancy in common, but with no power of partition. Devise to two daughters, to be equally divided between them, share and share alike, for their natural lives; then to be to their and each of their children, and to be divided between them share and share alike. Held, the daughters took an estate for life in common, but could not make partition to bind their children.(6)

36. *Cross-remainders* may arise in a will by *implication*.(7)

37. Devise to the testator's five youngest sons and their heirs; and if they all died without issue male, or any of them, the land to revert to his right heirs. Held, it was plainly intended that the deviser's right heirs should have nothing, while any issue of the five sons remained; and therefore these sons took estates tail, with cross-remainders.(8)

38. Devise to A and his heirs of a portion of land, and the rest to B

(1) *Stones v. Heurtly*, 1 Ves. 165.

(2) *Rose v. Hill*, 3 Burr. 1881; *Garland v. Thomas*, 1 B. & P. N. R. 82.

(3) *Doe v. Botts*, 4 Bibb. 420.

(4) *Barker v. Giles*, 2 P. Wms. 280; *Barker v. Smith*, 9 Mod. 157; 3 Bro. Parl. 104.

(5) *Hawley v. Northampton*, 8 Mass. 3.

(6) *Jackson v. Luquere*, 5 Cow. 221.

(7) See *Livesey v. Harding*, 1 Russ. & My. 636; *Green v. Stephens*, 12 Ves 419, 17, 64; *Turner v. Fowler*, 10 Watts, 325; *Cursham v. Newland*, 4 Mees. & W. 101; *Vanderplank v. King*, 3 Hare, 1; *Smith v. Stewart*, 3 Eng. L. & Equ. 175.

(8) *Clache's case*, *Dyer*, 330.

(a) Devise to A and B, equally between them, as joint tenants, and their several and respective heirs and assigns forever. Held, they were joint tenants for life, with several inheritances upon the survivor's death. *Doe v. Green*, 4 Mees. & W. 229.

and his heirs; the survivor of them to be heir to the other, if either die without issue. A and B take an estate tail in common, with cross remainders.(1)

39. Devise to A and B and their heirs, equally to be divided between them, and, if they die without issue, then to C. A and B take estates tail with cross-remainders.(2)

40. But the implication must be a *necessary* one. In other words, there must be an intention that no one else shall inherit any part of the estate or take it by way of remainder, while any of the immediate devisees or their issue are living. Thus a devise to A and B, equally to be divided, and to the heirs of their respective bodies, and for default of such issue to C; creates no cross-remainders between A and B, the words "for default, &c.," meaning merely for default of *heirs of their respective bodies*, which last expression would clearly have created no cross-remainders.(3)(a)

41. Devise to A for life, then to B and C, equally to be divided, and the several and respective issues of their bodies, and for want of such issue to A in fee. Held, the words *several and respective* disjoined the title, and no cross-remainders were created.(4)

42. But in a subsequent case, it was remarked by Lord Kenyon, that creating a tenancy in common equally divides the title, whether the word *respective* be used or not; and that it was unworthy of the great learning and ability of Lord Hardwicke to lay such stress as he was stated to have done on this word.(5)

43. Devise to all and every the younger children of A; if more than one, equally to be divided, and to the heirs of their *respective* body and bodies, as tenants in common; if only one, then to such child and the heirs of his or her body; and for want of such issue to B. Held, the younger children of A took cross-remainders.(6)

44. Devise to A, B and C, and the heirs of their bodies respectively, as tenants in common; in default of such issue, to the testator's right heirs. Held, cross remainders were created between A, B and C.(7)

45. Devise to four sons and the male heirs of their bodies forever, and if either of them die under twenty-one, his or their lands to be equally divided between the surviving brethren or their male heirs. Held, no cross-remainders were raised.(8)

46. Devise of a farm to A and B, equally between them, share and share alike; with the words "I entail" it upon the lawful male heirs of A and B. Held, no cross-remainders arose.(9)

(1) Chadock v. Cowley, Cro. Jac. 695.

(2) Holmes v. Meynel, T. Ray. 452; 2 Show. 135.

(3) Comber v. Hill, Stra. 969; Hungerford v. Anderson, 4 Day, 368.

(4) Davenport v. Oldis, 1 Atk. 579.

(5) See Livesey v. Harding, 1 Russ & My. 636.

(6) Watson v. Foxon, 2 E. 36.

(7) Doe v. Webb, 1 Taun. 234; Roe v. Clayton, 6 E. 628; 1 Dow, 384.

(8) Hungerford v. Anderson, 4 Day, 368.

(9) Cooper v. Jones, 3 B. & A. 425.

(a) The rule has been thus stated by the court in South Carolina. Where property is devised to two persons for life, and at their death to their children; if *both* die without leaving children, remainder over; cross-remainders are implied. The same construction may be given, though the word *both* is omitted; founded upon an apparent intention to devise over the whole together as one estate, (which could not be effected till both were dead without children,) and not to limit over the respective shares. But it is clear that cross-remainders are not created, where the respective shares are limited over upon the death of *either* without children. Baldrick v. White, 2 Bal. 445.

47. It was formerly held, that cross-remainders could not arise by implication between more than two persons; the policy of the law being opposed to the division of estates and tenures,^(a) and it being uncertain whether the survivors should take as joint tenants or tenants in common. Thus where a testator devised a house to each of his three sons and his heirs, provided that if all of them should die without issue, the houses should remain over to his wife in fee; held, there were no cross-remainders, but, on the death of either son without issue, his estate passed to the wife.⁽¹⁾

48. In more recent cases this principle has been stated in a somewhat qualified form, as follows. Where there are but two parties, the law presumes in favor of cross-remainders, but where there are more than two, against them;^(b) but in either case a clear intention on the part of the testator will control the presumption of law. And the modern doctrine is stated to be, that in all cases where there are *no words to sever the title*, cross-remainders are implied. More especially is this construction adopted, where, although the will provides for the case of more than two devisees, yet in fact there are only two who claim under it.⁽²⁾

49. 'Devise, to the use of all and every the daughter and daughters of A, and the heirs of her and their bodies; such daughters to take as tenants in common; and for default of such issue to the right heirs of the devisor. Held, the last limitation was of the *whole estate*, after the death of *all the daughters*, and not of their respective shares upon the death of either of them; that the heir was to take nothing, while any of the daughters or issue continued; and therefore that the daughters took cross-remainders.⁽³⁾

50. Devise to three sons in succession for life, remainder to the heirs male of their bodies, then to the heirs female, then to all and every the testator's daughter and daughters as tenants in common, and to the heirs of her and their body and bodies, then to the heirs of his brother A forever. Held, the language of the will showed a clear intent that the issue, even the daughters, of each son, should all take before the next son;^(c) that the words *daughter and daughters, all and every, &c.*, implied that the number might probably be diminished before the daughters would take, and the limitation of a *remainder to the heirs* of A, that A himself would not probably outlive the prior parties, and that a single remainder only would vest in them; that if, on the death of one daughter, her share should go over to the heirs of A, this would involve the two-fold absurdity, of a remainder to the daughters themselves as the heirs of A, which they would be for want of children of A, and also of giving cross-remainders to the daughters of the testator's sons, and

(1) 1 Saun. 185 a, n. 6; Gilbert v. Witty, 777; Phipard v. Mansfield, Cowp. 797; 2 E. Cro. Jac. 655. 36.

(2) Doe v. Cooper, 1 E. 229; Cole v. Lev- (3) Wright v. Holford, Cowp. 31.
 ington, 1 Vent. 224; Pery v. White, Cowp.

(a) Lord Mansfield remarks, that this reason had not very great weight at the time it was given, and certainly had none then. Phipard v. Mansfield, Cowp. 800.

(b) The same principle has been stated thus; that in the former case an intention to raise cross-remainders is presumed; while in the latter it is necessary to resort to other words in the will to discover such intention. Atherton v. Pye, 4 T. R. 713.

(c) With cross-remainders between them.

withholding them from his own daughters; and upon these grounds that the daughters took cross-remainders.

51. Devise to A and B, brothers of the testator, and C his sister, and the heirs of their bodies, as tenants in common, and for want of such issue, to his own right heirs. Held, the words showed an intention that the brothers and the sister should be equal sharers of the testator's bounty, and that no division should take place, to create an inequality between them, till a failure of the heirs of all their bodies. If the testator meant the estate should go to his heir at law, he would not have made a will. The intention was, that neither A nor B should take as heir, but that the estate should remain subject to entailment, during the lives of A, B and C, and their issue, after which the heir at law was to take. Any other construction would give to one brother, upon the death of the other without issue, a fee-simple, and the sister nothing, in violation of the intended equality. Hence there must be cross-remainders.(1)

52. Devise to all and every the daughter and daughters of the testator's daughter A, and the heirs male of the body of such daughter or daughters, equally; if more than one, as tenants in common; for and in default of *such issue*, all said premises to the testator's heirs. Held, the words *such issue* must mean *issue of all of them*; that the word *all*,(a) in the last clause implied that the whole remainder should go at once to the heirs; and therefore the daughters took cross-remainders.(2)

52 a. A testator, by his will, which took effect in 1801, devised his real estate to his four sons and the heirs of their bodies, share and share alike; if any one of them should die without issue, his share was to go to the survivors, to be equally divided among them; and, if all the sons should die without issue, the estate was to go to the children of the daughters. Held, 1. That, by the primary devise to the sons, they took estates tail, with contingent cross remainders, which, by the New York Statute of 1786, abolishing entails, were converted into absolute estates; 2. That the limitations over to the survivors among the sons, and to the children of the daughters, were cut off by that statute.(3)

53. With regard to the words in a deed necessary to create a *condition*, as the condition, if any, constitutes a formal part of the instrument, the language required to express it will be more properly considered hereafter. (See *Condition*—also, *Estate on Condition*.)

54. In a devise, no formal expressions are necessary to create a condition. Thus a devise of land to an executor *to be solvl*, or a devise to a person *ad solvendum*, £20 to A, makes a condition.(4)

55. Devise to A, the eldest daughter of the testator, and her heirs, that she should pay to B, her sister, £30 per annum. Held, a good condition, for breach of which B might enter, because this was the plain intent, and otherwise B would have no remedy.(5)

(1) Doe v. Burville, 2 B. 47.

(2) Atherton v. Pye, 4 T. R. 710.

(3) Lotl v. Wykoff, 2 Comst. 355.

(4) Co. Lit. 236 b. See Stark v. Smiley, 25 Maine, 201; Marwick v. Andrews, 12 Shepl. 525.

(5) Crickmere v. Paterson, Cro. Eliz. 146.

(a) It was remarked by Lord Kenyon, that this word could make no difference in the sense. Watson v. Foxon, 2 E. 42.

56. Upon the ground that for condition broken the heir alone can enter, where a devise is made to him in terms which would make a condition as to a stranger, they shall constitute a *limitation*, to take advantage of which no entry is necessary. Thus a devise to the eldest son of the testator, *paying* to the other children a certain sum in a certain period, is construed as a devise to him *till he fails* to make such payment.(1)

(1) Wellock v. Hammond, Cro. Eliz. 204; Boraston's case, 3 Rep. 20 b; (Curteis v. Wolverston, Cro. Jac. 56.)

